

Wars of Conquest in the Twenty-First Century and the Lessons of History – Crimea, Panama, and John Bassett Moore

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This Article uses history to explore how prominent international lawyers explain seemingly transgressive state behavior. It begins with the Russian annexation of Crimea in 2014. This seizure of another state's territory by force of arms seems to violate everything that the UN Charter and the post-1991 settlement of the Cold War stood for. Surprisingly, the various steps employed by the Russians to give their actions a veneer of legality follow almost exactly the playbook used by the United States in 1903 to seize the Panama Canal Zone. In both instances, leading professors of international law – Rein Müllerson, the Anglo-Estonian scholar, publicist, and statesman in the case of Crimea, John Bassett Moore, the most prominent U.S. international lawyer of the day, in the case of Panama – sought to justify these acts in the face of what they both supposed was a general ban on wars of conquest.

The details of these transgressions and the justifications offered by their prominent defenders shed light on the work that international law does. These events invite resort to the tools of comparative international law to uncover and assess claims about the validity of otherwise repugnant state behavior. This emerging field downplays the judgmental, project-oriented focus of contemporary international law in favor of striving for a better understanding of systematic differences in the way significant actors use international law.

In a world riven with entrenched and unbridgeable differences, counting on states to agree to an extensive body of deep rules to govern their international behavior is utopian, but expecting them to understand their adversaries' perceptions of their international legal standing and the ways they will explain themselves is not. The bipolar world of the Cold War required a tradeoff between consensus and comprehension. The contemporary multipolar world, with its challenges and conflicts, may do the same.

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I. INTRODUCTION.....	65
II. WARS OF CONQUEST UNDER INTERNATIONAL LAW.....	71
III. RUSSIA’S ANNEXATION OF CRIMEA.....	74
IV. THE U.S. ANNEXATION OF THE CANAL ZONE.....	89
V. INTERNATIONAL LEGAL EXPERTS AS ADVOCATES AND APOLOGISTS	95
<i>A. A Ban on Wars of Conquest: Ebbs and Flows Across Time</i>	96
<i>B. Universal Principles versus Competing Claims</i>	104
<i>C. Comparative International Law as a Check</i>	108
VI. CONCLUSION	112

I. INTRODUCTION

In our day, we say that international law has abolished war generally, and wars of conquest in particular. Yet states continue to resort to arms in their disputes, sometimes with territory changing hands. How states explain these events illuminate fundamental legal principles, particularly the way international legal arguments bridge these principles and great power interests. Studying these explanations shifts our focus from determining international law to understanding how to do international law.¹

The events of the last decade have forced us to concentrate anew on the legality of wars of conquest. A growing number of international conflicts manifest themselves as armed struggles over territory. The 2020 Nagorno-Karabakh war between Armenia and Azerbaijan is only the most recent of violent conflicts spawned by the breakup of the Soviet Union. Others include Russia's incursions in Abkhazia and South Ossetia in Georgia and its ongoing military operations in southeastern Ukraine. China's increasing militant rhetoric regarding the South China Sea and Taiwan may foreshadow a grave and dangerous confrontation in the not-too-distant future. Morocco's long ongoing war in Western Sahara recently popped up as part of its recent accord with Israel, while the long-term, intermittent border war between Chad and Libya recently took the life of Chad's President Déby. Decades of violent struggles over Israel's boundaries have no end in sight. The Horn of Africa's many armed conflicts over land recently morphed into the Tigray war. These crises compel us to consider how to talk about the prevailing international law.

According to a celebrated study, war for most of the modern era had been a fundamental means of vindicating a state's rights under international law. The Kellogg-Briand Pact, the UN Charter, and the post-World War II war crimes tribunals, the study contends, flipped that.² At some point between 1928 and 1945, the international community outlawed war in general and wars of conquest in particular.³ This rule was not simply an immediate means to entrench the territorial gains of World War II, but a

1 Cf. Arthur Leff, *Law and*, 87 YALE L.J. 989, 1011 (1978) ("Ultimately, the law is not something that we know, but something that we do.").

2 Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 ("Kellogg-Briand Pact"); Charter of the United Nations with the Statute of the International Court of Justice Annexed Thereto, Jun. 26, 1945, 59 Stat. 1031, T.S. 993 ("UN Charter"); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280 ("London Agreement"); see OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 48-49 (2017).

3 Hathaway and Shapiro argue that the Kellogg-Briand Pact worked this transformation and the U.N. Charter simply ratified the earlier achievement. HATHAWAY & SHAPIRO, *supra* note 2, at 315-19, 347-51. For purposes of this article, it suffices that sometime between 1928 and 1945 something significant happened to the *jus ad bellum*, the law governing the resort by states to armed force.

new universal principle that remains imperative today. By that telling, how states justified force as a means of seizing territory before 1928 is irrelevant. Violations of the principle since 1945 do not undermine it as long as states continue to condemn and sanction such actions.

This Article offers a new perspective on that argument and the principle it supports. Drawing on a largely forgotten piece of U.S. history, it shows how much the defenses of armed annexation offered by prominent international lawyers have stayed the same over the past century, notwithstanding the supposed transformation. This history undermines the contention that a universal ban on wars of conquests prevails in the contemporary world and has done so for most of the twentieth century and all of the twenty-first. States with the power to use force to acquire territory, either effectively or formally, often find apologists who discover exceptions to the ban. Not all the justifications work, but some seem to stick.

One might stop at this point, declaring that once again international law reveals itself as a blanket of claims advanced by privileged specialists to hide the power relations responsible for state practice.⁴ This conclusion, not without some truth, still misses a lot. The exceptions to the general ban that jurists propose share a common form while reflecting systematic differences in the way particular states approach international law. By looking at these rationalizations of wars of conquest, we can find a kind of order in international law, even if not universal principles and generally applicable rules.

The common form of these rationalizations entails two elements, a major premise and a minor one. The major premise maintains that the ban on wars of conquest necessarily allows an exception for armed force that responds to grave and intolerable threats to the international order. The minor premise asserts that the circumstances prompting the attack in question qualify as such a threat. In specific instances, prominent international lawyers will assume the validity of the major premise and then support or dispute the minor one.

The new field of comparative international law sheds light on these debates. It focuses on the persistent and systematic conflicts that run through international law and seeks to explain them.⁵ It invites international

⁴ See, e.g., MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* 339-45 (2011) (deconstructing formalism in international law).

⁵ Leading works include LAURI MÄLKSOO, *RUSSIAN APPROACHES TO INTERNATIONAL LAW* (2015); ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* 231-40 (2017); *COMPARATIVE INTERNATIONAL LAW* (Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg eds., 2018); Jean d'Aspremont, *Comparativism and Colonizing Thinking in International Law*, 57 *CAN. Y.B. INT'L L.* 89 (2020); Martti Koskenniemi, *The Case for Comparative International Law*, 20 *FINNISH Y.B. INT'L L.* 1 (2009); Lauri Mälksoo, *Post-Soviet Eurasia, Uti Possidetis and the Clash Between Universal and Russian-Led Regional Understandings of International Law*, 53 *N.Y.U. J. INT'L L. & POL.* 787

lawyers to free themselves from the straitjacket imposed by the aspiration of universality so as to permit them to make more granular and pragmatic arguments that have a better chance of both reflecting and shaping state behavior.⁶ Starting with the assumption that predictable disagreements can influence state decision-making just as much as do clear and mutually agreed rules, it explores the forces – historical, geopolitical, economic, cultural – that lead particular states and prominent lawyers to make the claims about international law that they do. This inquiry can untangle the seeming contradictions in the assertions significant actors have made about wars of conquest since the beginning of the twentieth century.

This Article, primarily a historical study, starts with the present and then looks back. In this century, the Russia annexation of Crimea stands out as the foremost instance of armed force used to acquire territory.⁷ International lawyers in the West dismiss the justifications made by their Russian counterparts.⁸ Many see this event as a grievous break with the modern international order and a manifest breach of international law.⁹ The Russians

(2021); Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467 (2015); Ryan Scoville & Milan Markovic, *How Cosmopolitan Are International Law Professors?* 38 MICH. J. INT'L L. 119 (2016); see also Leon Lipson, *Peaceful Coexistence*, 29 LAW & CONTEMP. PROBS. 871 (1964) (important antecedent); Edward McWhinney, *Operational Methodology and Philosophy for Accommodation of the Contending International Legal Systems*, 50 VA. L. REV. 36 (1964) (same).

⁶ See generally Paul B. Stephan, *Comparative International Law, Foreign Relations Law, and Fragmentation: Can the Center Hold?* in COMPARATIVE INTERNATIONAL LAW, *supra* note 5, at 53, 65-69 (defending usefulness of comparative international law).

⁷ Crimea, although the most dramatic recent annexation, does not stand alone. Others, either formal or de facto, that remain contested, occasionally by force of arms, include Morocco's seizure of former Spanish Sahara, Russia's proxy grasp of Abkhazia and South Ossetia in Georgia and Transnistria in Moldova, and Armenia's seizure, and Azerbaijan's recent reconquest, of Nagorno-Karabakh. Four of these five disputes have their origins in the breakup of the Soviet Union, as does the Crimean matter. See MÄLKSOO, *supra* note 5, at 173-76 (discussing Russian approaches to sovereignty of near abroad); Christopher Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts,"* 9 OR. REV. INT'L L. 477 (2007). What distinguishes Crimea is the revision of Russia's declared borders through annexation.

⁸ See ROBERTS, *supra* note 5, at 231-40 (contrasting Western and Russian arguments). Defining the West is at the crux of the matter, given the confusion between the regional and the universal that comparative international law explores. I propose a provisional definition that includes anglophone North America and Oceania, most of Europe west of Minsk, and Japan and South Korea. This category, however, is more fluid than those that defined the adversaries of the Cold War.

⁹ HATHAWAY & SHAPIRO, *supra* note 2, at 390-94; THOMAS D. GRANT, *AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW* (2015); *THE CASE OF CRIMEA'S ANNEXATION UNDER INTERNATIONAL LAW* (Wladyslaw Czapliński, Sławomir Dębski, Rafał Tarnogórski & Karolina Wierczyńska eds., 2017); Gergana Dimova, *Legal Loopholes and Judicial Debates: Essays on Russia's 2014 Annexation of Crimea and Its Consequences for International Law*, J. SOVIET & POST-SOVIET POL. & SOC. 1 (2019); Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT'L L. 68 (2015); Lauri Mälksoo, *The Annexation of Crimea and Balance of Power in International Law*, 20 EUR. J. INT'L L. 303 (2019). Western scholars have criticized in particular Russian efforts to defend the annexation under international law. See, e.g., Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, 91 INT'L L. STUD. 219, 255-61 (2015); David Hughes, *How States*

beg to differ and have their defenders among distinguished international jurists.¹⁰

In this moment of anguish about international law and armed conquest, everyone has overlooked the parallels between what Russia did to Ukraine in 2014 and what the United States did to Colombia in 1903. They are striking.

- In the midst of a violent domestic crisis in Ukraine, Russia introduced military forces into Crimea. It then procured from local actors of dubious provenance a declaration of independence on behalf of the region.
- Exploiting political instability and weak Colombian control over its Panamanian department, the United States inserted military advisers and its agents of influence into Panama. Those agents then declared independence from Colombia.
- The Crimean authorities received immediate official recognition from Russia and military support to back up their claim to have established a sovereign state. A day later, they negotiated their incorporation into the Russian Federation.
- In Panama, the U.S.-anointed authors of Panamanian independence received prompt state recognition from the United States as well as U.S. naval intervention that drove out Colombian forces present in the territory. Within days, these new authorities negotiated a transfer of sovereignty of the Canal Zone to the United States.

The comparison is not perfect. The newly independent Panama survived as an independent state, unlike Crimea. But the price of this survival was the surrender of what was at the time its most significant national asset, which it retrieved only eighty years later.

Russian lawyers worked hard to create the framework through which Russia incorporated Crimea, and for the most part its international legal specialists, as well as at least one prominent non-Russian scholar, the Anglo-Estonian jurist Rein Müllerson, have defended the move. In the Panama affair, John Bassett Moore, the leading U.S. international lawyer of the day, reassured President Theodore Roosevelt about the legality of what the United States planned for Panama. International lawyers who defend the Crimean annexation base their case largely on humanitarian arguments tied to civilizational values; so did Moore, although his conception of those

Persuade: An Account of International Legal Argument upon the Use of Force, 50 GEO. J. INT'L L. 839, 887-907 (2019); Erika Leonaitė & Dainius Žalimas, *The Annexation of Crimea and Attempts to Justify It in the Context of International Law*, 14 LITH. ANN. STRATEGIC REV. 11, 30-52 (2016); but see G. Matteo Vaccaro-Incisa, *Crimea's Secession from Ukraine and Accession to the Russian Federation as an Instance of North(-West) v. South(-East) Divide in the Understanding of International Law*, 15 SANTA CLARA J. INT'L L. 125 (2017) (defense of the Russian position).

¹⁰ See *infra* notes 65-86 and accompanying text.

values differs radically from that of Russia's defenders. Both states mixed justifications based on profound national interests with assertions that what happened didn't really count as a war of conquest, but rather as legal acts to protect international peace and prosperity.

If one were to believe that the adoption of the Kellogg-Briand Pact and UN Charter transformed the international legal system by banning the use of armed force as a means of dispute resolution, then this comparison would tell us nothing. What happened at the dawn of the twentieth century could have no bearing on the meaning on the legal regime that governs states in the twenty-first, including Russia in Crimea. This Article questions both the premise of that argument and its implications.

First, this Article will show that, at the beginning of the twentieth century, the U.S. take on international law and wars of conquest was not that of the European powers. The Roosevelt and Taft administrations, as well as Wilson's before the United States entered World War I, promoted the resolution of international disputes through arbitration rather than force. Accordingly, the United States in 1903 justified its actions against a standard that broadly rejected domination by powerful nations of the weak, whether the European great powers honored that principle or not.

Second, a ban on war, including wars of conquest, has never fit comfortably with post-1928 state practice, however popular it became as a rhetorical trope. The UN Charter admits two exceptions expressly and one implicitly.¹¹ In addition to these Charter exceptions, states and international lawyers have proposed others based on perceived needs of international order and the purposes of international law. A few states and many international lawyers today claim that a non-Charter exception extends to the so-called responsibility to protect vulnerable populations from grave human rights violations.¹² Civil society and a few academics have proposed extending this exception to military measures against ecocide.¹³ Prominent lawyers serving in the Kennedy administration argued that a different exception justified its attacks on Cuba, namely the imperative of stabilizing

11 The Charter both empowers the Security Council to authorize the use of armed force under its direction, U.N. Charter art. 42, and recognizes the "inherent right" of states to engage in self-defense in response to an armed attack, *id.* art. 51. A consensus also exists that the prohibition of the use of force "against" the territorial integrity or political independence of a state, *id.* art. 2(4), implies the right of a state, in the exercise of its political independence, to consent to the use of force by other states on its territory.

12 See Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A Reinterpretation*, 55 HARV. INT'L L.J. 251, 276-87 (2014) (reviewing literature); *infra* notes 146-147 and accompanying text. Humanitarian interventions can lead to rearrangement of state boundaries that achieve the functional equivalent of an annexation. A contemporary example is Kosovo's separation from Serbia and its subsequent functioning as a kind of de facto dependency of the United States and some European states.

13 See *infra* notes 154-155 and accompanying text.

relations between competing international blocs.¹⁴ Soviet lawyers of that era asserted a similar principle, that what they called the principle of peaceful co-existence overrode the UN Charter when the imperatives of managing the inter-bloc relationship required.¹⁵ The Crimean example simply represents an extreme instance of the interbloc-stability exception. All these episodes show how, in consequential contexts, states justify the use of force despite the rules enacted by the Kellogg-Briand Pact and the UN Charter.

With that objection bracketed for reconsideration in Part IV of this Article, the comparison becomes instructive. Both episodes feature regionally powerful states having their way with the territory of a state recognized by international law as equally sovereign and independent. Prominent jurists sought to justify these actions as based on, rather than in tension with, international law, even as others denounced them. Both the Crimean and Panamanian justifications seem at odds with a ban on wars of conquest and cry out for explanation.

The emerging field of comparative international law offers a way of dealing with these contradictions. It gives us the tools to unpack both the external context and internal logic of particular international legal claims. It focuses not on the audience – asking whether all or most other states accept a claim as an accurate statement of international law – but on the claimant – asking what explains why the particular actor chose the argument made. These insights in turn inform the audience, which can anticipate the claimant’s arguments even as it disagrees with them. Comparative international law bridges the gap between claimant and audience not by adjudicating who is right, but rather by giving both sides the means to engage with the other’s arguments. Such engagement may not bring about synthesis, but it is an improvement on mutual incomprehension.¹⁶

This Article begins with a brief account of the approaches international law has taken to wars of conquest. It describes the Russian annexation of Crimea and the way that lawyers defended the transaction, especially

14 See *infra* notes 128-133 and accompanying text.

15 See *infra* notes 80-86 and accompanying text.

16 See generally Miriam Bak McKenna, *Remaking the Law of Encounter: Comparative International Law as Transformative Translation* in THE POLITICS OF TRANSLATION IN INTERNATIONAL RELATIONS 67 (Zeynep Gulsah Capan, Filipe dos Reis F. & Maj Grasten eds., 2021) (comparative international law as a method of intermediation between conflicting international legal systems); Ryan M. Scoville, *U.S. Foreign Relations Law from the Outside In*, 47 YALE J. INT’L L. (forthcoming 2022) (discussing the value of U.S. knowledge of foreign knowledge of U.S. law); see also Hendrik Simon & Lothar Brock, *The Justification of War and International Order: From Past to Present*, in THE JUSTIFICATION OF WAR AND INTERNATIONAL ORDER 1, 4 (Lothar Brock & Hendrik Simon eds., 2021) (“[A] state’s effort to justify violence is to be interpreted as an expression of this state’s awareness of the fact that the use of force may damage not only its war opponent, but also his own standing in the normative order constituting the existing communication community. With this, the discourse of justifying war interacts with the international order. As norms of the international order shape the justification practices of states, the practice of justification in specific cases shapes the general normative order.”).

Müllerson. It then relates the parallel story of U.S. intervention in Colombia leading to acquisition of the Canal Zone and of Moore's justification of that intervention under international law. It considers the performance of prominent international lawyers in these episodes, using comparative international law as a lens to unpack the implications of their arguments, and compares those arguments to ones made by great powers in other contexts. It shows in particular how much Müllerson's position tracks that of leading Kennedy administration lawyers during its travails with Cuba. A conclusion summarizes what these stories reveal about the potential of comparative international law to help states do international law.

II. WARS OF CONQUEST UNDER INTERNATIONAL LAW

Not too long ago, the point of war often was to seize land. Such wars run through history. Sovereigns might explain their actions in other terms, but more often than not military victory and territorial conquest went together.¹⁷ The First World War, a cataclysm that left no part of the planet untouched, had many causes. Yet perceived national security threats driven by growing colonial empires and unravelling national empires surely must come at the top of the list. Notwithstanding early talk about not imposing annexations, that war ended with massive redistribution of territories among states, including the breakup of the Austrian, Ottoman, and Russian empires, the dispersion (but not liberation) of Germany's overseas colonies, and the redrawing of the losers' national borders in favor of both the victors and newly created states.¹⁸ Security was the concern, conquest the

¹⁷ A state might regard the taking of territory not as the ultimate object of an armed attack, but as a way of discouraging its adversary from taking a future path to which it objects. As a matter of game theory, the seizure of land might function as a kind of hostage-taking used to reshape the adversary's incentives. See Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 526-27 (1983) (strategic use of hostages); see also *infra* note 160 and accompanying text (suggesting that Crimean annexation might fit this model).

The alternative mechanism for transferring territory between states is straightforward sales or long-term leases. See Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797 (2017). These transactions spare the residents the burdens of war, but do not give them a say in the changes of sovereignty. The 1997 handover of Hong Kong to the People's Republic of China upon the expiration of the United Kingdom's lease provides a modern example of the gap between disposition of territorial sovereignty and the preferences of residents.

¹⁸ Much of the "no annexation" talk came from actors who at the time of the statements were peripheral to the conflict. Thus Woodrow Wilson, speaking as the leader of a then-neutral country, asserted that "no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property." A LEAGUE FOR PEACE, S. DOC. 685, 64th Cong., 2d Sess. 6 (1917) ("Presidential address to Senate on Jan. 22, 1917"). International socialists, a majority of the German Reichstag, and Pope Benedict XV endorsed his no-annexation-or-penalty appeal. In Russia, the Petrograd Soviet, a quasi-state body established after the abdication that February of Tsar Nicholas II, called for "peace without annexations or indemnities on the basis of the self-determination of peoples." John A. Thompson, *Woodrow Wilson and "Peace without Victory": Interpreting the Reversal of 1917*, 10 FED. HIST. 9,

instrument, and a mix of annexation and secession was the result. Real estate was the common theme.

In the aftermath of the war, however, many states, mostly European and North American, developed second thoughts about conquest as a justification for war.¹⁹ Sheepishness over armed annexation did not stop these states from engaging in wars of conquest during the 1930s, as Japan did in its imposition of its Greater Asian Co-Prosperty Sphere on China; as Italy did by invading Ethiopia; as Germany did by its conquest of Czechoslovakia, Austria, and most of Poland; and as the Soviet Union did by its annexation of Estonia, Latvia, and Lithuania and its occupation of the rest of Poland as well as some of Finland, all before its invasion by Germany in 1941. But none of these powers admitted to naked aggression as an instrument of annexation. Instead, they claimed that their conquests established new social, political, and economic orders that would better the lives of the residents of the seized territory, replacing backwardness with progress. Moreover, the aggressors for the most part did not formally join any territory to their homeland, instead organizing domination and control through puppet governments.²⁰

Another massive redistribution of territory followed the Second World War, especially in favor of the U.S.S.R., the state that had paid the largest butcher's bill in the conflict.²¹ Yet the allies declared that the aggressive wars of conquest waged by Germany and Japan constituted war crimes and organized legal processes to punish those who conducted them.²² The allied

13 (2018). But once the United States had entered the war, Wilson denounced these calls, seemingly parroting his appeal, as an “intrigue for peace” meant to confirm German gains. *Id.* at 14. And once the Armistice happened, everyone saw things differently. Wilson embraced the Versailles Treaty, which rejected self-determination for the victors while ratifying and in some cases extending their overseas empires, but did wield that principle to impose territorial sanctions on the Central Powers. *See* Ashley S. Deeks, *A (Qualified) Defense of Secret Agreements*, 49 ARIZ. ST. L.J. 713, 730-32 (2016) (review of secret treaties redistributing territory during and after World War I). As for the Russian revolutionaries, once they seized power in October/November 1917 they waged a fierce war to claw back what they could of the non-Russian parts of the former Russian Empire, notwithstanding self-determination.

19 HATHAWAY & SHAPIRO, *supra* note 2, at 105-15.

20 Japan, for example, created the puppet state Manchukuo, headed by Puyi, the last Qing Emperor, as the instrument of its rule in China. Similarly, in 1940, the Soviet Union reorganized the existing Baltic states and induced them to petition for membership in the Soviet Union. As these ploys illustrate, the distinction between annexation through direct rule and *de facto* control backed up by force, on which rests the claim that states in the latter half of the twentieth century mostly stopped engaging in armed conquest, seems problematic. *See id.* at 329 (acknowledging distinction). This article takes a more liberal view toward the concept of annexation. *See, e.g., infra* note 145.

21 The Soviet Union absorbed portions of Czechoslovakia, Finland, Germany, Poland, Japan, and Romania as well as ratifying its earlier annexation of the Baltic States. For its part, the United States acquired a vast network of overseas military bases, some located on the territory of the vanquished states. These may have been leaseholds rather than freeholds, but they still were interests in foreign territory acquired at the conclusion of combat.

22 Not surprisingly, but undercutting the claim that international law had undergone a sea change, the leaders of the U.S.S.R. were not similarly charged for their 1939-40 wars of conquest against

states also created a new organization, the United Nations, meant to prevent a repeat of the last two disasters. Its Charter endorsed seven principles, the fourth of which declares:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.²³

This prohibition encompasses annexation by force and thus wars of conquest. As much as international law can do, it puts an end to this kind of war.

Law, however, is tricky. Nothing in the UN Charter prohibits states from making voluntary adjustments of their borders. This power rests on the principle of sovereign equality of all states, codified by the Charter just before its ban on the threat or use of force against territorial integrity.²⁴ Sovereign states have certain basic attributes, including the capacity to make treaties.²⁵ Through treaties, what otherwise would be an imposed annexation becomes a voluntary accession.²⁶

The problem comes in determining what entities can exercise the power to consent to an accession. The Charter does not define a “state.” Moreover, it endorses at a high level of generality “the principle of equal rights and self-determination of peoples,” something it lists ahead of taking measures “to strengthen universal peace.”²⁷ What happens when the rights of “states” and the goal of “universal peace” conflict with the rights of “peoples”? The forty years following the creation of the United Nations demonstrated the limits of the Charter’s reach. Absent a consensus on the Security Council, without which Chapter VII’s regulation of threats to peace and the use of force has little bite, states have had considerable leeway to press self-determination

Finland, Poland, and the Baltic States, as anticipated in the secret annexes to the Molotov-Ribbentrop Pact. See FRANCINE HIRSCH, SOVIET JUDGMENT AT NUREMBERG – A NEW HISTORY OF THE INTERNATIONAL MILITARY TRIBUNAL AFTER WORLD WAR II 264-305, 370-82 (2020) (describing defense efforts to invoke the secret annexes but refusal of Tribunal to refer to this issue in its judgment).

²³ U.N. Charter art. 2, ¶4. The Charter’s Chapter VII implements this principle by regulating the use of force by states.

²⁴ *Id.* art. 2, ¶1.

²⁵ See Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571, 574 (1937) (arguing that capacity to contract through treaties is a constitutive feature of the international order and therefore *jus cogens*).

²⁶ Treaties obtained by coercion, including those that ratify an annexation, might contradict fundamental principles of international law and thus lack legal force. See Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331 (treaty procured by use or threat of force is void). But this outcome presumably would not apply to a state that gains its sovereignty with the military assistance of another state and then freely submits to the assisting state, as Panama did in 1903 or Crimea did in 2014.

²⁷ U.N. Charter art. 1, ¶2.

claims against other states even when threats to international peace and security resulted.²⁸

To make matters worse, the Charter, and international law more generally, do not effectively regulate state secession.²⁹ Accordingly, annexation masked as post-secession accession becomes fairly easy as a legal matter, whatever the material and moral cost. The “people” of the targeted territory need only effect its secession from its parent state and declare its independence. The newly independent state then can negotiate its merger into the acquiring state. For a transactional lawyer, it feels very much like a corporate acquisition carried out through a special purpose acquisition company, a spin-off followed by merger.³⁰ The Charter may impose some limits on the use of force as a means of inducing the transaction, but, as the Crimea episode illustrates, its express endorsement of self-determination undermines even that constraint.

Crimea shows how states can deploy the spin-off-and-merger device in the present world of international law. Panama recalls an earlier day where the law forbidding armed conquest was only emerging. What is interesting is how little has changed in the formal legal approach of great powers to the conquest of small states.

III. RUSSIA’S ANNEXATION OF CRIMEA

Ukraine’s post-Soviet experience has been largely unhappy. Its dysfunctional politics and corrupt public sector have contributed to widespread social and economic demoralization. Its place as a site of great power competition adds to its people’s misery. Russia’s recovery from the psychological and economic devastation of the 1990s led, perhaps inevitably, to a renewed interest in asserting influence over its “near abroad,” especially those former Soviet states with which it had the closest historic and cultural ties. Of these, none was closer than Ukraine. Concrete steps to act on this interest coincided with Vladimir Putin’s assumption of the Russian presidency in 2000. Exactly during this period the United States, newly insecure in the wake of the 9/11 attack, sought to consolidate its

²⁸ The 1961 Goa incident is illustrative. As Portugal manifested an inability to maintain its ancient overseas empire, India effected the decolonization and repatriation of Goa through an armed attack. The Soviet Union shielded India from accountability in the Security Council, and Portugal then dropped whatever claim it might have. *See* Quincy Wright, *The Goa Incident*, 56 AM. J. INT’L L. 617 (1962). No one sought to determine the will of Goa’s residents, dampening whatever claims of self-determination might have existed.

²⁹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (Jul. 22) (municipal and not international law governs state secession).

³⁰ *See* Paul B. Stephan III, *Disaggregation and Subchapter C: Rethinking Corporate Tax Reform*, 76 VA. L. REV. 655, 684-99 (1990) (describing transaction).

geopolitical position by floating the prospect of Ukrainian membership in NATO. The European Union in tandem proposed a path for Ukrainian accession.

The great power competition played out largely through proxies. Russia, next door and with close economic ties, pulled Ukrainian politics in its favor. The United States and European Union relied on their greater wealth and links to a nascent Ukrainian civil society to push back against Russia. The issue first came to a head in the winter of 2004-05. Leonid Kuchma, president of Ukraine for most of the post-Soviet period and widely seen as a Russian placeman, had come to the constitutional limit to his term. The 2004 election pitted Viktor Yanukovich, understood as Kuchma's heir and Moscow's choice, against Viktor Yushchenko, a liberalizing prime minister who enjoyed European and U.S. support. Many in Ukraine saw Moscow as the instigator of a chemical attack on Yushchenko shortly before the election that left him permanently disfigured. Yanukovich's purported victory provoked massive civil resistance amid credible claims that he had stolen the election.

This "Orange Revolution" resulted ultimately in a do-over election that Yushchenko won. Russia made its unhappiness clear but did not intervene directly at the time. It instead used its control over Ukraine's energy supply and other economic levers to harass the country. Yushchenko presided over further turmoil and failed even to qualify for a run-off in the 2010 presidential election. Yanukovich, who had reinvented himself as a temporizer who would play off Russian and U.S.-E.U. interests against each other, prevailed.

Yanukovich's balancing act became his undoing. He raised expectations of closer ties with the European Union while seeking to reassure Russia about his reliability. In 2013, he first acceded to an accession agreement with Brussels and then, under intense pressure from Moscow, backed away. As in 2004, anti-Russian protestors mobilized in Kyiv. Their civil disobedience included occupation of one of the capital's principal open spaces, Independence Square (*Maidan*). In February 2014, the confrontation between protestors and the government turned violent, with deaths on both sides. Yanukovich fled to Moscow, and a provisional government, satisfactory to the protestors but irregular as a matter of Ukrainian law, formed.

Russia, eager to avoid a rerun of the Orange Revolution, responded to the Maidan events through Crimea. That peninsula, and in particular its principal port Sevastopol, served as the home base of the Soviet, then Russian, Black Sea Fleet. Its transfer from Russia to Ukraine in 1954 seemed a caprice and, in the context of the Soviet Union's centralized system,

insignificant.³¹ Only the break-up of the Soviet Union in 1991 gave salience to its assignment to Ukraine.

Several treaties made in the 1990s confirmed Russia's military interest in Crimea. They used a lease structure to codify Russian basing rights and to provide for its extraterritorial authority on the peninsula.³² In 2014, the large Russian military presence in the peninsula rested on the lease treaties.

When Maidan happened, Russia made its move. It asserted that the new government in Kyiv was illegitimate because it had not received a constitutionally required parliamentary endorsement. It also claimed that violent ethno-nationalists lay behind the Maidan events and posed a threat to Crimea's largely non-Ukrainian population. It quickly introduced ununiformed armed forces into the peninsula and aided (some would say created) informal militias and mercenaries deployed in the neighboring regions of Eastern Ukraine to fight against the Kyiv government.

These Russian cut-outs and proxies obtained effective control over Crimea shortly after the Maidan Revolution. Three weeks later, the region conducted an independence referendum. That Ukrainian law did not authorize this plebiscite dissuaded neither the Russians nor the Crimeans. On March 16, an overwhelming majority of the referendum voters supported joining the Russian Federation.³³ The next day, the extant local parliaments for Crimea and Sevastopol declared independence from Ukraine and proclaimed a Republic of Crimea.³⁴ President Putin immediately recognized the new state.³⁵ During the single day of the Republic's existence, its legislative bodies expropriated all Ukrainian state property in the region, including most assets of state-owned firms.³⁶ The Republic's government also found time during that day to complete a treaty (the Accession Treaty) with the Russian Federation admitting the region and

31 Decree No. 798 of the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics on the Transfer of Crimea Oblast from the Russian Soviet Federative Socialist Republic to the Ukrainian Soviet Socialist Republic, Mar. 9, 1954.

32 Agreement on the Status and Terms of Stay of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine, Russ.-Ukr., May, 28, 1997; Agreement on Mutual Settlements Related to the Division of the Black Sea Fleet and the Stay of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine, Russ.-Ukr., May 28, 1997; Agreement on the Parameters of Division of the Black Sea Fleet, Russ.-Ukr., May 28, 1997; Agreement on Issues of the Stay of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine, Russ.-Ukr., Apr. 21, 2010. Russia denounced only these treaties after its annexation of Crimea, and not its other treaty commitments to Ukraine. Federal Law No. 38-FZ on Termination of the Agreements Relating to the Stay of the Black Sea Fleet of the Russian Federation on the Territory of Ukraine, Apr. 2, 2014.

33 The referendum presented a binary choice between remaining part of Ukraine and joining the Russian Federation. Intermediate alternatives such as full independence or negotiating greater freedom from Ukrainian control while remaining part of the country were not on the ballot.

34 Resolution No. 1745-6/14 of the State Council of the Republic of Crimea, Mar. 17, 2014.

35 Decree No. 147 of the President of the Russian Federation on the Recognition of the Republic of Crimea, Mar. 17, 2014.

36 *E.g.*, Resolution No. 1758-6/14 of the State Council of the Republic of Crimea, Mar. 17, 2014.

the city into the Federation.³⁷ That treaty applied provisionally from its signing on March 18.³⁸ That day the Russian Constitutional Court carried out the requisite review of the treaty's constitutionality, which an opinion issued March 19 upheld.³⁹ Russia's parliament ratified the treaty and adopted implementing legislation on March 21.⁴⁰

In less than a month, Russia had converted Crimea from Ukrainian territory in which it enjoyed a military concession and some extraterritorial powers into a part of the Russian Federation. Each step of the conversion reflected Russian law and complied scrupulously with its legal prerequisites for incorporating new territory.⁴¹ A key requirement of those rules was the consent of the affected foreign state to the transfer.⁴² The implementing constitutional law that accompanied ratification of the Accession Treaty deemed that requirement satisfied by way of Crimea's status (in its view) as an independent sovereign state, however ephemeral.⁴³ Given how quickly

37 Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, Mar. 18, 2014.

38 *Id.* art. 10.

39 Resolution No. 6-P of the Constitutional Court of the Russian Federation, Mar. 19, 2014. Under the law in effect at the time of this decision, the Court had jurisdiction to review the constitutionality only of treaties that had not yet entered into force. Federal Constitutional Law No. 1-FKZ on the Constitutional Court of the Russian Federation, Jul. 21, 1994, art. 3(1)(d). This limitation forestalled the embarrassment of Russia failing to uphold an international legal obligation that had taken effect due to a municipal law impediment based on the constitution. Later the constitutional law defining the Court's jurisdiction was amended to clear a path for repudiation of the Russian Federation's obligation under the European Convention on Human Rights to comply with judgments of the European Court of Human Rights, in particular the Strasbourg Court's judgment in the Yukos case. See Paul B. Stephan, *The Future of International Human Rights Law – Lessons from Russia*, 81 LAW & CONTEMP. PROBS. 167, 177 (No. 4 2018) (describing amendment and Yukos case in the Constitutional Court).

40 Federal Constitutional Law No. 6-FKZ on the Admission of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Entities of the Russian Federation – The Republic of Crimea and the Federal City of Sevastopol, Mar. 21, 2014 [hereinafter *Crimea Constitutional Law*]; Federal Law No. 36-FZ on Ratification of the Treaty Between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and the Formation of New Constituent Entities Within the Russian Federation, Mar. 21, 2014.

41 An exception to the statement in text was President Putin's recognition decree. At the time of the decree, Russia was party to a treaty that protected the territorial integrity of Ukraine and the inviolability of its borders. Treaty on Friendship, Cooperation, and Partnership, Rus.-Ukr., art. 2, May 31, 1997. Under the Russian Constitution as I understand it, the President lacked the authority to violate such a treaty. Constitution of the Russian Federation art. 15(4), available at <https://perma.cc/G2T8-3DAU> (international treaties of the Russian Federation have legal priority over Russian legislation); art. 90(3) (presidential decrees may not contradict constitution or federal laws). The subsequent adoption of a constitutional law, however, probably cured this problem.

42 Federal Constitutional Law No. 6-FKZ on the Procedure of Acceptance into the Russian Federation and Formation Within Its Composition of a New Subject of the Russian Federation, Dec. 17, 2001, art. 4(2).

43 *Crimea Constitutional Law*, *supra* note 40, art. 2(2). The Russian Constitution distinguishes constitutional laws from normal legislation by imposing higher voting thresholds for the two houses of its parliament. Russian Constitution art. 108(2).

events unfolded between March 16 and 21, it seems evident that the legal instruments – the organization and formulation of the independence plebiscite, the creation of the day-long Republic and the imposition of its expropriations, the negotiation of the treaty and enactment of the implementing legislation, the issuance of the Constitutional Court’s opinion – had been prepared some time in advance.

All this lawyering did not help much in the West. The United States, the European Union, and several allies punished Russia with economic sanctions.⁴⁴ A slim majority of the UN General Assembly adopted a resolution declaring that the Crimean independence referendum, “having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.”⁴⁵ The Parliamentary Assembly of the Council of Europe described Russia’s actions as “a grave violation of international law.”⁴⁶ The Parliamentary Assembly of the Organization for Cooperation and Security in Europe also passed a resolution labelling Russia’s behavior as “acts of military aggression against Ukraine.”⁴⁷ Ukraine brought cases against Russia in the International Court of Justice, the Permanent Court of International Arbitration, the European Court of Human Rights, and the International Criminal Court.⁴⁸ In parallel,

44 See, e.g., Countering Russian Influence in Europe and Eurasia Act of 2017, Pub. L. No. 115-44, Tit. II, 131 Stat. 886, 898-934 (codified at 22 U.S.C. § 9501 *et seq.*) (ratifying executive orders and providing legislative framework for sanctions); Council of the EU and the European Council, *EU restrictive measures in response to the crisis in Ukraine*, CONSILIUM (June 23, 2021), available at <https://tinyurl.com/t2r8nx58>. Australia, Canada, Japan, Norway, and Switzerland have imposed sanctions on Russia for either its seizure of Crimea or its military involvement in the neighboring parts of Ukraine.

45 G.A. Res. 68/262 (Mar. 27, 2014). The vote was 100 in favor, 11 against, and 82 abstaining or absent. Russian of course voted no. The abstainers included Argentina, Brazil, China, India, Pakistan, and South Africa. U.N. GAOR, 68th Sess., 80th mtg. at 17, U.N. Doc. A/68/PV.80. In other words, two permanent members of the Security Council and all of the BRICs chose not to support the resolution. Three years later, the General Assembly passed a resolution characterizing Russia as an occupying power in Crimea, G.A. Res. 72/190 (Dec. 19, 2017), with 70 votes in favor, 26 against, and 76 abstaining. China, India, the Philippines, and South Africa voted against the measure and Argentina, Brazil, Indonesia, Pakistan, and South Korea abstained. U.N. GAOR, 72d Sess., 73d mtg. at 29, U.N. Doc. A/72/PV.73.

46 PACE Res. 1990 (2014) (Apr. 10, 2014) (suspending Russian voting rights). The vote was 145 in favor, 21 against and 22 abstentions. Five years later the Parliamentary Assembly, faced with Russia’s refusal to pay dues and threat of a permanent departure from the Council of Europe, restored Russia’s voting rights, with 118 in favor, 62 against, and 10 abstentions. PACE Res. 2292 (2019) (June 26, 2019).

47 Resolution on the Continuation of Clear, Gross and Uncorrected Violations of OSCE Commitments and International Norms by the Russian Federation ¶ 21 (July 8, 2015). The vote was 96 in favor, 7 against, and 32 abstentions.

48 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment on Preliminary Objections, 2019 I.C.J. Rep. 558 (Nov. 8); Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Award on Preliminary Objections, PCA Case No. 2017-06 (Feb. 21, 2020) (Tribunal convened under U.N. Convention on the Law of the Sea) (Tribunal has no jurisdiction over questions that depend on

investors brought claims against Russia under the investor-state dispute settlement provisions of a 1998 bilateral investment treaty.⁴⁹ In none of these proceedings, however, does an international tribunal have jurisdiction to pass on the validity of the annexation under general international law.⁵⁰

At the moment of the annexation, Russian state actors declined to offer a detailed international legal justification for their deed. During its review of the constitutionality of the Accession Treaty, Russia's Constitutional Court might have addressed the issue. Article 15(4) of the Constitution provides:

The universally-recognized norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes rules other than those provided by legislation, the rules of the international treaty shall be applied.⁵¹

In light of this mandate, the Court might have said something about the tension between territorial integrity and self-determination as part of the “universally-recognized norms of international law.” Instead, it did not mention international law at all.⁵²

One Russian constitutional lawyer sharply attacked the Court for not meeting this challenge. Elena Lukyanova, a Professor at the Higher School of Economics and a prominent liberal, criticized the Court's failure to address what she saw as Russia's violations of international law.⁵³ Valery

a determination of which state has sovereignty over Crimea); Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukr. v. Russ.), PCA Case No. 2019-28 (filed Apr. 1, 2019) (Tribunal convened under U.N. Convention on the Law of the Sea); Ukraine v. Russia, App. No. 20958/14 & 38334/18, Decision on Admissibility (E. Ct. H.R.) (Jan. 14, 2021) (application partly admissible; court not called on to decide whether admission of Crimea into Russian Federation complied with international law); Office of the Prosecutor, International Criminal Court, Report on Preliminary Examination Activities, Dec. 5, 2019, ¶¶ 255-73.

49 Agreement Between the Government of the Russian Federation and Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, Nov. 27, 1998. In one of these proceedings, NJSC Naftogaz of Ukraine et al. v. Russian Federation, PCA Case No. 2017-16, I provided, at the request of the claimants, an expert witness report on questions of Russian (but not international) law relative to the tribunal's jurisdiction and Russia's responsibility for the measures taken. In 2019, the arbitral tribunal determined it had jurisdiction over the dispute and that Russia was liable in damages for the expropriation of Naftogaz's assets. The opinion defending that award, however, has not yet entered the public domain and I have not seen it.

50 See Nikolay Marin & Bilyana Manova, *The Constraints for International Courts as a Tool for Resolving the Ukrainian-Russian Conflicts*, 62 GERMAN Y.B. INT'L L. 371 (2019) (review of jurisdictional limits).

51 See *supra* note 41.

52 Resolution No. 6-P, *supra* note 39. The submissions to the Court did not refer to these international legal issues, but nothing barred the Court from addressing them *sua sponte* as relevant to the overall question of constitutionality.

53 Elena Lukyanova, *On the Rule of Law in the Context of Russian Foreign Policy*, 3 RUSSIAN L.J. 10, 18-31 (No. 2 2015). Lukyanova's teaching contract was not renewed in 2020, shortly after adoption of the new constitutional amendments. See *infra* notes 76-80 and accompanying text. Some have suggested that the nonrenewal represented retaliation for her outspoken liberalism. Anastasiya Kornya, *New*

Zor'kin, the chair of the Constitutional Court, responded with a harsh, *ad feminam* attack on Lukyanova.⁵⁴ He contended that Russia's actions came within the principle of responsibility to protect, whether or not they complied with international law. This interjection was puzzling, as the Russian government did not rely on this doctrine in the Crimean case and generally opposes it.⁵⁵

In the following months, Russian international lawyers began making the case for the legality of the annexation. These jurists offer two kinds of arguments. One claim asserts that the people of Crimea validly invoked their right of self-determination under international law and that everything Russia did thereafter flowed from the legality of the people's severance of their ties with Ukraine. The Accession Treaty referred to this right, as well as to human rights in general.⁵⁶ The other class of arguments maintains that

Layoffs at HSE: Professor Lukyanova, Who Criticized the "Zeroing" Reported by Open Media, Notified of the Termination of Her Contract, OPEN MEDIA (August 11, 2020), available at <https://openmedia.io/news/n3/novye-uvolneniya-v-vyshke-rastorgnut-kontrakt-s-elenoj-lukyanovoj-kritikovavshej-popravki-v-konstituciyu/>.

54 Valeriy Zor'kin, *Право – и только право (Law – And Only Law)*, РОССИЙСКАЯ ГАЗЕТА (RUSSIAN GAZETTE) (Mar. 24, 2015), available at <https://rg.ru/2015/03/23/zorkin-site.html>. Zor'kin sharply rebuked Lukyanova for not coming to the defense of the Constitutional Court in response to Yel'tsin's attack. During the conflict between the Russian presidency and parliament in 1992-93, Zor'kin's court had sided with the latter, arguably because the ramshackle constitution inherited from the Soviet period leaned in that direction. Yel'tsin had retaliated by shutting down the court after suppressing the parliament's October 1993 revolt. Zor'kin had to step down as chair before the court could reopen more than a year later. Lukyanova's failure to take Yel'tsin to task for his suppression of constitutional accountability thus was, for Zor'kin, a personal affront. The members of the Court restored Zor'kin to the chair in 2003, after Putin had become President. Stephan, *supra* note 39, at 181 & n. 41.

55 Putin had hinted at the applicability of the responsibility-to-protect concept in press statements before the annexation but did not invoke it subsequently. Russia otherwise has opposed the doctrine for decades. Ministry of Affairs of the Russian Federation, *Foreign Policy Concept of the Russian Federation* (approved by President of the Russian Federation Vladimir Putin on November 30, 2016), pt. 26(c) (Russian intends "to prevent military interventions or other forms of outside interference contrary to international law, specifically the principle of sovereign equality of States, under the pretext of implementing the 'responsibility to protect' concept"), Jan. 12, 2016, available at https://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2542248?p_p_id=101_INSTANCE_cKNonkJE02BB&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB; Oleksandr Merezhko, *Crimea's Annexation by Russia – Contradictions of the New Russian Doctrine of International Law*, 75 HEIDELBERG J. INT'L L. 167, 189-91 (2015); see also Lee, *supra* note 12, at 272-73 (Russia asserted its right to protect its own nationals, not to protect generally against genocide); Sergey Lavrov, *The Law, Rights, and the Rules*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION, No. 1301, June 28, 2021, available at https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4801890 (Russian foreign minister speaking of "Moscow's efforts to stand up for the rights of Russians in the aftermath of the bloody 2014 government coup in Ukraine, supported by the United States, NATO and the EU").

56 Treaty Between the Russian Federation and the Republic of Crimea, *supra* note 37. The preamble also refers to:

whatever the shortcoming of the self-determination claim, the annexation represented a lawful response to impermissible Western interference in Ukrainian affairs that threatened to destabilize the balance of power between Russia and its adversaries to the cost of international peace and stability.

The self-determination arguments, although predominant in the early going, present considerable difficulties and seem to have lost steam. First, they contradict Russia's prior position in international forums.⁵⁷ Second, only scant evidence suggested that Ukrainian actors posed an immediate, grave threat to the non-Ukrainian residents of Crimea.⁵⁸ Third, the claim that Ukrainian-Russian fault lines put Crimean ethnic Russians in mortal danger from their Ukrainian neighbors fits poorly with the assertion, also made by Russia's apologists, that Ukraine and Russia have such deep cultural

respect for and observance of human dignity, rights, and freedoms, including the right to life, freedom of thought, conscience, religion, and convictions for all within their territories, without distinction, in accordance with the generally accepted principles and norms of international law and cognizant of the close interconnectedness of the other main principles of international law enshrined, in particular, in the UN Charter and the Helsinki Final Act of the Conference on Security and Cooperation in Europe, and with the principle of respect for and observance of human rights . . .

See generally Anatoly Kapustin, *Crimea's Self-Determination in Light of Contemporary International Law*, 75 HEIDELBERG J. INT'L L. 101 (2015); Alexander Salenko, *Legal Aspects of the Dissolution of the Soviet Union in 1991 and Its Implications for the Reunification of Crimea with Russia in 2014*, 75 HEIDELBERG J. INT'L L. 141 (2015); Vladislav Tolstykh, *Three Ideas of Self-Determination in International Law and the Reunification of Crimea with Russia*, 75 HEIDELBERG J. INT'L L. 119 (2015); Lavrov, *supra* note 55 (arguing that "the free choice made by the people" of Crimea represents an instance of the principle of self-determination that the West supports only when in its "geopolitical interests"). Neither the treaty itself nor later legal arguments by Russian authorities spelled out which human rights were threatened in Crimea. It appears that this reference functioned more as boilerplate than a means of staking out a more developed position on the applicable international law. *But cf.* Tolstykh, *supra* note 56, at 125-28 (suggesting that self-determination rests on a conception of human rights but not developing the argument for purposes of the Crimean question).

⁵⁷ *See* Written Statement by the Russian Federation, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for advisory opinion), Apr. 16, 2009, at ¶¶ 83-85, 88 (maintaining that the international legal principle of territorial integrity normally has precedence over that of self-determination and that unilateral secession "should be limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question"). The Crimean Tatars may have an arguable claim based on their endangered national identity, but they make up less than an eighth of the Crimean population, fewer than the ethnic Ukrainians. *Cf.* Bill Bowring, *Who Are the "Crimea People" or the "People of Crimea"? The Fate of the Crimean Tatars, Russia's Legal Justification of Annexation, and Pandora's Box*, in *THE USE OF FORCE AGAINST UKRAINE AND INTERNATIONAL LAW* 21 (Sergey Sayapin & Evhen Tsybulenko eds. 2018) (arguing that Ukrainian treatment of Crimean Tatars after independence might have satisfied self-determination conditions but that a majority of this group opposed secession).

⁵⁸ A prominent Russian legal official's summary of these threats was underwhelming. Kapustin, *supra* note 56, at 116-17 ("Of course, compared to Bangladesh, Kosovo and other examples of this kind, the situation in Crimea was different. In fact, there were no mass killings of civilians or full-scale military actions, but this was not to the merit of the Ukrainian government or the international community.").

and economic ties that Crimea's transfer from Ukrainian to Russian jurisdiction simply realizes Russia's historic rights in the area.⁵⁹

The inter-bloc stability argument deserves closer inspection, even though most international lawyers in the West find it strange.⁶⁰ It rests on an assertion that, independent of the capitalist-socialist conflict that supposedly divided the world from 1917 to 1991, a more fundamental division resting on civilizational conflicts defines Russia's relations with the West. The argument maintains that Russia embodies a historically entrenched but imperiled civilization. Since 1991, it asserts, the main threat to Russian civilization has come from the West, which seeks to erase its very existence.

In the West, Russia is widely seen as a victim of self-harm through its seventy-four-year experiment with antidemocratic totalitarianism, militarism, and imperialism. Stubborn adherence to a dysfunctional regime, Western leaders believe, caused it to lose the geopolitical prominence it enjoyed at the end of World War II. Emblematic is President Obama's statement immediately following the Crimean annexation:

With respect to Mr. Romney's assertion that Russia is our number-one geopolitical foe, the truth of the matter is that America has got a whole lot of challenges.⁶¹ Russia is a regional power that is threatening some of its immediate neighbors not out of strength, but out of weakness. Ukraine has been a country in which Russia had enormous influence for decades, since the breakup of the Soviet Union. And we have considerable influence on our neighbors. We generally don't need to invade them in order to have a strong, cooperative relationship with them. The fact that Russia felt

⁵⁹ See Alexander Vylegzhanin & Kirill Kritsky, *U.S. Complicity in the 2014 Coup in Kiev as a Violation of International Law*, 65 INT'L AFFAIRS 35, 36 (No. 3 2019) ("Russians and Ukrainians lived together within a single state, the Russian Empire, from the 17th century until 1917. During the Soviet period, the border between the Russian Soviet Federative Socialist Republic and the Ukrainian Soviet Socialist Republic did not have international legal significance."); see also Vladimir Putin, *On the Historical Unity of Russians and Ukrainians*, July 12, 2021 ("The incorporation of the western Russian lands into the single state was not merely the result of political and diplomatic decisions. It was underlain by the common faith, shared cultural traditions, and – I would like to emphasize it once again – language similarity. . . . Together we have always been and will be many times stronger and more successful. For we are one people.") (article originally published in Russian newspaper *Kommersant*), available at <http://en.kremlin.ru/events/president/news/66181>.

⁶⁰ See *supra* note 8 (concept of the "West").

⁶¹ Mitt Romney had been President Obama's opponent in the 2012 presidential election and as of 2014 remained a leading figure in the Republican Party. After the 2016 presidential elections, the leadership of the two parties seemed to swap sides as to the existence and gravity of a supposed Russian threat.

compelled to go in militarily and lay bare these violations of international law indicates less influence, not more.⁶²

From this perspective, the annexation confirmed Russia's ongoing weakness and decline. Only a fuller embrace of the principles of liberal democracy and the rule of law, including international law, could save it from itself.⁶³ Undergirding this Western take is a conception of liberal democracy and a law-based international order as a natural and indeed inevitable product of global historical and economic forces bolstered by ideological progress.⁶⁴

Influential actors in Russia agree that the nation has suffered but deny that it was self-harm. Sergey Kortunov, a prominent foreign policy intellectual under Yel'tsin and Putin, argued as early as the 1990s that Russia's problems have little to do with the Bolshevik experiment and everything to do with the concept of Russia itself. The West, he asserted, fears rather than understands the idea of Russia and has tried throughout history to kill off Russian civilization.⁶⁵ He regarded the liberalism-and-international-law formula invoked by the West not as a recipe for reconstruction, but rather as an attempt to erase Russia as a specific and indispensable product of distinct historical forces.

Critical to Kortunov's argument is a conception of Russia not as an ethnos, but rather as a civilization.⁶⁶ For Russians, this idea reflects more than a millennium of history played out through bloody invasions by hostile peoples (the Mongols, Tamerlane, Persians, and the Ottomans from the Asian East and Varangians, Livonian Knights, the Polish-Lithuanian Commonwealth, Napoleon, and Hitler from the European West), punctuated by peaceful intervals when it served as a bridge between the East and West. Its Byzantine heritage, transmitted through Orthodoxy, serves as

62 Press Conference with President Obama and Prime Minister Rutte of the Netherlands, Mar. 25, 2014, available at <https://obamawhitehouse.archives.gov/the-press-office/2014/03/25/press-conference-president-obama-and-prime-minister-rutte-netherlands>.

63 See, e.g., MICHAEL MCFAY, FROM COLD WAR TO HOT PEACE (2018).

64 See Hugh Ragsdale & Paul B. Stephan, *Don't Feed the Bear*, 2 THE AMERICAN INTEREST 90 (No. 4, 2007), available at <https://www.the-american-interest.com/2007/03/01/dont-feed-the-bear/> (challenging that perspective). Cf. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (arguing on the basis of Hegelian theory for end of history through triumph of liberal democratic nation state). Many in the West rejected the specifics of Fukuyama's account but accepted the triumph of liberal internationalism as natural if not inevitable.

65 S.V. Kortunov, *Холодная война: парадоксы одной стратегии* (The Cold War: Paradoxes of a Strategy), *Международная Жизнь* (International Life) 23 (No. 5, 1998), translated as *Is the Cold War Really Over?*, 44 INT'L AFFAIRS 141 (No. 5, 1998).

66 See generally SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 56-78 (1996) (critique of concept of universal civilization; rebuttal of Fukuyama by one of his teachers); *id.* at 45-46, 139-44, 241-44 (scope and significance of Orthodox Russian civilization). See also Paul Robinson & Mikhail Antonov, *In the Name of State Sovereignty? The Justification of War in Russian History and the Present*, in THE JUSTIFICATION OF WAR AND INTERNATIONAL ORDER, *supra* note 16, at 396 (referring to "a messianic streak in Russian thought, according to which Russia is a nation endowed with a special moral purpose.").

the civilization's cement. People of many languages and ethnicities but shaped by a common Orthodox culture come under its sway, Slavs (Belarussians and Ukrainians) and Caucasians (Armenians and Georgians) alike. The Russian language embodies this point: It regards Russian identity as not based on ethnicity, which is *russkiy* (русский), but instead on participation in a particular state-based civilization, which is *rossiyskoye* (российское). The language is the русский language; the state is the Российская Federation, as is the cultural identity of both the peoples of the Federation and their compatriots abroad.⁶⁷

In Kortunov's eyes, the West, blinded by its uncritical belief in modern liberal internationalism as a universal value, does not understand the significance of a civilization, much less Russia's particular civilizational identity. As a result, it regards manifestations of this civilization as obstinacy in the face of supposed universal revealed truths and seeks to repress them. Conflict ensues, for which Russia bears no blame.⁶⁸

Odd as Kortunov's analysis might seem to a Western audience, all available evidence indicates that it resonates deeply with Russians. Figures as diverse as former President Mikhail Gorbachev, Nataliya Solzhenitsyna, widow of the great dissident writer and Nobel laureate, and dissident leader Aleksey Navalny supported the Crimean annexation, largely for the reasons expressed by Kortunov.⁶⁹ Putin clearly embraces this perspective. Without discussing Crimea specifically, in a 2019 press interview addressed to a Western audience he doubled down on his earlier characterization of the break-up of the U.S.S.R. as a tragedy for Russian civilization:

As for the tragedy related to the dissolution of the Soviet Union, this is something obvious. I meant, first of all, the humanitarian aspect of it. It appears that 25 million ethnic Russians were living abroad when they learned from the television and radio that the

⁶⁷ Compare Russian Constitution art. 68(1) (language), with *id.* art. 68(4) (Federation and cultural identity). Moreover, the state "protects the cultural identity of all peoples and ethnic communities of the Russian (Российская) Federation, guarantees the preservation of ethnocultural and linguistic diversity." *Id.* art. 69(2). Russian adjectives are gender specific, as indicated by variance in the *ck* suffixes of the root *Росси́й*.

⁶⁸ See MÄLKSOO, *supra* note 5, at 140-46 (account of Russia's construction of civilizational otherness from the West).

⁶⁹ Danielle Haynes, *Mikhail Gorbachev Hails Crimean Annexation to Russia*, UPI NEWS TRACK, Mar. 18, 2014, available at https://www.upi.com/Top_News/World-News/2014/03/18/Mikhail-Gorbachev-hails-Crimea-annexation-to-Russia/6881395193402/; X.S., *Alexander Solzhenitsyn's Widow on What Went Wrong*, THE ECONOMIST, Nov. 26, 2015, available at <https://www.economist.com/prospero/2015/11/26/alexander-solzhenitsyns-widow-on-what-went-wrong>; Anna Dolgov, *Navalny Wouldn't Return Crimea, Considers Immigration a Bigger Issue than Ukraine*, MOSCOW TIMES, Oct. 16, 2014, available at <https://www.themoscowtimes.com/2014/10/16/navalny-wouldnt-return-crimea-considers-immigration-bigger-issue-than-ukraine-a40477>.

Soviet Union had ceased to exist. Nobody asked their opinion. The decision was simply made.

You know, these are issues of democracy. Was there an opinion poll, a referendum? Most (over 70 percent) of the citizens of the USSR spoke in favour of retaining it. Then the decision was made to dissolve the USSR, but nobody asked the people, and 25 million ethnic Russians found themselves living outside the Russian Federation. Listen, is this not a tragedy? A huge one! And family relations? Jobs? Travel? It was nothing but a disaster.⁷⁰

The independence of Ukraine, in this view, caused an involuntary transfer of sovereignty over a people that did not wish it. The principle of self-determination, perhaps bolstered by a human rights interest in self-governance and self-expression, supports its reversal, as least for Crimea, a portion of Ukraine that is overwhelming non-Ukrainian and largely Russian.

Rein Müllerson, a prominent Anglo-Estonian international lawyer with ties to the Russian leadership, provides the fullest statement of the international legal dimensions of this argument.⁷¹ His view deserves special consideration because his prominence today roughly corresponds to Moore's in 1903. He was a leading figure in Soviet international law circles during the Gorbachev period, serving as head of the international law department of the Institute of State and Law of the U.S.S.R. Academy of Sciences and as a member of the UN Human Rights Committee. After the break-up of the Soviet Union, he briefly held office as Deputy Foreign Minister of newly independent Estonia. Afterwards he took senior academic positions at King's College London and Tallinn University as well as serving as a member of the executive council and President of the *Institut de Droit International*, a prestigious international non-governmental body. He currently belongs to the Valdai Discussion Club, an informal body that advises Putin.⁷²

Müllerson argues that the West's assertion of an uncompromising commitment to universal values in international law represents an ahistorical product of the period of U.S. hegemony following the collapse of the Soviet Union. These supposed values, he argues, reflect U.S. concepts and interests

⁷⁰ Interview with the Financial Times, June 27, 2019, available at <http://en.kremlin.ru/events/president/news/60836>.

⁷¹ REIN MÜLLERSON, DAWN OF A NEW ORDER: GEOPOLITICS AND THE CLASH OF IDEOLOGIES (2017).

⁷² See Mälksoo, *supra* note 9, at 311 (discussing Müllerson's background). As further evidence of his cosmopolitan stature, Müllerson co-edited a book published in the United States comparing the views of Russian and U.S. scholars on international law. BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA (Lori Fisler Damrosch, Gennady M. Danilenko & Rein Müllerson eds., 1995).

rather than those of the entire international community.⁷³ International peace and stability, he claims, require a return to the principle of balance of power, one that seeks to check the ambitions of any global hegemon. This principle validates the annexation of Crimea, as Russia's actions ended the concrete risk of extending NATO's sway to the Crimean Peninsula and ousting the Black Sea Fleet from its home port.⁷⁴ Restoration of Russian influence through territorial aggrandizement, from this perspective, not only fulfils the destiny of Russian civilization but serves world order by correcting a dangerous imbalance in great power relations.⁷⁵

Müllerson's argument supposes that, as during the Cold War, opposing blocs define geopolitics and international relations. In the old days, capitalism versus socialism seemed a sufficient organizing principle to classify the blocs, even if the characterization rested on peculiar Soviet conceptions of those social and economic systems. For purposes of Crimea, however, the stakes are clear (at least to Müllerson). NATO functions as a bloc that poses a grave risk to Russia. An armed annexation is legitimate to the extent that it reduces that risk.

The latest amendments of the Russian Constitution, adopted in July 2020, indicate that Müllerson's argument conforms to Russia's current view of its place in the world.⁷⁶ In essence, they confirm his account of Russia as the embodiment and leader of a civilization that faces opposing forces in the world community. A new Article 67(2¹) declares not only that Russia will defend its territorial integrity, but that actions "directed at alienating part of state territory as well as calls to such action will not be permitted."⁷⁷ A

73 MÜLLERSON, *supra* note 71, at 75-76. Müllerson also tracks the arguments made by Russian international lawyers in the immediate aftermath of the annexation, namely that Ukraine behaved badly and that the United States had abused the self-determination principle on multiple prior occasions to justify armed intervention in and the dismemberment of sovereign states. *Id.* at 114-16. For an official Russian statement to the same effect, see Lavrov, *supra* note 56.

74 MÜLLERSON, *supra* note 71, at 113.

75 *Id.* at 154; see generally Mälksoo, *supra* note 9, at 314-16 (criticizing the argument).

76 Federal Constitutional Law No. 1-FKZ on Introducing an Amendment to the Constitution of the Russian Federation on Improving the Regulation of Certain Aspect of the Organization and Functioning of Public Authority, Mar. 14, 2020 (proposing amendments that, after a national referendum, went into effect on July 4, 2020); see Lauri Mälksoo, *International Law and the 2020 Amendments to the Russian Constitution*, 115 AM. J. INT'L L. 78, 78-80 (2021) (describing adoption of constitutional amendments).

77 Constitution of the Russian Federation art. 67(2¹); see Mälksoo, *supra* note 76, at 80-82. The legislature implemented the constitutional edict by amending the Federal Law on the Countering of Extremist Activity to extend the definition of extremism to include efforts to alienate Russian territory. Federal Law No. FZ-299 on Amending Article 1 of the Federal Law on the Countering of Extremist Activity, July 31, 2020. The "alienating" language is new to the constitution of the Russian Federation, but tracks in part article 78 of the 1977 U.S.S.R. Constitution. See Конституция (основной закон) Союза Советских Социалистических Республик (Constitution (Fundamental Law) of the Union of Soviet Socialist Republics) (1978) ("USSR Constitution"), translated in THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS 71-171 (F.J.M. Feldbrugge, ed. 1979). The Soviet variant, however, did not contain a specific prohibition of advocacy, perhaps because provisions of the extant criminal code generally proscribed opposition to official policy.

new Article 67¹(2) refers to the Russian state as a “historically formed state unity” based on a “thousand-year history.”⁷⁸ A new Article 69(3) proclaims the obligation of the Russian state to protect the interests of compatriots living abroad and to preserve their “all-Russian” cultural identity.⁷⁹ Reading these provisions together, we find an assertion that the Russian state bears Russian civilization, and that this burden entails a duty to defend that civilization, not just within the immediate territory of the Russian Federation, but wherever it has put down historic roots and has a present manifestation.

The new constitutional amendments also declare the principles underlying the country’s approach to international law. New Article 79¹ provides:

The Russian Federation takes measures to maintain and strengthen international peace and security, ensure the peaceful coexistence of states and peoples, and prevent interference in the internal affairs of the state.⁸⁰

What is relevant here is the reference to peaceful coexistence, a conceptual innovation that popped up in the Soviet Union early in the 1950s.⁸¹ At least in its Soviet incarnation, the term meant the pursuit of neither peace nor coexistence, but rather the inherent (*jus cogens*) right of the Soviet Union to reject any principle of international law that it regarded as repugnant to its fundamental interests.⁸² Its revival in the new Constitution suggests Russia’s

⁷⁸ Constitution of the Russian Federation art. 67¹(2); see Mälksoo, *supra* note 76, at 79.

⁷⁹ Constitution of the Russian Federation art. 69(3).

⁸⁰ *Id.* art. 79¹; see Mälksoo, *supra* note 76, at 82-83. The amendment’s reference to peaceful coexistence is new to the Constitution of the Russian Federation. Article 28 of the 1977 U.S.S.R. Constitution had provided in part:

The foreign policy of the USSR is aimed at ensuring international conditions favorable for building communism in the USSR, safeguarding the state interests of the Soviet Union, consolidating the positions of world socialism, supporting the struggle of peoples for national liberation and social progress, preventing wars of aggression, achieving universal and complete disarmament, and consistently implementing the principle of the peaceful coexistence of states with different social systems.

⁸¹ See Paul B. Stephan, *The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy*, in *THE LEGAL DIMENSION IN COLD-WAR INTERACTIONS: SOME NOTES FROM THE FIELD* 148 (Tatiana Borisova & William Simons eds., 2012); Leon Lipson, *The Rise and Fall of “Peaceful Coexistence” in International Law*, in *PAPERS ON SOVIET LAW* 6 (Leon Lipson & Valery Chalidze eds., 1977).

⁸² Paul B. Stephan, *The Political Economy of Jus Cogens*, in *THE POLITICAL ECONOMY OF INTERNATIONAL LAW: A EUROPEAN PERSPECTIVE* 75, 77-79 (Alberta Fabbriotti ed., 2016) (describing Soviet and East European effort to link *jus cogens* concept to doctrine of peaceful coexistence). China has its own variant, the “five principles of peaceful coexistence,” which does not necessarily in every respect map onto the Russian meta-theory described in text. See Agreement on Trade and Intercourse Between Tibet Region of China and India, China-India preamble, Apr. 29, 1954, 299 U.N.T.S. 57 (1958) (citing principles of mutual respect for sovereignty and territorial integrity,

belief that its veto right over the formation of universal principles and customary rules of international law survived the Soviet Union's demise.⁸³

Given the disappearance of the socialist-capitalist distinction (as formulated by Soviet theorists), where does a principle that originally governed only socialist-capitalist relations now apply? If the world remains divided into two camps, what are they?⁸⁴ Müllerson suggests an answer. In Russia's view, which he endorses, there exist at least two blocs today, one formed by Russia and its allies and the other comprising the "West."⁸⁵ Even though Russia abandoned the scientific-materialist apparatus of peaceful coexistence (the entrenchment of class conflict between capitalist and socialist states and the historical inevitability of the triumph of socialism) when it abandoned Marxism-Leninism, a deep struggle between two camps continues, now based on history, culture, and geopolitics. Preservation of international peace and order requires maintaining an equilibrium between the blocs. The Russian side thus may take measures to protect that equilibrium when the other side threatens it.⁸⁶

On this note, I move to events that unfolded 110 years earlier on the opposite side of the world. The United States was not then an imperial power seeking to claw back some of its past glory, as Russia is now, but rather a recent entrant into the game of modern imperialism. It had just acquired the Philippines and Hawai'i, the former by a conventional war of conquest and the latter by backing a coup.⁸⁷ Its most important acquisition, however, was Panama's Canal Zone, a transaction that I describe in the next section.

mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence); *see also* The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, pt. 1, June 25, 2016, *available at* http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698 (embracing the "Five Principles of Peaceful Coexistence").

⁸³ *See generally* Mälksoo, *supra* note 76, at 83-86 (noting tendency of 2020 amendments to portray the Russian Federation as a continuation of the Soviet Union, rather than as a distinct successor state under international law).

⁸⁴ *See* USSR CONSTITUTION, art. 28 (principle of peaceful coexistence applies to "states with different social systems").

⁸⁵ *See supra* note 8 (definition of the "West"). Müllerson does not address the question of whether there exists a third camp, comprising states within China's sphere of influence, that also might present a long-term threat to Russian civilization. As Kortunov argued, threats from the East have defined Russian identity as much as those from the West. *See supra* note 65 and accompanying text.

⁸⁶ *See supra* notes 74-75 and accompanying text.

⁸⁷ Unlike Polk's war of conquest with Mexico, the McKinley administration did not plan to incorporate its newly acquired territories into the United States. *See generally* BENJAMIN ALLEN COATES, LEGALIST EMPIRE – INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY 41-44 (2016) (break with past U.S. practice of acquiring territory only for eventual incorporation).

IV. THE U.S. ANNEXATION OF THE CANAL ZONE

The Polk administration was second only to Jefferson's in making the United States a continental power.⁸⁸ Unlike Jefferson, Polk used armed conquest and annexation as his principal means of acquiring territory.⁸⁹ In one important instance, however, Polk emulated Jefferson by using a treaty as a peaceful means to extend U.S. sovereignty.⁹⁰

The eponymous Bidlack treaty, negotiated by the U.S. chargé d'affaires in Bogotá on his own initiative in 1846, gave the United States a right of way across the Isthmus of Panama with respect to "any modes of communication that now exist, or that may be, hereafter, constructed."⁹¹ In return, the United States guaranteed the "perfect neutrality" of the Isthmus as well as the "rights of sovereignty and property" that Bogotá had over the territory.⁹² Surprised at first, the Polk administration, shortly after news of the discovery of gold in California, decided to accept Bidlack's deal and obtained Senate consent to ratification in 1848.

A U.S. firm built a trans-isthmus railroad, which began operations in 1855. The railroad met the most pressing needs of commerce and military mobility, but represented a clearly inferior technology. The goal remained the construction of a canal. In 1878, a French entrepreneur and descendant of the Emperor, Lucien Napoleón Bonaparte-Wyse, obtained a concession from the Colombian government to do this. The following year he transferred these rights to the Société internationale du Canal interocéanique, a company formed by Ferdinand de Lesseps, the French diplomat who had organized the Suez canal project.⁹³ The de Lesseps

⁸⁸ Treaty Between the United States of America and the French Republic (Louisiana Purchase Treaty), U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.

⁸⁹ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hildago), U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (concluding Mexican-American War and confirming territorial transfers to victor). The United States earlier had annexed what it deemed an independent Republic of Texas. Joint Resolution for the Admission of the State of Texas into Union, 9 Stat. 108 (1845). The United States obtained Mexico's consent to the annexation only through the later Treaty.

⁹⁰ Peaceful as between the states. In keeping with the legal assumptions of the time, international law did not recognize any rights in the native people who actually occupied these territories and who thus remained subject to violent conquest. *Cf.* *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (native occupants of land in New World have no ownership rights as against European states that "discovered" the territory).

⁹¹ Treaty of Peace, Amity, Navigation, and Commerce, New Granada-U.S., art. XXXV, Dec. 12, 1846, 9 Stat. 881, T.S. 54 [hereinafter Bidlack Treaty]. The Rionegro Constitution of 1863 renamed New Granada as the United States of Colombia.

⁹² Bidlack Treaty art. XXXV.

⁹³ President Hayes objected to the undertaking based on longstanding U.S. policy to prevent Western Hemisphere entanglement with European interests. 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (NEW SERIES) 4537-38 (James D. Richardson ed., 1897). Both Houses also considered resolutions of protest. *E.g.*, 9 CONG. REC. 2312 (June 25, 1879) (Senator

venture failed miserably, due partly to poor conception, partly to bad leadership, and largely to an inability to cope with the yellow fever and malaria that ravaged the work force. The Société went into bankruptcy in 1888 and a French court convicted de Lesseps and his son of financial crimes in 1893. In 1894, another French company, the Compagnie Nouvelle du Canal de Panama, acquired the Société's rights, including the Wyse concession, and restarted work, but soon halted.⁹⁴

Following the 1898 war with Spain and the consequent territorial acquisitions, U.S. military and political leaders came to see a Central American canal as a strategic necessity. They focused on two potential routes, the one staked out by de Lesseps and another going through Nicaragua. The Roosevelt administration first made the Hay-Pauncefote Treaty to confirm British assent to the project "by whatever route may be considered expedient."⁹⁵ Supporters of a Panamanian route, including agents of the Compagnie Nouvelle, prevailed in the 1902 Spooner Act, by which Congress authorized a government-run project through the Panamanian Isthmus.⁹⁶ The Compagnie Nouvelle sold its rights to the United States, and Colombia's Foreign Minister signed the Hay-Herrán Treaty to allow the United States to proceed.⁹⁷ But Colombia's Senate balked, apparently because the Compagnie Nouvelle had not shared with Colombia any of the money it had received from the United States. Rather than approving the Treaty, the Senators instead conditioned their approval on a payment to the national treasury comparable to what the Compagnie Nouvelle had received.⁹⁸

At this point, the Roosevelt administration faced a quandary. Colombia's monetary demands repelled it, and it also believed they went beyond anything the U.S. Senate would abide. It remained convinced that a canal through the Panamanian Isthmus was critical to the nation's international role and national security. At the same time, it did not want to taint its arrival on the world stage as a global power with a display of

Burnside introducing S.R. 43, which denounced any attempt by European powers to build a canal as violative of Monroe Doctrine); 10 CONG. REC. 12-14 (Dec. 2, 1879) (remarks of Senator Burnside); *id.* at 1154 (Feb. 26, 1880) (Congressman Warner introducing H.R. 226 calling for U.S. control of canal). Ultimately, however, the United States took no concrete steps to block the enterprise.

94 See DAVID MCCULLOUGH, *THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL, 1870-1914*, at 25-203 (1977) (describing de Lesseps's adventure).

95 Ship Canal (Hay-Pauncefote Treaty), U.K.-U.S., Nov. 18, 1901, 32 Stat. 1903, T.S. 401.

96 The Compagnie Nouvelle was ably represented by William Nelson Cromwell, who claimed, and perhaps deserved, credit for the Act. His bill to the Compagnie for services rendered was enormous, although later settled in 1907 for \$200,000, the equivalent of \$5,483,000 today. MCCULLOUGH, *supra* note 94, at 402.

97 Hay-Herrán Treaty, Colom.-U.S., Jan. 22, 1903, *reprinted in full in* DWIGHT CARROLL MINER, *THE FIGHT FOR THE PANAMA ROUTE – THE STORY OF THE PANAMA ROUTE AND THE HAY-HERRÁN TREATY* 413-26 (1940).

98 MINER, *supra* note 97, at 307-09.

contempt for international law and stability. Unlike Polk in the past or the European powers in his own day, Roosevelt did not wish to be seen as someone who waged war just to grab territory.

International law then entered the picture in the person of John Bassett Moore. Moore was, in 1903, the preeminent American international lawyer. After his studies at the University of Virginia School of Law and a few years of legal practice in Delaware, Moore joined the State Department in 1885, became Secretary Bayard's law clerk, and rose thereafter to the position of Third Assistant Secretary.⁹⁹ He left the Department in 1891 to assume a newly created chair at Columbia Law School for international and diplomatic law. He then took a leave of absence from Columbia in 1898 to serve as Assistant Secretary of State and secretary to the Paris Peace Commission that settled the Spanish-American War. In 1903, when he thrust himself into the Panamanian Isthmus controversy, his stature as an authority on international law was unsurpassed in the United States.¹⁰⁰

Upon learning that Colombia had rejected the treaty, Moore reached out to Assistant Secretary of State Francis B. Loomis to suggest he might help. Loomis alerted Roosevelt, who asked Moore to prepare a memorandum on the status of U.S. rights in the Isthmus under international law. Moore delivered the requested advice in August.¹⁰¹ Given the impact of his memorandum on the President and U.S. actions, I discuss it in detail.

The Moore memorandum had twelve points. The first two frame the context, namely the rejection by the Colombian legislature of a treaty approved by its government. The next three consider the general principles. Point three puts the matter starkly: "If the Panama route is, as we are advised, the best and the most practicable route, both for construction and for operation, it is the one that we should have."¹⁰² Point four explains that "the United States, in undertaking to build the canal, does a work not only for itself but for the world." It then asks: "The United States now holds out to the world for the first time a certain prospect of a canal. May Columbia be permitted to stand in the way?"¹⁰³

Point five offers an answer "on general grounds." It quotes Lewis Cass, James Buchanan's Secretary of State, speaking in 1858 on the significance

⁹⁹ Illness prevented Moore from taking his final exams at Virginia, forcing him instead to qualify for the bar by reading law with a practitioner. At Virginia he was a classmate of future U.S. president Woodrow Wilson, who discovered a distaste for law and left early. Wilson later prevailed on Moore to join his administration in 1913. It was reported that Moore "was wont to say that the longer he knew Wilson the less he thought of him . . ." Edwin Borchard, *John Bassett Moore*, 42 AM. J. INT'L L. 98, 99 (1948).

¹⁰⁰ See COATES, *supra* note 87, at 34-36 (details of Moore's background); Borchard, *supra* note 99 (Moore's stature).

¹⁰¹ COATES, *supra* note 87, at 53; see MINER, *supra* note 97, at 427-32 (full text of the memorandum) [hereinafter Moore Memorandum].

¹⁰² Moore Memorandum, *supra* note 101, point 3.

¹⁰³ *Id.* point 4.

of an interoceanic canal. Cass noted the particular need of the United States, after the acquisition of California from Mexico, for the “speediest and the easiest modes of communication” between its coasts. Cass had concluded:

While the just rights of sovereignty of the States occupying this region should always be respected, we shall expect that these rights will be exercised in a spirit befitting the occasion and the wants and circumstances that have arisen. Sovereignty has its duties as well as its rights, and none of these local Governments . . . would be permitted in a spirit of Eastern isolation to close these gates of intercourse on the great highways of the world, . . . or, what is almost equivalent, to encumber them with such unjust regulations as would prevent their general use.¹⁰⁴

Moore does not use the terminology of property law, but his argument suggests that international law may impose something like an easement of necessity on territory belonging to another sovereign state.¹⁰⁵ This imposition would not depend on state consent, but rather would follow from the requirements of civilization and progress.¹⁰⁶

Moore’s memorandum conveyed to Roosevelt assurance that he could proceed knowing that even advanced views of international law would support his actions. A month after receiving it, Roosevelt invited Moore to stay at his Oyster Bay estate to discuss the matter. According to Moore, the President revealed then that he would have no more dealings with Colombia and, if Panama were to revolt and set up its own government, he would support it.¹⁰⁷

¹⁰⁴ *Id.* point 5. The reference to “Eastern isolation” invoked Japan, which U.S. Admiral Perry had opened up to the West just five years before Cass’s speech.

¹⁰⁵ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.15 cmt. a (AM. L. INST. 2000) (history of easements of necessity).

¹⁰⁶ The remainder of the Memorandum addresses the Bidlack Treaty, still in force in 1903. The Treaty contained a clause giving the United States a right of way for purposes of building means of transportation. See *supra* note 91. Under the Treaty, “the United States is in a position to demand that it shall be allowed to construct the great means of transit which the treaty was chiefly designed to assure.” Colombia, Moore concludes, “is therefore not in a position to obstruct the building of the canal.” Moore Memorandum, *supra* note 101, point 11. Moore notes that the Treaty did not mention the construction or operation of a canal by the U.S. government, because as of 1846 all relevant actors in the United States considered such a project beyond the constitutional powers of the federal government. But the domestic consensus as to federal powers had changed and, Moore argues, nothing in the Treaty precluded the United States from doing something that as a matter of domestic law it could not have done at the time of the Treaty’s making. *Id.* Moore further argues that the Treaty was not merely a contract, but a conveyance. Even though the Treaty was not by its terms perpetual, “the rights of property, when once acquired, and the license to dig, when once secured, would not be dependent on the treaty.” *Id.* point 12. Interestingly but not surprisingly, the Memorandum says nothing about the U.S. obligation under the Treaty to safeguard Colombia’s sovereignty over the Isthmus.

¹⁰⁷ COATES, *supra* note 87, at 54 (quoting from Moore’s papers).

Loomis and Moore promptly shared this information with an agent for the Nouvelle Compagnie, who then recruited people on the ground in the Isthmus to make it so. A local force, backed by a U.S. naval mission, seized control of the department and declared Panama's independence from Colombia. The few Colombian troops present either joined the rebels or went home. The United States promptly sent a fleet to Panama and informed Colombia that it would bar Bogotá from sending any reinforcements to its former department. Roosevelt recognized the new state three days after its declaration of independence, with a treaty establishing friendly relations and transferring the Canal Zone to the United States signed soon thereafter.¹⁰⁸ His message to Congress justifying his actions relied largely on the arguments that the Moore memorandum had supplied and referred expressly to the "interests of civilization."¹⁰⁹

Not everyone in the U.S. legal establishment accepted Roosevelt's defense.¹¹⁰ Days after Roosevelt's message to Congress, Yale international law professor Theodore S. Woolsey published a rebuttal. He argued that the United States, intervening militarily in the face of Colombia's attempt to assert its rights, had violated international law, and that the Bidlack Treaty did not give the United States the authority that Roosevelt (relying on Moore) had claimed. Woolsey described Roosevelt's position as:

[W]e gave Colombia fair terms, she tried to "hold us up," we set up a State which we could manage, and now Colombia pays the penalty of overreaching herself. . . . It is the interests of civilization that are appealed to, the world's need of a colossal public work, not the reign of law and the equality of States. . . . [These actions] carry us far towards the theory that to the United States belongs such headship of the States on this continent as to make its own sense of justice, its own will, the only law.¹¹¹

As the European powers held imperial sway in Asia and Africa, so the United States purported to set itself up as master of "this continent." Woolsey condemned this move as disrupting the project of replacing war with "the reign of law and the equality of States."

Not for the last time in U.S. history, a broadside from New Haven had no effect on U.S. conduct. Colombia lacked the capacity to resist, whatever the merits of its claim. Nor did the international community indicate any objections. By the standards of the day, defined by the scramble for Africa and other instances of imposed colonialism by European powers, the U.S. dismemberment of Colombia was even a bit progressive: it bestowed

108 Isthmian Canal Convention, Pan.-U.S., Nov. 18, 1903, 33 Stat. 2234 (1903), T.S. No. 431.

109 COATES, *supra* note 87, at 55.

110 *Id.* (reviewing domestic reaction).

111 Theodore S. Woolsey, *The Recognition of Panama and Its Results*, THE GREEN BAG 6, 10 (1904).

independence on Panama as a formal matter, whatever the reality of its dependent status.¹¹² Indeed, not long after the episode, Roosevelt received the 1906 Nobel Peace Prize for his successful mediation of the Russo-Japanese War.¹¹³

To summarize, early on, the United States had acquired limited rights in the Panamanian isthmus through the Bidlack Treaty, just as the Russian Federation acquired rights in Crimea through its naval lease treaties. The United States then confronted pushback from the reigning (and problematic) sovereign Colombia, just as Russia in early 2014 faced resistance from the newly (and problematically) installed Ukrainian government. The United States' proxies led a secessionist movement and, with U.S. military support, declared independence; much the same occurred in Crimea. At lightning speed, recognition of a new state followed, with its government surrendering sovereignty over its only significant territory quickly afterwards. So, it was with Crimea, except that there the surrender of sovereignty was complete.

More to the point, both these adventures had champions within the international legal establishment. Müllerson invoked the civilizing mission of Russia as a protector of its peoples from threats originating in both Europe and Asia. Where local sovereigns put Russians and their compatriots at risk, while disrupting the international balance of power in the process, Russia had a right to do what was necessary to redress these problems. Moore invoked the needs of civilization in the form of modern inter-oceanic communication. No state, Moore argued, could invoke its sovereignty as an impediment to the imperative to submit nature to science for the benefit of humanity.

Obvious distinctions between the episodes exist, but should they matter? The international legal ban on wars of conquest was not as fully developed in 1903 as it was in 2014. Yet, as the next section shows, the discontinuity between the international law of the early twentieth century and that of the mid-century, at least in the view of the United States, may not have been as dramatic as one might think. Even though the outlawing of armed conquest had not yet been codified in 1903, Moore and the U.S. leadership recognized that wars of conquest were unacceptable under the

¹¹² COATES, *supra* note 87, at 34-38 (contrasting U.S. approach to empire to European imperialism).

¹¹³ Years later, Colombia signed a treaty with the United States that accepted Panamanian independence and U.S. rights in the Canal Zone in return for a payment of \$25,000,000. Treaty Between Colombia and the United States for the Settlement of Differences, Colum.-U.S., Apr. 6, 1914, 42 Stat. 2122, T.S. 661 (ratified by United States, Jan. 11, 1922; proclaimed Mar. 20, 1922). A renegotiation of the amount of compensation caused the delay in ratification. *See generally* James Brown Scott, *The Treaty Between Colombia and the United States*, 15 AM. J. INT'L L. 430 (1921). The treaty gave Colombia more money, but, unlike the deal demanded by the Colombian Senate in 1903, came at the price of the permanent loss of its Panamanian department.

international law to which they aspired and strove to explain why what happened in Panama passed muster. Even if the great imperial powers did not object to what the United States did in Panama, critical voices spoke out. To complete the comparison, notwithstanding the limited economic sanctions imposed by the West, Russia has not yet paid a price for Crimea in any way commensurate with what Ukraine has lost.¹¹⁴

How then should we square what happened in Crimea and Panama with the general ban on the use of armed force to acquire territory? How do we assess the claims made by the international lawyers who defended what happened? What do those claims imply about international lawmaking? The next section addresses these questions.

V. INTERNATIONAL LEGAL EXPERTS AS ADVOCATES AND APOLOGISTS

One way to reconcile Panama and Crimea with the general ban on wars of conquest is to treat Panama as a product of an earlier age when the ban did not exist, and to see Crimea as deviant behavior that clarifies and confirms the modern norm through its violation.¹¹⁵ This argument has two parts, temporal discontinuity coupled with territorial universality. The ban on wars of conquest did not exist until discrete, time-specific acts birthed it. But once born, the ban was, and is, universal. A breach does not nullify a rule. Rather, the concerted response of the international community, by condemning and punishing Russia, confirms it. We lose the ban on wars of conquest only if the international community treats Russia's conduct (and that of copycats) as normal, which so far has not happened.

Each leg of this response, however, has its problems. The historical record and contemporary work of international lawyers undermines the temporal claim of a sharp discontinuity. More recent justifications of the use of force also reveal bloc-based territorial fissures in the world today, not universal values. This diffidence about whether things changed all that much after 1928-45 may explain the less-than-overwhelming reaction of the international community to Russia's transgression.

These problems need not lead to the conclusion that international law has little to say about state use of force and acquisition of territory. Seen from the perspective of comparative international law, messy histories and divergent practice complicate, but do not stop, the development of international rules. States do not have to agree on either underlying

¹¹⁴ *But see* Juergen Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 N.Y.U. J. INT'L L. & POL. 747 (2017) (asserting that the West "stood up" to Russia and confirmed principle against armed annexation).

¹¹⁵ *See generally* KAI ERIKSON, *THE SOCIOLOGIST'S EYE – REFLECTIONS ON SOCIAL LIFE* 28-29 (2017) (social function of deviance).

arguments or precise rules to maintain an international order that works in some places some of the time.

A. A Ban on Wars of Conquest: Ebbs and Flows Across Time

A lot happened in international law between 1903 and 2014. At the time of Panama, most of the great powers considered international law as something “recognized [only] by civilized nations” but imposed on all humanity. By no later than the consummation of the decolonization project in the 1960s the distinction between civilized and other states had disappeared.¹¹⁶ The United Nations and its many components now exist, even if with manifest shortcomings. The technologies of international intercourse and war have changed profoundly. Even so, one can find overlaps in the aspirations people had for international law at both ends of the twentieth century.

To begin with, efforts to outlaw war as a means of international dispute settlement, and especially to acquire territory, go back well before the campaign for the 1928 Kellogg-Briand Treaty. In 1897, the United Kingdom and the United States signed the Olney-Pauncefote Treaty, a product of efforts by the great and the good of both countries to abolish war. The pact would have referred all disputes between those countries, territorial ones aside, to mandatory arbitration.¹¹⁷ Hostility to Great Britain in the United States, fueled by the Irish question and British commitment to the gold standard, led the Senate to fail to consent to ratification by three votes.¹¹⁸ A decade later, the Roosevelt administration promoted the 1907 Hague Peace Conference, also with an agenda to replace war with arbitration. The conferees could not reach consensus on the most ambitious goals but did adopt landmark treaties codifying rules constraining resort to force as well the means of waging war.¹¹⁹

¹¹⁶ The language lives on, however, in Article 38(1)(c) of the Statute of the International Court of Justice.

¹¹⁷ ARBITRATION WITH GREAT BRITAIN, S. DOC. 161, 58th Cong., 3d Sess. (1897). The territorial exception reflected a British desire to avoid challenges to its empire. Nelson M. Blake, *The Olney-Pauncefote Treaty of 1897*, 50 AM. HIST. REV. 228, 230 (1945).

¹¹⁸ Blake, *supra* note 117, at 239-40.

¹¹⁹ Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241, T.S. 537; *see* BARBARA W. TUCHMAN, *THE PROUD TOWER – A PORTRAIT OF THE WORLD BEFORE THE WAR 1890-1914*, at 233-34 (1966) (Hay’s efforts to promote arbitration of international disputes as a means of avoiding war); STEPHEN WERTHEIM, *TOMORROW, THE WORLD – THE BIRTH OF U.S. GLOBAL SUPREMACY* 21-22 (2020) (commitment of pre-World-War-I U.S. leaders to ending war through international law). Hathaway and Schapiro’s account of the movement for the outlawing of war scants the peace movement before World War I and does not mention the 1897 treaty or the Convention on resort to force that came out of the 1907 conference. Instead, they describe the 1907 conference as if its only function were to codify the *ius in bello* (the law regarding the conduct of war) and not *ius ad bellum* (the law governing resort to war).

At the time of Panama, then, the United States, if not the other great powers, had begun the journey toward Kellogg-Briand and the UN Charter. Moore in particular was an architect of the view of international law that led the United States toward its commitment to outlaw war. Roosevelt also tempered his considerable international ambitions with a commitment to the rule of law.¹²⁰ Indeed, he brought Kellogg to Washington, albeit initially as a trustbuster. John Hay, Roosevelt's Secretary of State during the Panama affair and his loyal lieutenant, played a large role in the international movement to avoid war through arbitration of interstate disputes.¹²¹ Even if the United States in 1903 had not yet bound itself to the rules codified in 1928 and 1945, the principals in the Panamanian adventure anticipated and largely embraced those commitments.

A conventional view of general international law would regard the U.S. position at the dawn of the twentieth century as irrelevant unless and until other states concurred. From the perspective of comparative international law, however, claims about the content of international law matter, notwithstanding the indifference or opposition of other states. Rather than aspiring to judge which claims are worthy, a task in which jurists can be sometimes pompous and too often disingenuous, comparative international law invites one to think about the meaning of claims independent of consensus.¹²² Workers in this field do not reject the possibility of broad agreement but find an exclusive focus on "finding" international law through such a lens to be too limiting and potentially misleading.

Using the comparative-international-law approach to probe the significance of the Panama episode, one must take a closer look at who made what claims. State justifications are essential, at least in a world where states and not others make international law. But states always have a short-term interest in excusing their conduct. Arguments become more compelling if made by actors that have some degree of independence from any one state and enjoy the trust and respect of other international actors.¹²³ From this

HATHAWAY & SHAPIRO, *supra* note 3, at 77, 79, 109. Perhaps they wished to give Kellogg-Briand a more Athenian birth than it actually had.

120 Roosevelt did not assert a general right to go to war but argued that armed force was a justified response to "occasional crimes committed on so vast a scale of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it." COATES, *supra* note 87, at 43 (quoting Roosevelt's Fourth Annual Message, Dec. 6, 1904).

121 John M. Raymond & Barbara Frischholz, *Lawyers Who Established International Law in the United States, 1776-1914*, 76 AM. J. INT'L L. 802, 825 (1982) (describing Hay's work).

122 See *supra* note 5.

123 See Paul B. Stephan, *The Legitimacy of International Law*, in PALGRAVE HANDBOOK OF INTERNATIONAL POLITICAL THEORY (Howard Williams, David Boucher, Peter Sutch & David A. Reidy eds., 2022) (arguing that a focus on claims tied to state views avoids the problem of sorting between significant and inconsequential hermeneutic communities).

point of view, we can reexamine the circumstances of Moore's argument as well as its particulars.

First, Moore took the initiative. He reached out to the State Department, not the other way around, once he saw that the United States needed good international legal arguments (by his lights) to get what it wished. At that moment he had left government service, although he reasonably might have expected future interesting assignments from political leaders if he did well.

Second, his arguments, presented to President Roosevelt first in writing and then orally, seemed to matter. We will never know, of course, what Roosevelt would have done if he had heard from Woolsey instead of Moore. But the record indicates that Moore's memorandum clarified Roosevelt's thinking and stiffened his resolve. Roosevelt did extend Moore's arguments to a situation not addressed in the memorandum, namely the dismantling of Colombia through a sponsored secession. But once Moore learned of the President's thinking, he did nothing to deter him and even encouraged the designated secessionists. Moore owned Roosevelt's plan, even if he did not invent it.

Third, Moore thought that the right starting point for his arguments was not the structural importance of international law and the coherence of its doctrine, but rather the interests of civilization and the role of international law in service to those interests. Civilization is based on accomplishments, most importantly triumphs of engineering. It was an unquestioned good thing "to use science in dominion over nature."¹²⁴ As Woodrow Wilson put it in his famous "peace without victory" address shortly before the U.S. entry into World War I, the "free, constant, unthreatened intercourse of nations is an essential part of the process of peace and development."¹²⁵

In sum, Moore found that he could both deplore wars of conquest in general and justify an act of forced annexation by invoking certain principles to which international law assigns dispositive weight. Moore might say, if pushed to explain himself, what good is international law if it does not promote the progress of civilization? International law must embrace broad principles, such as disapproving war in favor of arbitration, but also acknowledge that the needs of humanity shall dictate exceptions. Here humanity's desire for prosperity and progress through reshaping of the planet's surface overcomes a ban on wars of conquest.

124 The quotation is from a speech by University of Virginia President Edward Alderman extolling the Lewis and Clark expedition. ARMISTEAD C. GORDON, THE UNVEILING OF THE LEWIS-CLARK STATUE AT MIDWAY PARK IN THE CITY OF CHARLOTTESVILLE, NOVEMBER TWENTY-ONE, NINETEEN HUNDRED NINETEEN 8 (W.M. Forrest ed., 1919). It captures, though, the spirit of that age. The spirit of the present age, one might note, has led the City to get rid of the statue, which has a degrading depiction of the expedition's Native American guide.

125 A LEAGUE FOR PEACE, *supra* note 18, at 6.

What about the world after Kellogg-Briand and the UN Charter became law?¹²⁶ Looking on the other side of the supposed 1928-1945 transformation of international law, states still use force in international disputes.¹²⁷ Important episodes where states both argued that a blanket ban does not represent the prevailing legal standard and acted on those arguments indicate that something besides a universal ban is at work.

In these episodes, states and their international legal advisers have claimed that international law does not absolutely ban wars of conquest, but rather permits exceptions based on fundamental international interests. Specification of these compelling interests has changed, but not the underlying argument. To cite only the most obvious example, Müllerson's defense of the Crimean annexation tracks closely what Moore said in 1903. He posits, as does Moore, that a problem that fundamentally threatens international peace and prosperity can justify an armed seizure of another state's territory. For Moore, it was the removal of impediments to engineering projects that would revolutionize international intercourse; for Müllerson, the need to maintain equilibrium in relations between opposing blocs justified the seizure of Crimea. Each is a global, rather than a national, interest that justifies armed conquest because it advances international peace and prosperity.

One might dismiss Müllerson's argument as a transgressive one-off that ultimately confirms the significance of a universal norm, just as any deviant behavior allows a society to embody and delineate its norms. If any state could decide for itself what counts as a compelling international interest, the exception to the ban on wars of conquest would swallow up the rule. A little history, however, undermines the one-off brush off. During the Cuban Missile Crisis, arguably the greatest and most consequential test of the post-

126 One historian has argued that Hathaway and Shapiro do not understand what work the framers of Kellogg-Briand meant the treaty to do, and in particular how the United States could reconcile its acceptance of that pact with its rejection of the League of Nations. See WERTHEIM, *supra* note 119, at 23-29. I note the point but do not pursue it further. My goal is not to refute the Hathaway-Schapiro account of Kellogg-Briand, but rather to show more generally alternative ways of looking at international law, including the regulation of wars of conquest.

127 Hathaway and Shapiro support their claim that violations of the ban have decreased after 1928 by counting conflicts as such. HATHAWAY & SHAPIRO, *supra* note 3, at 313-30. Their critics argue that data on deaths in combat provide a more meaningful measure on the extent of norm violation. See, e.g., Michael J. Glennon, *How Not to End War*, LAWFARE (Oct. 18, 2017), <https://www.lawfareblog.com/how-not-end-war> (citing authorities). One may question, however, whether the quality of the data on pre-1928 deaths in combat can support any claim one way or another.

Another critic argues that *fait accompli* annexations involving land grabs that aggressor states hope will not provoke a violent reaction, and thus not entail the use (as distinguished from the threat) of armed force, should be added to the tally of wars of conquest. Since World War II, states have done this rather frequently. In a substantial minority of cases, miscalculation by the aggressor has led to military conflict. See Dan Altman, *The Evolution of Territorial Conquest after 1945 and the Limits of the Norm of Territorial Integrity*, 74 INT'L. ORG. 490 (2019). The annexation of Crimea, for example, did not conclude an armed conflict, but rather resulted from an unopposed threat of force with little violence in Crimea itself.

war international order we have seen so far, the United States made essentially the same argument. When it mattered, important people who took international law seriously did not find a universal ban on armed conquest adequate to the task.

The crisis had its origins in the shambolic U.S. attempt to overthrow the Castro regime that culminated in the April 1961 Bay of Pigs debacle. In the days before the launch of the invasion, the Justice Department's Office of Legal Counsel (OLC), the executive branch's paramount legal arbiter, advised Attorney General Robert Kennedy on the legality of the enterprise under international law.¹²⁸ Its analysis turns on the significance of a conflict between opposing geopolitical blocs. In the OLC's view, international peace and security depends on maintaining stability in the relations between these blocs. The requirements of international law flow from this premise:

Alignments within the Communist Bloc and within the West are long-term political alignments with considerable aspects of supra-national authority. As a result, the security system from the point of view of each bloc depends less upon neutrality of alignment than it does upon preserving the alignments which exist. Therefore, despite changed legal doctrine, there is considerable pressure for intervention in situations where bloc security is threatened. There is nothing in the existing legal structure which recognizes this state of affairs, but there are numerous instances where intervention has been tolerated in the postwar period; for example, Hungary, Guatemala, Lebanon, and, in 1948, Israel.¹²⁹

The Memorandum concluded that U.S. failure to prevent private groups based in the United States from seeking to overthrow Cuba's government would not violate international law where the target of the attack was a government newly aligned with the communist bloc:

In Latin America the United States has gained the acquiescence of other Latin American countries in the basic principle that a communist government in the area constitutes a threat to all. . . . [I]t seems to me that the collective adoption of this principle would justify the United States in tolerating activities aimed at an overthrow of the communist government to a greater degree than would otherwise be the case.¹³⁰

The OLC's position rests on a false fact claim, namely that the United States only tolerated the anti-Castro forces and had not organized, trained,

¹²⁸ Nicholas deB. Katzenbach, Ass't Att'y Gen., Off. of Legal Counsel, *Memorandum Opinion for the Attorney General*, Apr. 12, 1961, 1 SUPP. OP. O.L.C. 225 (Nathan A. Forrester ed. 2013).

¹²⁹ *Id.* at 226.

¹³⁰ *Id.* at 229.

and paid for them. But the fundamental argument resonates with Müllerson's: the rules governing the use of force apply differently to measures meant to prevent dangerous disruption of inter-bloc relations. The United States certainly rejected the premises and implications of the Soviet doctrine of peaceful coexistence, namely the inevitability of the triumph of socialism and the necessity of a Soviet veto over the formation of all norms of international law.¹³¹ But the reference to the 1956 invasion of Hungary indicates a tacit acceptance of that doctrine's core principle, namely that the imperative of keeping Cold War competition from spiraling out of control could justify carving out exceptions from the general obligations imposed by the UN Charter.

The OLC returned to this claim the following year during the Missile Crisis. Seeking to exploit perceived U.S. vulnerability in the aftermath of the failed invasion, the Soviet Union decided to bring its nuclear deterrent directly to the U.S. border. The Kennedy administration discovered this and determined to respond firmly. Besides an outright air attack on Cuba (favored by the Joint Chiefs of Staff, Vice President Johnson, and others), another option under consideration was a naval blockade to prevent Soviet ships from delivering materiel and other support to Cuba. At that point the administration again turned to the OLC. No one doubted that a naval blockade, enforced by armed ships, would constitute an act of war, under the Charter a "threat or use of force against the territorial integrity or political independence of [a] state," and an "armed attack" that would trigger Cuba's and the Soviet Union's right to respond in kind. Nor did anyone argue that the blockade would fit under any of the Charter exceptions. The only issue was whether it could come within an emerging customary-international-law exception based on state practice subsequent to the Charter.

The OLC argued that it did. After quoting the earlier memorandum's language on the significance of blocs for framing the legality of armed intervention, it concluded:

Moreover, although publicists in the field of international law have not yet formulated concepts and doctrines which expressly recognize the changed world situation, it seems probable that international law, as reflected in the actual practices and expectations of states, already recognizes the decisive importance of bloc security today in certain geographic areas.¹³²

¹³¹ See *supra* notes 80-84 and accompanying text.

¹³² Norbert A. Schlei, Ass't At'y Gen., Off. of Legal Counsel, Memorandum Opinion for the Attorney General, Aug. 30, 1962, 1 SUPP. OP. O.L.C. 251, 257 (Nathan A. Forrester ed. 2013). After working through this opinion with his advisers, President Kennedy on September 4 declared: "[I]f

Because the blockade would address a threat to bloc security, it would satisfy the requirements of international law in spite of the unavailability of the Charter exceptions. Armed force, the OLC concluded, was a legitimate means of redressing a significant disruption in the alignment of forces between the United States and the Soviet Union.¹³³

If these arguments about an “international interest” exception to the ban on wars of conquest have any weight, what of their provenance? Are they ad hoc rationalizations of fundamentally problematic behavior by beleaguered government lawyers, or serious attempts by well-regarded international jurists to articulate and apply general doctrine? The more the latter is true, the stronger the case for regarding the claims as constituting comparative international law.

Consider Panama first. Moore’s work and connections brought special authority to his views. His early State Department career entailed success in Washington, rather than service in distant outposts. Upon joining Columbia’s faculty, he became the first U.S. law professor to hold a chair dedicated to international law. His scholarly influence was enormous, although mostly in the form of treatises and digests rather than more analytic monographs or articles. He remained at the government’s call after joining the academy, as when he left Morningside Heights temporarily to handle the diplomatic ramifications of the Spanish-American War. His post-Panama

Cuba should ever attempt to . . . become an offensive military base of significant capacity for the Soviet Union, then this country will do whatever must be done to protect its own security and that of its allies.” President States U.S. Policy Toward Cuba, 47 U.S. DEP’T. ST. BULL. 481 (1962); see ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 133 (1974) (describing Kennedy’s discussions with advisers).

The OLC does not have a set policy for publication of its work product: Some opinions see the light of day almost immediately, while others await a decade or more for publication and some remain unpublished. Chayes reprinted the opinions associated with the missile crisis a dozen years after they were issued and long before their official publication. *Id.* at 107-32, 135-48.

¹³³ In another opinion delivered three days before President Kennedy announced the blockade, an unsigned, unaddressed memorandum probably authored by Katzenbach, by then Deputy Attorney General, and Leonard Meeker, the Deputy Legal Adviser to the Department of State, argued that a blockade might be justified in the face of the U.N. Charter if a state were “to assert the right to preserve the peace by acting in an emergency on behalf of a regional organization, promptly submitting the matter to the organization for ratification.” Memorandum, October 19, 1962, 1 SUPP. OP. O.L.C. 486, 491 (Nathan A. Forrester ed. 2013). The concept of preserving the peace is different from self-defense and seems to rest on the bloc argument found in the earlier opinions.

Ultimately the Organization of American States endorsed the use of force by its members to quarantine Cuba, strengthening the U.S. argument that it was exercising its right of collective self-defense under Article 51 of the U.N. Charter. Resolution of Council of the Organization of American States Meeting as the Provisional Organ of Consultation of October 23, 1962, 47 U.S. DEP’T. STATE BULL. 722 (1962). The Russian Federation in 2014 did not obtain comparable advance authorization from any collective body. This difference seems significant but not conclusive. The OAS Resolution did not assert that Cuba posed an imminent threat of armed attack, without which the applicability of Article 51 is debatable. In any event, at the time of the OLC opinion, the United States had not obtained any OAS approval. Norbert A. Schlei, 1 SUPP. OP. O.L.C. at 251.

career of public service was unmatched.¹³⁴ His obituary refers to him as “the greatest authority on international law.”¹³⁵ In a nutshell, his was a life where public service led to academic opportunities that produced further chances to serve both his nation and the international community. He represents an early avatar of what one modern scholar has characterized as a distinctive U.S. approach to international lawyering based on complementary academic and government work.¹³⁶

What of the Russia defenders of the Crimean annexation? Bracketing Russian jurists of various levels of cosmopolitan stature, Müllerson deserves particular attention. He is a non-Russian figure of international prominence who seems to have the ear of the Russian leadership. As an Estonian national and an emeritus professor at a great English law faculty, he is not obviously subject to Russian pressure. He seems a reasonable match for Moore in terms of combining authority with independence.

The views of the OLC relating to Cuba might be easiest to dismiss as self-interested pleading. The job of government lawyers, one can argue, is to make the best case they can for their client, not necessarily to build international consensus. Yet the Kennedy administration’s Justice Department to this day enjoys a reputation as an exceptionally talented and progressive team, while the State Department’s principal lawyer, Abram Chayes, was an esteemed professor of international law on loan from Harvard.¹³⁷ Nicholas Katzenbach, who authored the 1961 OLC opinion and

¹³⁴ Moore acted as agent for the United States in an arbitration with Dominican Republic and carried out various diplomatic functions for the Taft administration. He also served on the working committee that led in 1906 to the establishment of the American Society of International Law. Raymond & Frischholz, *supra* note 121, at 823. The Wilson administration called him back to Washington to serve as Counselor to the State Department. After that he took on a variety of international positions, including as the first U.S. member of the Permanent Court of International Justice.

¹³⁵ Borchard, *supra* note 99, at 98.

¹³⁶ ROBERTS, *supra* note 5, at 112-13.

Woolsey, the most prominent member of the international law community to attack the Roosevelt administration and hence Moore’s position, represented a purely academic perspective. The son of a Yale president, he spent almost his entire professional life on the Yale law faculty. He began as an instructor, taking over an international law course that his father had taught, and was promoted in 1878 to Professor of International Law. He was a prolific scholar (by the standards of his day) and founded the Yale Review. His public service, however, was limited to chairing the New Haven Parks Board after retiring from Yale; he never had a position in the federal government, much less the State Department, or in any international institution. Woolsey, in short, represents the model of a purely academic international lawyer, engaged through publication but not as a practitioner. *See* COATES, *supra* note 87, at 36-38 (comparing Moore and Woolsey).

The only person who might be considered a peer of Moore and Woolsey was Edward Strobel, the inaugural Bemiss Professor of International Law at Harvard from 1898 to 1903. Strobel worked as a diplomat both before and after his Harvard tenure and never published any scholarship while in academia. He was characteristically silent as to Panama.

¹³⁷ In a book published a dozen years after the event, Chayes gave a detailed account of how the lawyers at the Departments of Defense and State responded to the August OLC opinion. CHAYES, *supra* note 132, at 17-24. He concluded that, “[w]orking independently, they had reached a remarkably consistent view of those issues.” *Id.* at 24.

participated throughout in the process, is a revered figure among elite U.S. lawyers. All the actors deeply appreciated the gravity of the situation and expected their choices to face the judgment of history. The opinions are thoroughly researched and closely argued, not obvious attempts to provide a veneer of legality to a deeply problematic action.

To summarize, one cannot dismiss Moore's memorandum simply on the ground that it came before the Kellogg-Briand Pact and the UN Charter. Its core claim, that interests based on international peace and prosperity may justify departures from a general ban on the use of force in international relations, has survived, as the Cuban and Crimean cases establish. Over time, beliefs about historical imperatives and the prerequisites for peace and prosperity have changed. The argument that a ban on war and conquest must give way to such imperatives, however, endures.

B. Universal Principles versus Competing Claims

A fundamental feature of the claim that, post 1928 (or 1945), international law forbids wars of conquest is its universality. The ban applies to all states and does not admit any opt-outs, other than the exceptions codified in the UN Charter. In particular, it refuses to recognize any exceptions based on subsequent state practice, such as the inter-bloc stability assertions made by the United States regarding Cuba and the defenders of Russia's actions in Crimea.

It is exactly the claim of universality that comparative international law challenges. It concentrates on dueling claims without any near-term prospect of authoritative resolution. It has greater salience at times when the division of the world into competing blocs amplifies the salience of these conflicts.¹³⁸

U.S. officials during the Cuba episode believed that bloc competition dominated the international environment and determined the content of international law, notwithstanding the broad strictures of the UN Charter. As to Crimea, Müllerson states expressly what the official Russian statements suggest: the annexation represents a lawful response to the attempt of the United States and its European allies to move Ukraine definitively from the Russian to the Western sphere of influence.

Are these claims about bloc rules that supersede universal values credible? Insisting on universality presents problems of both fact and principle. One can question whether the liberal democratic values of the

¹³⁸ Compare MÄLKSOO, *supra* note 5, at 17 ("For the purposes of this study, I proceed from the hypothesis that the claim about the universality of international law is often of a normative, rhetorical, and political character, rather than fully accurate in the empirical sense."), with Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (arguing that the end of the Cold War opened up possibilities for creation of universal rules).

West took over the world after 1989 and created a new universal international order.¹³⁹ What seems clear, however, is such an order, if it ever existed, has come undone. One can debate when the undoing occurred, at the time of the 9/11 attack, when the U.S.-led coalition invaded Iraq in 2003, when the global financial system melted down in 2008, or when national populism (understood broadly enough to include the Xi regime in China) assumed power in many states during the 2010s. One also can argue about what constitutes the new blocs: Is it China against the world; the United States against the world; or the rich West against the revisionist states, China and Russia in particular? That the world now faces a fractured international order based on competing claims about values, norms, and international law, however, seems incontrovertible.¹⁴⁰

In this environment, not so much new as a return to a not-so-distant past, insistence on universality in international law leads to either utopianism or fragility. One might deny that the fracture exists, or concede its existence and require that all international law await its repair. The alternative to these two dead ends is to accept that international law must adapt to the world in which we find ourselves. These adaptations entail acknowledging particular rules as “local” international law.¹⁴¹ In a world divided into blocs, one also might devise principles and norms that apply specifically to inter-bloc relations.¹⁴² The insights of comparative international law apply to both endeavors.

Comparative international law has two agendas: It seeks to uncover systematic variations in international-law claims along national or regional lines (including bloc law, applicable either within or between blocs), and it assesses the consequential significance of these claims in light of their non-universal nature. The first project may have elements of debunking, but not the second. A rule of international law, researchers in this field insist, can do important work even if important state actors reject it.¹⁴³ In particular, it enables those who make claims about international law to anticipate their reception and to gauge their actions accordingly.¹⁴⁴

Consider what happens if one synthesizes the views expressed by Moore, the Kennedy administration’s OLC, and Müllerson. Each takes

139 Compare FUKUYAMA, *supra* note 64, with HUNTINGTON, *supra* note 66; see generally Paul B. Stephan, *Sovereignty and the World Economy*, 17 U. ST. THOMAS L.J. (forthcoming Nov. 2021)

140 See The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law, *supra* note 82.

141 Cf. Fisheries Jurisdiction Case (U.K. & N. Ir. v. Ice.), 1974 I.C.J. 3 ¶¶ 53-54, 65-66 (July 25) (discussion of local international law).

142 See Lipson, *supra* note 81, at 6 (contrasting theory of peaceful coexistence, applicable to inter-bloc relations, with principle of socialist internationalism, applicable to intra-bloc relations).

143 See Stephan, *supra* note 6.

144 See *supra* note 16 and accompanying text; cf. SUN T’ZU, THE ART OF WAR 84 (Samuel B. Griffith trans., 1963) (“Know the enemy and know yourself; in a hundred battles you will never be in peril.”).

seriously a prohibition of the use of force to acquire territory or to impose a proxy regime (the functional equivalent of annexation), but argues for exceptions. The specifics of the exceptions vary significantly, but a common thread emerges. Each purports to identify a serious threat to an essential international interest. In Moore's case, the construction of infrastructure essential to international intercourse can override sovereign interests. Both the Kennedy-administration OLC and Müllerson argued that intra-bloc violence can contribute to inter-bloc stability, if the alternative is an enhanced risk of greater state violence. The systemic interests pursued by international law, in other words, in specific circumstances justify non-Charter exceptions to the ban on war and permit one state to take control of another's territory.¹⁴⁵

Put this way, Panama and Crimea do not seem quite so transgressive. The argument that the goals of international law – international harmony based on peace, prosperity, and justice – might override specific rules seems a plausible, even if not inevitable, move. It resonates in particular with a claim that many in the academic and human-rights community embrace, namely the doctrine of responsibility to protect. This argument asserts that states may intervene militarily in the internal affairs of sovereign states without satisfying the requirements of the Charter exceptions, if the intervention seeks to forestall a humanitarian catastrophe.¹⁴⁶ At least one permanent member of the Security Council has embraced this doctrine, although the other four and most other countries regard it as only aspirational.¹⁴⁷

¹⁴⁵ The stakes in Cuba were not formal annexation, unlike those in Panama and Crimea. But the United States, in defending its support for the exile invading force in 1961, effectively asserted a right, backed up by arms, to choose the government of a nominally sovereign state. It had consistently asserted this prerogative throughout the Cold War, not only in Cuba but in places such as Guatemala, Iran, Lebanon, the Dominican Republic, Cambodia, Laos, and Viet Nam. I have trouble seeing much daylight between the exercise of this right and a formal annexation. The Soviet Union seemed to agree, as seen in Korea, East Germany, Poland, Hungary, Czechoslovakia, Angola, Ethiopia, and Mozambique, among other places where it intervened militarily without U.N. authorization or a plausible claim of self-defense or permission of the affected state. *Cf.* Katzenbach, *supra* note 128, at 226 (citing these events as precedents for an emerging norm of international law).

¹⁴⁶ *See* Lee, *supra* note 12, at 306-18 (linking twenty-first century conception of doctrine to traditional right to use force to protect a state's nationals from grave harm).

¹⁴⁷ *See* Guidance: Chemical Weapons Use by Syrian Regime: UK Government Legal Position, Prime Minister's Office (Aug. 29, 2013) (invoking responsibility to protect as a ground for responding militarily to chemical attacks on civilians), *available at* <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>. Few other states agree. High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, U.N. Doc. A/59/565 (Dec. 2, 2004) (insisting on necessity of Security Council authorization), endorsed by Resolution Adopted by the General Assembly on 16 September, 2005, 2005 World Summit Outcome, ¶ 139, U.N. Doc. A/RES/60/1, *available at* https://digitallibrary.un.org/record/556636/files/A_RES_60_1-EN.pdf; *cf.* Lee, *supra* note 12, at 296-306 (describing retreat from exception to ban of the use of armed force).

For purposes of comparative international law, it does not matter that none of the particular arguments used to justify the Panamanian annexation, the attacks on Cuba, the Crimean annexation or the doctrine of responsibility to protect has received universal, or even widespread, assent from states. Rather, the point is that the claims are out there, that they have been adopted by significant (as opposed to fringe) actors, and that they rest on a common fundamental principle. They share a major premise that international imperatives can override the UN Charter's ban on the use of force in international disputes outside of the Charter's narrow exceptions. Comparative international law then seeks to explain why we see variations in the application of that fundamental principle and explores the possible effect of these variations on the international legal system as a whole.

First, states that devote a substantial portion of their resources to participation in geopolitical rivalry have a different take on international law from those that see an overarching consensus supporting a range of universal commitments, notwithstanding adversarial relationships. During the Cold War, international relations and law rested on a consensus about the existence of bipolarity. In that environment, U.S. attempts to oppose Soviet encroachment and Warsaw Pact applications of socialist internationalism (also known as the Brezhnev doctrine) both made sense to the adversaries, even as they accused each other of violating (their version of) international law. In the contemporary world, the "West" has not come to terms with the convictions of China, Russia, and perhaps the other BRICS states that a different schism exists today, even if its dimensions are less clear than that which underlay the Cold War.¹⁴⁸

This change matters. During the Cold War, doing international law had a tragic aspect. Insiders could predict with some confidence how specialists on the other side of the divide would act and react, what their arguments would look like, and what facts claims they would assert. They understood that agreement normally would be out of reach except at some level of abstraction that seemed to do little if any work. But what they lacked in consensus they made up for in mutual understanding. Advancing projects on a global scale normally was unrealistic. But maintaining a way of getting along that held off the worst outcomes was feasible. Indeed, it worked for forty-five years, even with the near misses.

Comparative international law might help to restore this sense of tragedy to contemporary international law. It promotes, or at least valorizes, a willingness to accept understanding in place of agreement. It invites reflection about the bases of fundamental conflict, rather than insisting that a unified and coherent body of international law lies beneath the surface disputes.

148 See *supra* note 8.

At the same time, comparative international law does more than deconstruct. It accepts that international law, even if fractured, still does work. Accordingly, it continues to distinguish plausible claims from invalid ones, even if plausible claims can contradict each other due to regional differences and inter-bloc imperatives. The next section develops this point.

C. Comparative International Law as a Check

A sense of tragedy can limit the ambitions of international law without leading to nihilism. Using the tools of comparative analysis, one still may distinguish the plausible from what is out of bounds. Tolerating incoherence based on observable variations in state circumstances does not mean anything goes. Even taking cultural, historical, economic, and geopolitical variation into account, some claims will continue to make no sense and thus fall outside useful invocation of international law. Others will gain traction but not universal acceptance.

A few illustrations help to make this point. I begin with Moore's arguments. One can see both a dead end for claims about positional monopolies in the global ecosystem and an alternative path toward potential valid, although obviously controversial, positions on environmental threats. I then do the same with defenses of the Crimean annexation, distinguishing bloc maintenance from old-fashioned irridentism.

One can read Moore as suggesting that any state having a positional monopoly over a critical node of international commerce must give up its sovereignty in favor of international control. The imperatives of international intercourse, in this view, impose something like an easement on strategically located territory regardless of the principles of state sovereignty and territorial integrity. No state has the right to block the development of essential facilities on which the world depends.

The problem with this argument is its confusion of permanent and ephemeral bottlenecks. Global intercourse and transportation have changed radically over the last century-plus, altering the significance of great infrastructure projects directed at traditional means of connectivity. Sea carriage remains critical to the world economy, but substitutes now exist that would have been inconceivable in 1903. Inter-oceanic canals produce

cost savings, but are not indispensable.¹⁴⁹ No one would argue today that Panama holds its territory in trust for all of humanity.¹⁵⁰

But as human needs evolve, other imperatives arise. Consider rainforests and their role in countering global warming. States that possess these resources can exploit them for short-term benefits (both lumber and expanding arable land), but the global value of carbon monoxide reduction were they left pristine may exceed the returns from exploitation. In a world of frictionless bargaining, the global community simply would pay states such as Brazil and Indonesia to preserve these forests. States indeed have attempted to strike these bargains, particularly through Reducing Emissions from Deforestation and Forest Degradation (REDD) agreements.¹⁵¹ But absent effective enforcement mechanisms, these arrangements have tended to deliver less than expected. They have proven especially vulnerable in the face of national-populist politics, as in Brazil.¹⁵²

With Panama as a precedent, may we argue that states may employ sticks, and not just carrots, to enforce REDD agreements or even to impose them on recalcitrant states? If global warming poses an existential threat to human civilization, shouldn't the principles of international law allow measures that may reduce that threat? Moore might have been a failure as an environmental ethicist, but should we take him more seriously as an international legal theorist? It becomes possible to envision a kind of protectorate over endangered rainforests, carried out through occupation and backed up by force. States could overcome Security Council vetoes by proclaiming the right to act on behalf of humanity.¹⁵³

A handful of international legal scholars have embraced this argument, at least in the abstract. Linda Malone, for example, sees the principle of

149 By way of comparison, the closing of the Suez Canal during the 1956 Egypt-Israel war disrupted international commerce, but not disastrously so. The Ever Given episode in March 2021 that briefly blocked the Suez Canal reinforces the point: the blockage imposed large costs but did not pose a grave threat to the world economy. A key natural transportation route, the Dardanelles Strait, falls under an international treaty that restricts Turkey's sovereignty, but more because of the historic accident of Turkey's defeat in World War I than due to any imperative of international order. Convention Relating to the Régime of the Straits, July 24, 1923, 28 L.N.T.S. 115.

150 Cf. Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25) (recognizing obligation to share equitable portion of common resource, but no claim to enforce that obligation through force). The concept of the common heritage of humanity does similar work in opposing national sovereignty. In the view of most authorities, however, this idea has not developed into a rule of customary international law. See Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L & COMP. L.Q. 190 (1986).

151 See 15th Conference of the Parties to the United Nations Framework Convention on Climate Change, Copenhagen, Den., Dec. 7-18, 2009, Copenhagen Accord, ¶ 6, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) (endorsing REDDs).

152 See Ruslan Klafehn, *Comment: Burning Down the House: Do Brazil's Forest Management Policies Violate the No-Harm Rule under the CBD and Customary International Law?* 35 AM. U. INT'L L. REV. 941 (2020).

153 Given the attenuation of the causal chain in both space and time between forestry loss and particularized harms to states, invocation of self-defense under Article 51 seems implausible.

responsibility to protect as possibly providing a pathway to circumvent the Security Council and a means to legalize uses of force against acts of ecocide.¹⁵⁴ Her suggestion, however, is tentative. We should think of the possibility of applying Moore's argument to rainforests as a thought experiment. What matters for present purposes is that one can imagine circumstances where reviving Moore's old exception from the ban on war would be plausible, even if those circumstances do not yet exist.¹⁵⁵

Turning to Crimea, one can distinguish three kinds of arguments. The first, linking the Russian annexation to Crimea's invocation of its right to self-determination, seems implausible as a factual matter. The inhabitants of the peninsula faced no grave human rights threat from Ukrainians and had plenty of opportunities to bargain for new arrangements for the region within the existing Ukrainian constitutional structure. The others deserve more consideration. Russia's defenders argued both that the annexation corrected a historical injustice, namely the involuntary transfer of the region to Russia, pro forma in 1954 and substantively in 1991 and, *pace* Müllerson, thwarted a dangerous attempt to upend the regional balance of power.

As for historical wrongs, one only need recall how many historical grievances lurk around the world to appreciate how untenable would be implementation of a strong restorative justice principle. Polk's armed seizure of California, Nevada, Texas, and Utah, as well as parts of Arizona, Colorado, Montana, and New Mexico, might seem to some a historical injustice that demands rectification.¹⁵⁶ In the more recent past, the creation of Iraq and Kuwait as separate states, imposed by a British commissioner in 1922 in the backwash of the dissolution of the Ottoman Empire, undoubtedly had no sounder historical or cultural foundation than did the double transfer of Crimea to Ukraine. But no serious political leader presses a Mexican irredentist claim today.¹⁵⁷ In 1990, all of the permanent members

154 Linda A. Malone, *Responsibility to Protect in Environmental Emergencies*, 103 AM. SOC'Y INT'L L. PROC. 19, 22-23 (2009). Professor Malone acknowledges that existing doctrine limits the principle to international crimes, which to date does not extend to ecocide. *Id.* at 26-27.

155 See Craig Martin, *Atmospheric Intervention? The Climate Change Crisis and the Jus ad Bellum Regime*, 45 COLUM. J. ENV'T. L. 331, 396-98 (2020) (describing arguments for new exception to ban on armed force); Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?*, 30 FORDHAM ENV'T. L. REV. 1 (2019) (describing civil society campaign to amend Rome Statute to make ecocide an international crime). Armed seizure of territory might not work even when confronting ecocide risk. Managing a critical natural resource, such as a rain forest, requires the cooperation of local authorities to address behavior such as poaching and squatting. Violent interventions degrade the prospects of future cooperation. This argument, however, although persuasive, may not apply in all circumstances and therefore cannot support a categorical rule prohibiting all interventions.

156 See HATHAWAY & SHAPIRO, *supra* note 3, at xv-xvi (describing Mexican-American War).

157 Interestingly, Germany's foreign minister offered such a deal to Mexico in 1917 as an inducement to enter World War I against the United States. Not only did Mexico refuse the bait, but the offer greased the way for the United States to join the fray. See generally BARBARA W. TUCHMAN, *THE ZIMMERMANN TELEGRAM* (1985).

of the UN Security Council and much of the rest of the world rejected Iraq's use of force to adjust a border that had its origin in great power colonialism.¹⁵⁸ Repudiating historically problematic boundaries opens up a wide range of controversies that too easily can spiral into armed conflict.¹⁵⁹

Dismissing the bloc-stability claim that emerged with the Soviet doctrine of peaceful coexistence, then championed by the Kennedy administration for Cuba and invoked by Müllerson for Crimea, is not as easy. In a world of blocs, expecting a single regime centered on an international organization over which each bloc holds a veto to maintain effective discipline seems dangerously utopian. In such a world, allowing hegemony to maintain discipline within blocs while using some commonly accepted principles to limit inter-bloc conflicts may offer a safer alternative for governing international violence. That both sides adopted this approach during the Cold War seems significant, even if it does not prove anything conclusively.

Differences in circumstances may matter. First, the Cuban confrontation featured two powers that relied heavily on their nuclear deterrent as the foundation of their security, while the standoff between NATO and Russia in Ukraine, although involving states with nuclear arms, did not seriously risk any use of these weapons. Second, the lines of division between the two camps were fairly clear in 1961-62, while today the states of the "West" do not concede either that they constitute a bloc or that Russia has a "side" that opposes them. Third, the Kennedy administration aspired to choose Cuba's political system but did not claim its territory, while Russia purported fully to incorporate Crimea into its sovereign territory.

With a rule that depends on circumstances, the proportional relationship of the provocation and the response become relevant. Russia's strategic concern – absorption of Ukraine by an opposing bloc – did not match the action taken – hiving off a portion of Ukraine's territory but leaving the remainder of the state free, and perhaps more motivated, to align with the West. One might respond that the annexation increased the credibility of a Russian threat to take further action were Ukraine to do more to change its bloc affiliation. One can view the Cuban events in similar terms.¹⁶⁰

158 S.C. Res. 662 ¶ 1, UN Doc. S/RES/662 (1990) (Aug. 9, 1990) (deciding that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void").

159 The Goa incident might be seen as a counterexample. *See supra* note 28. There, India pulled off an act of unilateral decolonization through force of arms without prompting copycat behavior. One might attribute this isolated incident more to the discipline of the bipolar standoff coupled with the general willingness of European states to surrender their empires. In this context, Portugal was an outlier, the last of the European states to attempt to hang on to an ancient overseas empire in the face of armed resistance.

160 *See supra* note 17 (game theory analysis of hostage taking).

Whether these distinctions, singly or collectively, put Crimea on one side of an international validity line and the U.S. actions against Cuba on the other is not the question that comparative international law necessarily seeks to answer. Instead, it teases out the contexts in which arguments are embedded. It invites inquiry into the deep background of claims. Rather than adjudicate which survive the exacting scrutiny necessary to count as general international law, it seeks to explain why particular states make particular claims. It may turn out, of course, that after this inquiry some claims remain inexplicable. But, in winnowing out plausible claims from nonsensical ones and showing why some are coherent, even if disagreeable, comparative international law gives the field a certain resilience that a rigid insistence on universal acceptance does not.

VI. CONCLUSION

The path from Panama to Crimea is straighter than one might think. In between these episodes much changed in the international system. What did not change, however, was a widely held view that international law, while seeking to discourage uses of force in international relations, tolerates armed attacks on another state's territory with the purpose of controlling and even seizing that land, if the attack functions as a proportionate response to a grave threat to international peace and prosperity. What also has not changed is that significant actors disagree about the application of this principle. Sometimes, although not always, these disagreements reflect fundamentally different perceptions of international threats that rest on systematic variations among states in history, culture, and interests.

The Panama and Crimea stories illustrate a deep problem in international law. When its sweeping commands collide with controversial state acts, legality comes under threat. States motivated by what they consider urgent interests may offer up exceptions that can end up swallowing the international legal rule. Laws become empty aspirations if states easily can avoid them. But persistent state refusals to accept an unbounded version of the rule cry out for explanation, if international law is to influence as well as reflect state practice. Rules that lack credibility become ineffectual and irrelevant every bit as much as rules that are too easy to evade.

The field of comparative international law, with its focus on claims more than audience response, offers one strategy for addressing this problem. It gets us past the threshold of state invocation of its parochial interests, a move that most would consider inadequate to automatically call off an otherwise applicable rule. It employs history and the various social sciences to identify what claimants perceive the stakes to be. It then asks how these stakes might fit into some kind of solution to the problem, which we might

then ascribe to international law. It does not always generate new rules: that's not its job. But comparative international law can inform the conversation and block off dead ends, keeping alive the possibility of groping toward some kinds of workable rules and principles that might ward off the worst kinds of international misunderstandings and conflicts. Panama and Crimea may be bookends on a story about the enduring nature of international anarchy. But they also might suggest, if only by hinting at paths not pursued, latent possibilities in the law.

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