Pre-publication manuscript accepted by the *American Journal of International Law*. Subject to change during the editing and production process.

DOI: 10.1017/ajil.2024.26

The Prohibition of Annexations and The Foundations of Modern International Law

Ingrid Brunk & Monica Hakimi

ABSTRACT

The international legal norm that prohibits forcible annexations of territory is foundational to modern international law. It lies at the core of three projects that have been central to the enterprise. The first focuses on settling title to territory as the basis for establishing state authority. The second regulates the use of force across (settled) territorial borders. The third provides for the people within each state's (settled) borders collectively to determine their own fates. The norm that prohibits forcible annexations is integral to each of these projects independently, and by tying them together, has had a transformative effect on the legal system as a whole.

However, this prohibition is also misunderstood, both as a matter of history and in its relationship to other contemporary international legal norms. Because it is intertwined with all three of the above projects, its origins cannot be traced to only one or the other. The common narrative that describes it as the inevitable outgrowth of regulating war is, therefore, misleading and incomplete. That narrative overlooks the role that formerly colonized states played in securing this norm while seeking to establish themselves as states, through decolonization and claims of self-determination. In modern doctrine, too, the prohibition of annexations is often subsumed into the general prohibition on the use of force, when in fact, its normative influence extends much more broadly.

As a result, the norm's significance and position in modern international law are consistently overlooked. Analysts have also, by and large, failed to appreciate that it is now caught up in a broader contest over the future world order and at risk of erosion. As deeply flawed as the previous world order was, jettisoning this norm is a dangerous path forward. From Ukraine to Palestine, Israel, the Nagorno-Karabakh region, the Golan Heights, Western Sahara, and the Chagos Archipelago, states and nonstate actors alike care deeply about exercising power over territory, which has historically been a primary impetus of interstate war.

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Ingrid Brunk & Monica Hakimi [±]

TABLE OF CONTENTS

[±] Helen Strong Curry Chair in International Law, Vanderbilt Law School, and William S. Beinecke Professor of Law, Columbia Law School, respectively. The authors are co-Editors-in-Chief of the *American Journal of International Law*. They were not involved in the selection of this Article for publication; the selection process was instead overseen by Jeffrey Dunoff and Neha Jain of the Board of Editors, adhering to the *Journal*'s usual double-blind, peer-review standards. The authors are grateful for helpful comments received during workshops at Vanderbilt Law School, the 2023 Mid-Year Meeting of the American Society of International Law, and Columbia Law School, and from Rebecca Allensworth, Arnulf Becker Lorca, Eyal Benvenisti, Alejandro Chehtman, Jacob Katz Cogan, Gregory Fox, Thomas Grant, Tanisha Fazal, Claus Kreß, Don Herzog, David Hughes, Asaf Lubin, Tamar Megiddo, Marko Milanovic, Sean Murphy, Umut Özsu, Mark Pollack, Steven Ratner, Juan Pablo Scarfi, Alexander Schmidt, Stefan Talmon, Jamie Trinidad, and Timothy William Waters. The authors are also grateful to William McGovern, Zachary Orr, Kathleen Sharkey, Natalie Smith, and Cherry Tang for excellent research support.

I. INTRODUCTION

Even the casual observer of international affairs can appreciate the significance of prohibiting states from forcibly taking the territory of other states. The modern international order is structured around a stable set of territorially-defined states. These states have remained remarkably free from forcible territorial changes since World War II, especially since the last major wave of decolonization ended, a dramatic departure from the preceding era. We argue in this Article that the international legal norm that lies at the core of this change—the prohibition of annexations—is foundational to contemporary international law; that its origins and doctrinal status are shrouded in confusion; and that there is good reason to believe that it is today at serious, underappreciated risk of erosion.

The prohibition of annexations forbids states from acquiring, through the threat or use of force, the territory of another state or of a recognized non-self-governing entity.[1] This prohibition is intricately connected to three central projects in international law. The first works to establish and entrench state authority in defined territorial spaces. Historically, international law developed with the territorial entrenchment of states—from Europe in the seventeenth century, through Latin American independence in the nineteenth century, and into the process of decolonization following World War II. Prohibiting annexations is critical to the project on territorial entrenchment, because if annexations were permitted, state authority in any given territory would be more susceptible to disruption or revision.

The second project with which the prohibition of annexations is intertwined fosters peace among independent, territorially-defined states. Popular movements to limit or end interstate wars developed in the late nineteenth century in Europe and the Americas. Eventually, these movements helped create the League of Nations, the Pact of Paris, and the United Nations, all of which made peace a core ambition. Although the project to secure interstate peace has not been limited to preventing wars over territory—it has also sought to prevent other

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[1] Some define annexation more narrowly, to mean "the forcible acquisition of territory by one State at the expense of another State." *See, e.g.*, Rainer Hoffman, *Annexation*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2020). Part of our argument, however, is that the prohibition of annexations crystallized through the massive wave of decolonization following World War II. In that process, it came to apply both to the territories of other states and to non-self-governing territories. *See* G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (Oct. 24, 1970) ("The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.") [hereinafter "Friendly Relations Declaration"]; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, 2019 I.C.J. 95, ¶ 160 (Feb. 25) ("Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination.").

kinds of interstate wars—the prohibition of annexations has nevertheless been central to it. The desire to acquire territory, with title, has historically been a principal impetus for war, including some of the most brutal and violent wars. Prohibiting states from acquiring title to territory through threats or uses of force thus eliminates a historic reason for the initiation of interstate war.

The third project aims to realize the self-determination of the peoples within territorially-defined states. Self-determination is an emancipatory project and was central to the process of decolonization. It is deeply connected to territory, because it allows peoples within a defined geographic space to determine together their own political, economic, and cultural fates. Early nineteenth century claims to self-determination in Europe began to challenge forcible territorial annexations that failed to consider the wishes of the people who lived in the annexed territory. After World War II, newly decolonized and non-aligned states led the push to end annexations as part of a broader agenda on self-determination. Today, the parameters of the right to self-determination are contested, but to the extent that annexations forcibly impose on peoples the authority of a foreign power, they also violate the right to self-determination.

Because the prohibition of annexations lies at the core of each of these projects—on territorial entrenchment, interstate peace, and self-determination—and because each is independently foundational to modern international law, so too is the prohibition itself. Among contemporary analysts, however, this prohibition is poorly understood and often overlooked. The most common misconstruction conflates it with the project on interstate peace.[2] Some argue that annexations are unlawful because they result from unlawful uses of force.[3] Even the International Court of Justice ("ICJ") has described the "illegality of territorial acquisition resulting from the threat or use of force" as a

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[2] *See* ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 36 (2d. ed. 2010) ("Article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity of another State and therefore the acquisition of territory by force"); Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 294 (2005) (noting "the illegality of state annexation under article 2(4) of the U.N. Charter"); Ronit Levine-Schnur, Tamar Megiddo & Yael Berda, *A Theory of Annexation* (February 5, 2023), *available at* https://ssrn.com/abstract=4330338 (describing "annexation as a violation of the prohibition on the use of force").

[3] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 222 (9th ed. 2019) (describing conquest as a form of negative prescription that is prohibited because "[p]rescription can no longer create rights out of situations brought about by illegal acts"); Hoffman, *supra* note 1 ("[N]ot only war, but also the use of force in any form is to be regarded, in principle, as an internationally wrongful act from which no rights may be derived; consequently, annexations are illegal."); Marcelo G. Kohen, *Conquest*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2015) ("Resort to force being illegal, there is currently no possibility of producing a territorial change of sovereignty as a result of it"); *see also* ALEXANDER ORAKHELASHVILI, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 147 (8th ed. 2020) (suggesting that the lawfulness of annexations resulting from lawful uses of force remains an unresolved question).

"corollary" to the "principles of the use of force incorporated in the Charter."[4] Likewise, the end of the doctrine of conquest—which permitted annexations—is often described as the result of the project on interstate peace.[5] These characterizations are over-simplified, and at times inaccurate. The prohibition of annexations and the doctrine of conquest both regulate the acquisition of sovereign title to territory, an issue that is distinct from the regulation of war and tied to all three normative projects, rather than just one.

The lack of clarity about the prohibition has significant consequences. Regulating the use of force does not by itself resolve questions about the transfer of title to territory following the use of force. Moreover, some uses of force remain lawful; even if limiting when force may be used would also limit when title may be transferred—on the theory that an unlawful use of force may not confer title to territory—important questions about annexations following lawful uses of force would remain unanswered. The issue has contemporary significance, for example, in the dispute around Israel's attempted annexation

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[4] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 87 (July 9); *see also* EYAL BENVENISTI & ELIAV LIEBLICH, OCCUPATION IN INTERNATIONAL LAW 43 (2022) ("[T]he principle of non-annexation" would "take its final shape only with advent of the UN Charter"); Tanisha M. Fazal, *The Return of Conquest?*, FOREIGN AFFS. (Apr. 6, 2022), https://www.foreignaffairs.com/articles/ukraine/2022-04-06/ukraine-russia-war-return-conquest (asserting that the U.S. worked to "enshrine" the norm against conquest "in the U.N. Charter."); *Public sitting held on Monday 19 February 2024, at 10 a.m., at the Peace Palace, President Salam presiding, on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Request for advisory opinion submitted by the General Assembly of the United Nations), Verbatim Record at p. 73 (Paul Reichler, on behalf of the State of Palestine) (noting that Japan's submission "emphasizes that the annexation of occupied territory is unlawful, referring to Article 2 (4) of the United Nations Charter.").

[5] *See, e.g.* Jochen von Bernstorff, *The Use of Force in International Law Before World War I: On Imperial Ordering and Ontology of the Nation-State*, 29 EUR. J. INT'L L. 233, 258 (2018) ("Organized pacifism in the interwar period intensified its struggle to abolish unilateral wars of conquest . . . ."); Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. J. INT'L L. 115, 164 (1999) ("The advent since World War II of even stricter rules on the use of force in international relations has stripped conquest of whatever legal force it might once have exercised."); Pierre Klein & Vaios Koutroulis, *Territorial Disputes and the Use of Force*, *in* RESEARCH HANDBOOK ON TERRITORIAL DISPUTES IN INTERNATIONAL LAW 235, 236 (Marcelo G. Kohen & Mamadou Hébié eds., 2018) ("[T]he gradual outlawing of war 'as an instrument of national policy' and the corollary undertaking to resolve international disputes by peaceful means proclaimed in the 1928 Kellogg-Briand Pact and—with a much wider impact—in the United Nations (UN) Charter made unlawful at the universal level any use of force for the acquisition of territories or the resolution of territorial disputes."); Kohen, *supra* note 3 (asserting that, although "[i]t is difficult to determine at what precise moment conquest ceased to be a valid mode of acquisition of territorial sovereignty," "[t]he prohibition of the threat or the use of force set out in Art. 2(4) UN Charter marked the achievement of that evolution"); OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS 330 (2018) (arguing that "the transformation to a world in which conquest is exceptional was set in motion by the Peace Pact of 1928"); STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 295–96 (2005) (linking the prohibition of annexations to the prohibition of the use of force in the Pact of Paris).

of the Golan Heights, a piece of land that is part of Syria, and for various territories around the globe that are occupied. The issue was also important to non-aligned states in the decades following the adoption of the UN Charter. After all, if powerful states have disproportionate influence over whether the use of force is lawful, whether by virtue of their positions on the UN Security Council or otherwise, less powerful states have an interest in protecting their territory no matter the lawfulness of the use of force. Equating the two sweeps all of this away and obscures the significant role that decolonized and non-aligned states played, from early nineteenth century Latin America through the 1960s, in establishing the prohibition of annexations.

The lack of clarity about this prohibition also systematically obscures what makes it both distinct and foundational in international law—and thus what might be the signs and stakes of its erosion. Indeed, even following Russia's open violation of it with the 2014 and 2022 invasions of Ukraine, states rarely focused specifically on it.[6] The same is true of expert commentators. They have emphasized international criminal accountability,[7] the prohibition on the use of force,[8] and reparations for the war.[9] But they have generally failed to highlight—and at times have even denied[10]—that Russia's conduct is unlike other violations of the UN Charter because it amounts to a direct assault on *this* foundational norm: the prohibition of annexations.[11]

By contrast, resituating the prohibition, as we do, at the intersection of all three normative projects brings into focus the trends that might lead to its erosion. As others have observed, the international order is rapidly changing, with a geopolitical contest to "remake" the

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[6] *See infra* Part V.

[7] *See, e.g.*, Adil Ahmad Haque, *An Unlawful War*, 116 AM. J. INT'L L. UNBOUND 155, 155 (2022).

[8] *See, e.g.*, Jens David Ohlin, *#genocide: Atrocity as Pretext and Disinformation*, 63 VA. J. INT'L L. 101, 104 (2023).

[9] *See, e.g.*, Oona Hathaway, Maggie Mills, & Thomas M. Poston, *War Reparations: The Case for Countermeasures*, 76 STAN. L. REV. (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4548945.

[10] *See infra* notes 290–299 and accompanying text.

[11] For an early and prescient exception, see THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW (2015). *See also* Mikulas Fabry, *How to Uphold the Territorial Integrity of Ukraine*, 16 GER. L.J. 416–433 (2015); Tanisha M. Fazal, *The Return of Conquest?*, FOREIGN AFFS. (Apr. 6, 2022), https://www.foreignaffairs.com/articles/ukraine/2022-04-06/ukraine-russia-war-return-conquest; and Stefan Talmon and Hannah Janknecht, *consequences of Germany's non-recognition of the Russian annexation of Crimea* in GERMAN PRACTICE IN INTERNATIONAL LAW 2020 (2023) 8-18 (S. Talmon, ed.).

world in full swing.[12] In this worldmaking contest, we explain, Russia's conduct in Ukraine has been just one piece in a broader set of geopolitical developments that together threaten the prohibition of annexations and put interstate conflicts over territory back on the international agenda, with potentially devastating consequences for the world.[13]

The Article makes important contributions in a number of registers—historical, conceptual, doctrinal, and policy-oriented. It weaves together different strands of historical research to present the first comprehensive history of the prohibition of annexations. This history also offers new insights that correct existing accounts of international law's regulation of war and peace. Conceptually, the Article explains that the prohibition of annexations is foundational because it ties together the three central projects in international law. The Article then uses that conceptual frame to analyze the prohibition's standing in contemporary legal doctrine and to intervene in global policy debates about the changes unfolding in the world.

Some might discount these contributions by arguing that the prohibition of annexations is captured by other international legal norms, especially the prohibition on the use of force. If that prohibition were fully effective, the argument might run, it would eliminate wars of conquest, making the prohibition of annexations redundant. But the prohibition of annexations is not fully encompassed by the prohibition on the use of force or by any other international legal norm. As we have emphasized, this prohibition addresses sovereign title to territory, an issue not directly regulated by limitations on use of force. Separating the two, as we do in this Article, is historically accurate and offers some much needed conceptual and doctrinal clarity, in part because it underscores the significance of territory in international law. Our framing also highlights the ways in which this prohibition fills gaps and mediates tensions among the other, related norms—for example, by providing that annexations are unlawful, even when the initial use of

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[12] *See infra* Section V.C; *see also* Karim El Aynaoui, Paolo Magri & Samir Saran, *Foreward* in *Annual Trends Report,* THE RISE OF THE GLOBAL SOUTH: NEW CONSENSUS WANTED (Dec. 2023); Anthony J. Blinken, U.S. Sec'y of State, The Administration's Approach to the People's Republic of China (May 26, 2022); Tim Murithi, *Order of Oppression: Africa's Quest for a New International System*, FOREIGN AFFS. (Apr. 18, 2023); BEN RHODES, AFTER THE FALL: BEING AMERICAN IN THE WORLD WE'VE MADE (2021).

[13] We borrow the term "worldmaking" from ADOM GETACHEW, WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION (2019). Getachew uses the term to explain that "decolonization was a project of reordering the world," not a project confined to the formation of nation-states. *Id*. at 2. We use the term to describe a geopolitical contest that is likewise "reordering the world" in terms of political and economic power, as others have argued. More specifically, we argue, this worldmaking contest is putting at issue questions about how state power over territory will be allocated. *See infra* Section V.D.

force is lawful, and that self-determination is to be exercised consistently with the norms on territorial entrenchment. To the extent that its content *is* captured by these other norms, identifying its connections to all three of the above projects brings into view that its erosion would have implications for all of them, not for only one of them.

The Article proceeds as follows. Part II traces the origins of the prohibition of annexations in the pre-World War II period. Part III shows that it finally crystallized in international law not with the UN Charter at the end of World War II, as many suggest, but in the decades after the Charter was adopted, as part of a broad push for self-determination in the process of decolonization. Part IV analyzes the prohibition's connections to other key doctrines in international law. Part V then examines the signs that it is eroding. Part VI concludes by underscoring that, although this prohibition helps to solidify unjust territorial divisions and otherwise to support an inequitable world, it also protects vitally important values that have, for well over a century, defined the field.

II. ORIGINS

The prohibition of annexations emerged in conjunction with three sets of norms in international law. The first regulates states' acquisition of title to territory. These norms are part of a longstanding project in international law to establish states as states and to legitimate and entrench their authority in defined territorial units. The second regulates states' use of force across national borders. These norms are part of a different project in international law to try to outlaw war and achieve interstate peace. The third promotes the self-determination of the people who live in territorially-defined states. Each of these three projects has had a profound impact on the international legal order; the prohibition of annexations sits at the intersection of them.

A. The Territorial Basis of International Law

Historically, states formed, grew, and flourished together with international law. International law helped them establish themselves as states—political entities with sovereign authority in defined territorial units. It did this in several ways, including through the doctrine of "conquest,"[14] which entitled them to acquire territory, with sovereign title, as a consequence of war.[15] As Henry Wheaton wrote, "[t]he title of almost all nations of Europe to the territory now possessed by them,

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[14] Conquest is defined as the "right of the victor" to "sovereignty over the conquered territory and its inhabitants." SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 8 (1996).

[15] *See* HALLECK'S INTERNATIONAL LAW, vol. II, at 444 (Sir Sherston Baker's ed. 1878) (quoted in R.Y. Jennings, *Government in Commission*, 23 BRIT. Y.B. INT'L L. 112, 134 (1946)).

in that quarter of the world, was originally derived from conquest. . . ."[16] The international legal doctrine of conquest was thus tied to settling title to territory, which created the conditions for states to entrench their authority as states and to continue using international law to serve their other interests.

For example, the Peace of Westphalia is often cited for establishing a system of formally coequal states and, with it, the modern structure of international law.[17] Even if that characterization is misleading, the set of treaties that European states concluded at the time (in the mid-seventeenth century) were meant to foster peace amongst themselves by settling title to territory and, on that basis, entrenching state authority. This entrenchment helped to establish their positions as states so that they could continue to use international law for other ends.[18]

Sovereign authority over specific territory eventually became the defining attribute of statehood in international law.[19] This development was not a foregone conclusion. Alternative conceptions of statehood based, for example, on the allegiance of peoples to a central authority were also available, but "effectiveness in controlling a land and a population" was a critical ingredient for an entity to earn the status of state in international law,[20] and with it, nearly exclusive authority to control events in and access to that territory.[21] In this way, state authority and territorial control emerged together and reinforced each other.[22]

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[16] Quoted in KORMAN, *supra* note 14, at 67; *see also* M.N. Shaw, *Territory in International Law*, 13 NETH. Y.B. INT'L L. 61, 79 (1982) [hereinafter "Shaw, *Territory in International Law*"].

[17] BENNO TESCHKE, THE MYTH OF 1648: CLASS, GEOPOLITICS, AND THE MAKINGS OF MODERN INTERNATIONAL RELATIONS (2003).

[18] *See* Randall Lesaffer, *The Non-Westphalian Peace*, OXFORD PUB. INT'L L., https://opil.ouplaw.com/page/368.

[19] *See* Convention on the Rights and Duties of States art. I, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19; Shaw, *Territory in International Law*, *supra* note 16, at 61–63.

[20] Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 417 (1999).

[21] Shaw, *Territory in International Law*, *supra* note 16, at 73.

[22] Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L L. 808, 808 (2006) ("The resolution of conflicting claims to land has long stood at the heart of the project of international law."); *see also* Malcolm N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis Juris *Today*, 67 BRIT. Y.B. INT'L L. 75, 75 (1997) [hereinafter "Shaw, *The Heritage of States*"] ("The territorial definition of States is a matter of the first importance within the international political system. It expresses in spatial terms the dimensions and sphere of application of authority of States and provides the essential framework for the operation of an international order that is founded upon

Imperial states also used international law to project power through their colonial expansions. As Antony Anghie has shown, the legal construction of sovereign authority, as connected to territory, was "constituted and shaped through colonialism."[23] The insistence, for example, that sovereignty belonged only to those who exercised territorial control developed in part to ensure that the "barbarian nations" that were "'wandering tribe[s] with no fixed territory'" lacked sovereignty and thus the benefits that attached to it under international law.[24] Just as the Peace of Westphalia was first and foremost a treaty that established territorial boundaries, the Conference of Berlin that formalized and provided a legal framework for colonial rule in Africa was also an agreement about establishing territorial boundaries. It facilitated imperial control over territory and the exploitation of peoples outside the "society" of "civilized" European, sovereign states.[25]

In addition to the doctrine of conquest, the doctrines of *terra nullius*, occupation, prescription, and cession were used by imperial states to acquire—and to entrench their authority in—colonial territories. Each of these doctrines was both about territory and shaped by the colonial encounter. International law defined as *terra nullius* territory that did not belong to any Christian state and permitted any state to acquire title to it through occupation; occupation meant physical control of territory and, at the time, established a basis for asserting sovereignty over it; acquisitive prescription permitted states to acquire sovereignty if they openly encroached on the territory without protest for an extended period; and cession provided for the consensual transfer of title to territory.[26]

These doctrines developed and changed to enable colonialism. For example, cession presented a doctrinal problem for European

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strict territorial division. In terms of international law specifically, the territorial delineation . . . is the essential framework within which the vital interests of States are expressed and with regard to which they interact and collide.").

[23] Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 6 (1999).

[24] *Id.* at 26 (quoting THOMAS LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 58 (1895)).

[25] For discussions of the use of international law by non-Western imperial states to enable territorial expansion, see Maria Adele Carrai, *Learning Western Techniques of Empire: Republican China and the New Legal Framework for Managing Tibet*, 30 LEIDEN J. INT'L L. 801, 822-23 (2017) (describing the use by China's leaders of the "language of international law to claim sovereignty over Tibet and frontier territories that were well beyond their control"); and Robert Knox, *Civilizing Interventions? Race, War and International Law*, 26 CAMBRIDGE REV. INT'L AFFS. 111, 126–29 (2013) (discussing Russia's intervention in Georgia as an example of imperialist states adopting the legal arguments of the United States).

[26] Which doctrine was best applied to various colonial acquisitions of territory was debated for centuries. *See* MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER, 1300-1870, 258-63, 507, 720-22 (2021).

states. Without the sovereignty that international law conferred, non-European entities lacked the capacity to consent to the transfer of title. The problem was resolved through the remarkable conclusion that "cession of territory made to a member of the Family of Nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family."[27] In other words, non-European entities could be sovereign for purposes of relinquishing their territories but for little else. Here again, rules permitting and regulating the forcible taking of territory, with title, were intertwined with the development of states as states, and with the broader legal frameworks that they used to project and maintain control over land and people around the globe.

B. The Slow Demise of the Doctrine of Conquest

The doctrine of conquest was also part of a complex relationship between territory, war, and international law. Until the twentieth century, international law regulated but did not outright prohibit war, whether waged over territory or for other reasons.[28] Antiwar movements that gained traction in the late nineteenth century initially sought to disarm states and to create arbitral or judicial mechanisms to resolve state-to-state disputes.[29] With the onset of World War I, they shifted their attention to the League of Nations, which curtailed the use of force; then to the 1928 Kellogg-Briand Peace Pact, which outlawed war; and finally the UN Charter, which establishes a collective security system that prohibits states from using force against one another, except in self-defense or with a decision by the UN Security Council.[30]

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[27] Anghie, *supra* note 23, at 70 (quoting LASSA OPPENHEIM, INTERNATIONAL LAW 286 (2d ed. 1912)).

[28] *See* NEFF, *supra* note 5, at 49, 102. International law might have increasingly required some kind of justification for violence against other states, but virtually any justification sufficed. *See* von Bernstorff, *supra* note 5, at 244.

[29] *See* BENJAMIN ALLEN COATES, LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY 28–30 (2016); Mary Ellen O'Connell, *Peace and War*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 272 (Bardo Fassbender & Anne Peters eds., 2012).

[30] *See* HATHAWAY & SHAPIRO, *supra* note 5, at 101–214, 309-35; NEFF, *supra* note 5, at 278–356; O'Connell, *supra* note 29, at 272–73. On the increasingly transnational peace movement after World War I, see Cecelia Lynch, *Peace Movements, Civil Society, and the Development of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 29, 198, 213. On the rich anti-war tradition in Latin America, see Juan Pablo Scarfi, *Latin America and the Idea of Peace, in* THE OXFORD HANDBOOK OF PEACE HISTORY 266, 270–72 (Christian Peterson, Charles F. Howlett, Deborah Buffton & David Hostetter eds. 2023) [hereinafter Scarfi, *Latin American and the Idea of Peace*].

The Charter restrictions on the use of force are sometimes described as ending conquest and creating the prohibition of annexations.[31] The prohibition of annexations is not, however, itself a limit on the use of force. It regulates sovereign title to territory. And the assignment of title does not necessarily follow from the lawfulness (or not) of the use of force. Moreover, although limits on the use of force did help fuel the demise of conquest, conquest was also undermined by claims to self-determination in Europe and Latin America and by efforts by Latin American states to establish their own territorial entrenchment.[32] Historically, these three projects—on the regulation of the use of force, self-determination, and territorial entrenchment—intersected in complicated ways. But they are not the same. Each provided a different normative basis for challenging the doctrine of conquest and for establishing the prohibition of annexations.

1. Conquest and its Detractors: Nineteenth Century

As a classic form of territorial acquisition, conquest had its own set of rules, including that title was perfected only when the conquering forces had effective possession or control over the territory.[33] The doctrine created an incentive for strong states to use force by conferring title on the basis of successful territorial control. However, the doctrine was also seen as a way to limit war within a system in which war was generally legal. Clarifying that title passed with control would, the reasoning went, bring the conflict to a speedier end. For example, if title instead belonged to the party that had a morally superior claim, the unjust belligerent would have fewer incentives to agree to a peace treaty.[34] Conquest was also said to limit potential future war by conferring title. Without title, Vattel explained, "no certain possession can be obtained of any thing taken in war. . . ."[35] And without certain possession, future conflict over title was thought to be more likely.

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[31] *See* sources at *supra* note 5.

[32] Authors who focus specifically on the history of conquest sometimes discuss aspects of these developments. *See* KORMAN, *supra* note 14; ROBERT LANGER, SEIZURE OF TERRITORY: THE STIMSON DOCTRINE AND RELATED PRINCIPLES (1947); *cf.* Brook Gotberg, *The End of Conquest: Consolidating Sovereign Equality*, *in* INTERNATIONAL NORMS AND CYCLES OF CHANGE 82 (Wayne Sandholtz & Kendall Stiles eds., 2008) (discussing nineteenth-century France but not Latin America as providing the antecedents for the demise of conquest and concluding that "World War II provided the impetus for codifying, in the United Nations Charter, international rules against aggression and conquest").

[33] KORMAN, *supra* note 14, at 8.

[34] *Id*. at 18–29 (discussing the justifications advanced for conquest by Grotius, Pufendorf, Vattel, and others).

[35] *Id.* at 26 (quoting Vattel).

The regulation of conquest was also distinct from the prohibition of war. War might be permissible but conquest—and the associated conferral of title—prohibited. Or conquest might be permissible but other uses of force not. Finally, conquest was at the time understood as being a fundamentally flawed and deeply unjust doctrine, so it had its detractors.[36] But it was defended as a way for the decentralized international legal system to generate certainty and stability by aligning the legal authority that sovereign title conferred with the physical control of territory. Settling title to territory, as the doctrine of conquest did, thus became central both to the project of consolidating each state's power over its own territory and to the separate but increasingly related project of regulating war.

It is perhaps unsurprising that, as new states emerged in Latin America, more formal efforts to limit or prevent conquest took root there. These states sought to limit territorial and other forms of military aggression especially, at first, from Europe. For example, the 1823 Monroe Doctrine both promoted U.S. hegemony and protected the territorial integrity and self-determination of Latin American countries from European domination.[37] As fears of "re-conquest" by Europe waned, principles of territorial integrity and non-intervention were advanced in Latin America to protect against aggression from the United States and from other neighbors in the Americas.[38]

From the outset, Latin American states focused specifically on ending conquest and on reinforcing their own territorial entrenchment. As early as 1810, Latin American states "committed themselves to a reciprocal respect of their territorial status and thus abolished among themselves the legitimacy of a right of conquest."[39] At the first Inter-American Conference held in Panama in 1826, treaties were signed to provide collective guarantees of respect for territorial boundaries and

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[36] *See* Andrew Fitzmaurice, *Discovery, Conquest, and Occupation of Territory*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 29, 840, 847-51; Quincy Wright, *The Stimson Note of January 7, 1932*, 26 AM. J. INT'L L. 342 (1932) [hereinafter "Wright, *The Stimson Note*"].

[37] Juan Pablo Scarfi, *Latin America and the Idea of Peace*, *supra* note 30, at 266, 268-69 (noting that, although the term "self-determination" was coined first in Europe, the principle was also promoted and developed in Latin America through the Monroe Doctrine and principle of *uti possidetis juris*).

[38] Alejandro Alvarez, *Latin American International Law*, 3 AM. J. INT'L L. 269, 270,343 (1909); *See* J. LLOYD MECHAM, THE UNITED STATES AND INTER-AMERICAN SECURITY, 1889–1960, 42–44 (1961); Scarfi, *Latin America and the Idea of Peace*, *supra* note 30, at 269, 270.

[39] Eduardo Jimenez de Aréchaga, *Boundaries in Latin America:* Uti Possidetis *Doctrine*, *in* 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 45, 46 (1983).

to limit war.[40] Through the turn of the twentieth century, Latin American countries were global leaders in pressing to end conquest.[41] They also pushed for other norms to preserve territorial boundaries. For example, they drafted instruments that tried to establish a duty not to recognize the transfer of title in certain cases involving forcible acquisitions of territory. They advocated for this duty—what became known as the "duty of non-recognition"—many decades before U.S. Secretary of State Henry Stimson famously articulated the same.[42] In addition, they pioneered the doctrine of *uti possidetis*, pursuant to which newly independent states have the same borders "that they had when they were administrative units within the territory" of empire.[43] These other norms to preserve territorial boundaries were in some sense contingent on the prohibition of conquest.[44] Each would be compromised so long as conquest remained permissible.

In Europe, conquest during the nineteenth century was constrained by different developments. To begin, the system for the Concert of Europe, which the Congress of Vienna established in 1815, was an effort to broker peace among powerful states and was linked to reducing territorial conquest. It created a "strong presumption against

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[40] *See* LANGER, *supra* note 32, at 34.

[41] *Id*. at 34–39; *see also* Alvarez, *supra* note at 38 (describing nineteenth-century congresses in Latin America that proclaimed "two new principles" both of which protected the territory in Latin America from foreign acquisition or occupation); ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY, 1842–1933, 334–35 (2014) (describing a 1912 codification project by Epitácio Pessôa that adopted a "proscription of conquest as a lawful title to acquire territory."). These efforts were not fully successful, even within Latin America. *See* Langer, *supra* note 32, at 35–36 (discussing territorial acquisitions in the Pacific War between Chile, Peru and Bolivia (1879-1883)).

[42] *See* Philip C. Jessup, *The Saavedra Lamas Anti-War Draft Treaty*, 27 AM. J. INT'L L. 109, 111 (1933) (referencing "the many antecedents in the history of the Americas for Mr. Stimson's declaration of a 'non-recognition' policy, notably the resolution adopted in 1890 at the First International Conference of American State").

[43] Scarfi, *Latin America and the Idea of Peace, supra* note 30, at 269; Shaw, *The Heritage of States*, *supra* note 22, at 97.

[44] On the influential Latin American efforts to develop the principle of non-intervention generally, including the prohibition of the use of military force to collect debts, *see* BECKER LORCA, *supra* note 41, at 149–58, 341–51; MECHAM, *supra* note 38, at 65–67. For example, the Drago Doctrine, sought to preclude as justifications for occupation or conquest on the continent the failure to satisfy debts. The doctrine posited that "a public debt cannot give rise to the right of intervention, much less to the occupation of the soil of any American nation by any European Power." A. Pearce Higgins, The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts and Conventions with Commentaries 186 (1909) (internal quotation marks omitted). It was influential in the drafting of the Hague Convention on the Recovery of Contract Debts. *Id*. at 180, 184–97.

unilateral changes in the status quo."[45] The Concert opposed revolutionary changes in government, so it was conservative and anti-democratic in disposition.[46] It also opposed changes in territory. During this period, non-consensual territorial acquisitions by members of the Concert required some justification but were not prohibited by international law.[47] Moreover, the entire Concert was based on the Vienna Final Act, a peace agreement that brought several smaller territorial settlements together into one larger territorial settlement, with the aim of furthering peace and stability.[48] There is good evidence that this framework to settle territorial borders worked to reduce interstate conflict, at least for a time. The Concert ushered in a remarkably peaceful period—and a period with few territorial changes—on the continent.[49]

At the same time, conquest was in tension with emerging notions of self-determination. Following the French Revolution, the consent of the governed (or the appearance thereof) became more important to forming legitimate domestic governments. Emphasis on popular consent also began to shape international affairs, often under the heading "self-determination."[50] Claims about self-determination posited that the people in a given territory should decide their own political futures when it changed hands, an idea fundamentally at odds with the doctrine of conquest, which provided for the transfer of title without consulting the affected population.[51] The revolutionary government in France thus denounced conquest.[52]

In addition, Germany's annexation of French Alsace Lorraine was controversial after the Franco-Prussian War not so much because the use of force was thought to be wrongful—it was generally seen as a legitimate response to French aggression—but because annexation

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[45] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 19–20 (1963).

[46] Hendrik Simon, *The Myth of* Liberum Ius ad Bellum*–Justifying War in 19th-Century International Legal Theory and Political Practice,* 29 EUR. J. INT'L L. 113, 132–33 (2018).

[47] Von Bernstorff, *supra* note 5, at 244.

[48] Simon, *supra* note 46, at 132.

[49] BEAR F. BRAUMOELLER, ONLY THE DEAD: THE PERSISTENCE OF WAR IN THE MODERN AGE 178-83, 219-20 (2019).

[50] *Cf*. JÖRG FISCH, THE RIGHT OF SELF-DETERMINATION OF PEOPLES: THE DOMESTICATION OF AN ILLUSION 61–62 (Eng. ed. 2015) (describing various relationships between self-determination and popular sovereignty in early modern Europe).

[51] KORMAN, *supra* note 14, at 121-22.

[52] *See* Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 L. & HIST. REV. 621, 648 (2008); Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 730 (2005).

was inconsistent with the right of the people living in that territory to self-determination.[53] A handful of nineteenth century peace treaties even had language allowing people who lived in disputed territories to determine by collective vote the country to which they would belong; others gave residents of the territory a limited opportunity to choose their country of allegiance under what was sometimes called a "right of option."[54]

Self-determination also began to limit the law of conquest by generating fundamentally new ideas about occupation. Because self-determination was inconsistent with the basic premise of conquest—that sovereign title could transfer through force—the term "occupation" increasingly became used to describe military control that "does not confer sovereignty over enemy territory."[55] Not all countries accepted this limitation on conquest. For example, Britain did not distinguish between capture and occupation; well into the twentieth century, it maintained that occupation conveyed sovereign title, following the old rules of conquest.[56]

The United States, too, resisted limitations on the doctrine of conquest. During the First International Conference of American States in 1889-1890, for example, all of the other participants supported a text that declared that "the principle of conquest shall never hereafter be recognized as admissible under American public law."[57] A compromise agreement, which never entered into force, would have provided for the arbitration of international disputes, in keeping with U.S. proposals for establishing peace.[58] The efforts of other American states to use international law for their own territorial entrenchment

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[53] KORMAN, *supra* note 14, at 87–93.

[54] *See* SARAH WAMBAUGH, A MONOGRAPH ON PLEBISCITES, WITH A COLLECTION OF OFFICIAL DOCUMENTS 989–1085 (1920) (explaining that a plebiscite (never held) was arranged for the Tacna-Arica region between Chili and Peru in the treaty of 1883 terminating the War of the Pacific); *see generally* Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 26 (1998) (describing the right of option).

[55] Benvenisti, *supra* note 52, at 628; *see also* HALLECK'S INTERNATIONAL LAW, *supra* note 15, at 444 (quoted in Jennings, *supra* note 15) ("Until ownership of such property so taken is confirmed or made complete, it is held by the right of *military occupation* (*occupatio bellica*), which, by the usage of the nations and the laws of war, differs from, and falls far short of, the right of *complete conquest* (*debellatio, ultima victoria*).").

[56] Benvenisti, *supra* note 52, at 636 ("[A]s late as 1914 and despite ratifying the 1899 and 1907 Hague Regulations, Britain asserted sovereignty over Egypt and Cyprus through occupation.").

[57] *Id*. at 641.

[58] COATES, *supra* note 29, at 74–81, 88–98 (describing the "judicialist" and "legalist" agenda of the United States at many peace conferences in the late nineteenth and early twentieth centuries).

continued through the adoption of the 1933 Montevideo Conference, which again connected the end of conquest to notions of statehood, sovereign equality, and peace, and which would eventually assume central importance in international law.[59]

2. *Limiting Annexations: Early Twentieth Century*

Short-term aspirations to prevent interstate war through international law ended with World War I. But what the War would mean for the doctrine of conquest was an open question. At the outset of the War, "the territories of Asia, Africa, and the Pacific were controlled by the major European states," and the United States' colonial ambitions were largely satisfied, so in that sense the doctrine of conquest became less central to global affairs.[60] However, the doctrine remained important for warring countries, as they fought to acquire territory from one another. A series of secret agreements, predicated on the right of conquest, purported to establish the post-War divisions of territory among the victors.[61]

As the war came to a close, some countries—especially Russia—renounced conquest.[62] After the war ended, colonial territories of the losing countries were not annexed by victorious states but instead became mandates of the League of Nations.[63] Nevertheless, many territorial allocations favored the powerful, victorious countries, often cloaked in the language of self-determination.[64] Post-war arguments based squarely on the right of conquest were advanced by the United States and others.[65] Thus, although World War I has been described as a "moral turning point" against the doctrine, it hardly marked the end of conquest.[66] Meanwhile, the post-war focus on questions of territorial settlement illustrate the ongoing distinction between regulating the

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[59] *See* LANGER, *supra* note 32, at 75–79.

[60] Anghie, *supra* note 23, at 2.

[61] In the Treaty of London, for example, the Allies promised territory to Italy in return for its decision to switch sides in the war, *see* Rene Albrecht-Carrie, *The Present Significance of the Treaty of London of 1915,* 54 POLIT. SCIENCE QUARTERLY, 364 (1939), and in the Sykes-Picot Agreement, the United Kingdom and France divided territory of the Ottoman Empire*, see James Barr, A Line in the Sand: Britain, France and the Struggle that Shaped the Modern Middle East (2011).*

[62] *Id.* at 131.

[63] *See* SUSAN PEDERSON, THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE 32 (2015).

[64] FISCH, *supra* note 50, at 142–45; KORMAN, *supra* note 14, at 139–61.

[65] *See* KORMAN, *supra* note 14, at 158–61.

[66] *Id*. at 161.

use of force (which was not the immediate issue) and regulating the forcible annexation of territory (which was the immediate issue).

The 1920 Covenant of the League of Nations obligated its members, in Article 10, "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[67] The Covenant required states to satisfy certain procedural requirements before resorting to war. But the Covenant continued to permit war, even beyond situations involving self-defense or collective security. Its effect on the right of conquest was disputed. Some argued that the Covenant's language on "territorial integrity" prohibited all annexations resulting from war. Others argued that it did not prohibit annexations by states that lawfully engaged in wars of self-defense. Still others went further and argued that states were also entitled to annex territory in wars that were lawful but not taken in self-defense.[68] In short, the language in Article 10 on "territorial integrity" was open to different interpretations on whether and to what extent it still permitted forcible transfers of title to territory.

The 1928 General Treaty for the Renunciation of War—more commonly known as the Pact of Paris or the Kellogg-Briand Pact—achieved what the Covenant of the League of Nations had not: it outlawed the recourse to war among the state parties, except in self-defense or, arguably, in the interests of collective security.[69] Most nations, including the world's most powerful, signed the Pact.[70] Oona Hathaway and Scott Shapiro have argued that it was a transformative development in international law, one that was ultimately successful in curtailing war and ending conquest.[71] But ending war and ending conquest are different matters. And while the Pact did aim to end war, it is strikingly silent about the disposition of title to territory—which, as discussed, is what the doctrine of conquest regulates.

Because the Pact of Paris still permitted some wars, it left open questions about the lawfulness of forcible annexations in contexts in

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[67] Covenant of the League of Nations art. 10 (Apr. 28, 1919).

[68] *See* KORMAN, *supra* note 14, 179–92. Some also argued that "territorial integrity" in Article 10 was violated "only if the attacking state formally annexed territory." BROWNLIE, *supra* note 45, at 65.

[69] The Pact provides in Article 1 that the contracting parties "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Covenant of the League of Nations art. 1. For a discussion of the wars that the Pact prohibited and those that it did not, see Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM J. INT'L L. 39 (1933).

[70] On Latin American precedent for the Paris Peace Pact, *see* Scarfi, *Latin America and the Idea of Peace*, *supra* note 30, at 275-77.

[71] HATHAWAY & SHAPIRO, *supra* note 5, at 309-33.

which the use of force was permissible. Moreover, it did not address the territorial consequences of wars waged in violation of it. In fact, it did not include any language at all about territory.[72] Whereas Article 10 of the Covenant safeguarded the "territorial integrity" of member countries, which arguably prohibited (some or all) annexations, the Pact lacked comparable language. Language from an early draft that would have prohibited annexations was quietly dropped in the final text.[73] The omission might have had the effect of expanding the scope of lawful annexations, relative to Article 10 of the Covenant. According to Brownlie, the "prohibition of forcible annexation under the Covenant would not . . . apply to a war of sanction" under the Pact.[74]

Although the Pact of Paris did not replicate the "territorial integrity" language from the Covenant, it eventually became part of the basis for the duty of non-recognition. In 1915, the United States sought to deter Japanese aggression in China by announcing that it would not recognize actions impairing "the political or territorial integrity of the Republic of China . . . ."[75] The U.S. announcement, which attracted almost no attention when it was issued and is little remembered today, predated both the Covenant's limitation on the use of force and the Pact of Paris, and had as its intellectual antecedents the ideas developed in Latin America in the nineteenth century. In 1921, the United States threatened not to recognize Japan's title to East-Siberia, following Japan's occupation and installment of civil administrative authorities in the territory.[76] That year, too, the League of Nations took up the idea of a duty not to recognize territorial changes as a way to sanction acts of aggression. The idea was proposed—not surprisingly, in light of Latin America's leadership on the issue—by a committee member from Brazil.[77]

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[72] Issues relating to territorial conflicts and sovereign title were not the focus of the drafters of the Pact of Paris. Consistent with historical efforts by the United States to curtail war, the drafters worked instead to create an international court to deter aggression and debated potential sanctions for violations, but in the end, the Pact included neither. *Id*. at 112–29.

[73] *Id*. at 113.

[74] BROWNLIE, *supra* note 45, at 336; *see also* Fabry, *supra* note 11, at 428.

[75] David Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law,* 2 CHINESE J. INT'L L. 105, 117–18 (2003) (quoting ROBERT H. FERRELL, AMERICAN DIPLOMACY IN THE GREAT DEPRESSION: HOOVER-STIMSON FOREIGN POLICY, 1929–1933, 154 n.37 (1957)). On the relationship between the Stimson Doctrine and the non-recognition doctrine announced by Williams Jennings Bryan, see Richard N. Current, *The Stimson Doctrine and the Hoover Doctrine*, AM HIST. REV. 513, 540 n.99 (1954).

[76] STEFAN TALMON, KOLLEKTIVE NICHTANERKENNUNG ILLEGALER STAATEN 92 (2006).

[77] LANGER, *supra* note 32, at 46.

Then, in 1932, the United States announced the well-known Stimson Doctrine, which established a policy of not recognizing transfers of title in acquisitions resulting from aggression, based in part on outlawing of war in the Pact of Paris.[78] The policy emerged to address Japan's further conduct against China; the United States invoked it while refusing to recognize "Manchukuo," a "state" that Japan tried to create from part of China through the use of force and occupation. Japan argued that the new state was a "product of authentic internal self-determination and that its use of force and occupation was an unrelated act of enforcing Japan's treaty rights in Manchuria."[79] China dismissed the new entity as a "puppet State" "entirely the work of "Japanese militarists" and part of the de facto annexation of Manchuria.[80] The exchange foreshadows modern events by illustrating that, if international law prohibits conquest, countries might try to evade the prohibition and still claim title to territory with creative but factually false assertions of consent.

The Stimson doctrine (which should probably be renamed to acknowledge its Latin American origins) quickly gained traction as a way to limit war by "depriving the conqueror of the fruits of his conquest."[81] But it did not resolve all issues relating to annexations, including whether annexations were ever permissible following lawful uses of force. Again, Latin American countries pushed an ambitious agenda. In a flurry of declarations, treaties, and resolutions, they advanced strict versions of both the duty of non-recognition and the prohibition of annexations.[82] Perhaps most significantly, they adopted the

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[78] Henry L. Stimson, Memorandum by Secretary of State, 3 U.S. Foreign Rel. 8 (1932).

[79] Fabry, *supra* note 11, at 424.

[80] Current, *supra* note 75, at 522.

[81] *See* Herbert W. Briggs & Norman J. Padelford, *Non-Recognition of Title by Conquest and Limits on the Doctrine*, 34 PROC. AM. SOC'Y INT'L L. ITS ANN. MEETING (1921-1969) 72, 74 (1940) (summarizing a May 7, 1932 statement by the American Under-Secretary of State); *see also* NICHOLAS MULDER, THE ECONOMIC WEAPON 187 (2022) (describing non-recognition as an alternative to economic sanctions).

[82] *See, e.g.*, The Chaco Declaration of 1932, Aug. 3, 1932, Dep't of State, Press Releases, No. 149, Aug. 6, 1932, at 100–01 ("American nations further declare that they will not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms."); Anti-War Treaty (Nonaggression and Conciliation) art. 2, Oct. 10, 1933, 49 Stat. 3363, 163 L.N.T.S. 395 ("[The parties] declare that as between the high contracting parties territorial questions must not be settled by violence, and that they will not recognize any territorial arrangement which is not obtained by pacific means, nor the validity of the occupation or acquisition of territories that may be brought about by force of arms."). An Inter-American Conference for the Maintenance of Peace declared at its eighth meeting, held in 1938, that "occupation or acquisition of territory or any other modifications of territorial or boundary agreement obtained through conquest by force or by non-pacific means shall not be valid or have legal effect." *See* LANGER, *supra* note 32, at 78–79.

Montevideo Convention, which provided that the "territory of a State is inviolable" and established a "precise obligation not to recognize territorial acquisitions" "obtained by force."[83]

These instruments marked a turning point for pan-American international law, away from a U.S.-led approach that applied "standard[s] of civilization" to justify external meddling toward more multilateralism and the principle of "absolute non-intervention."[84] Latin American diplomats advanced, as a unified set of ideas, the "condemnation of conquest[] and territorial acquisitions," the promotion of peace, sovereign equality, and an absolute prohibition of intervention.[85] The Montevideo Convention and the Anti-War Treaty of Saavedra Lamas from the early 1930s brought these ideas together by entrenching each state's authority in its territorial boundaries, limiting war and other forms of intervention, and condemning U.S. policy.[86]

Eventually, Europe and the world entered another devastating global conflict that began with Italy's conquest of Ethiopia.[87] Questions about the War's effects on the distribution of territory preoccupied leaders from the start. In 1941, Churchill and Roosevelt issued a joint declaration—the Atlantic Charter—that began by renouncing "aggrandizement, territorial or other" and expressing the "desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned."[88] By the end of the War, the territorial conquests of the losing countries were reversed, though the Allies also agreed to some territorial reallocations.

C. Lessons from History

This history brings into view three important themes that get lost when the demise of conquest and the prohibition of annexations are lumped together with—and attributed to—the prohibition on the use of force. First, long before international law became an instrument

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[83] Convention on the Rights and Duties of States art. II, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. (entered into force Dec. 26, 1934).

[84] JUAN PABLO SCARFI, THE HIDDEN HISTORY OF INTERNATIONAL LAW IN THE AMERICAS: EMPIRE AND LEGAL NETWORKS 150–60 (2017).

[85] *Id*. at 151.

[86] *Id.* at 150–52.

[87] On state practice and non-recognition during World War II, see BROWNLIE, *supra* note 45, at 413–18.

[88] Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, U.S.–Gr. Brit., Aug. 14, 1941, 55 Stat. 1603 [hereinafter "Atlantic Charter"].

for outlawing war, it was an instrument for allocating and consolidating state power over territory, with the entrenchment of each state's authority in its designated territory. Regulating the disposition of territory, including its annexation, was central to this project on territorial entrenchment. Second, limits on territorial annexations were motivated only in part by the desire to prevent war. Prohibiting annexations was also tied to the establishment of state authority and to ideas about self-determination and non-intervention.

Third, powerful states, such as Britain and the United States, eventually supported various limits on the use of force and on annexations, without fully embracing the broader project to create more politically independent states, free from other forms of external interference. In other words, the distinction between limiting annexations as part of a project to regulate war and limiting them as the first step in an ambitious project to strengthen states as states tracks some of the power dynamics of the period. Outlawing wars of aggression eventually aligned with the objectives of powerful states that had historically benefited from annexations, suffered significant losses in the associated wars, and completed their projects of colonial acquisitions. A vision for statehood was advanced by newly independent states that wanted to be free from domination, so that they could realize their self-determination and establish themselves as fully independent states, in their own territories. As we will see, this division between those who saw limiting annexations as primarily about war and those who tied it to the broader project on statehood and self-determination continued well into the post-World War II period.

III. Convergence

Following World War II, states adopted the UN Charter, with its comprehensive collective security system for regulating the use of force. Questions about the lawfulness of annexations persisted for decades after it was adopted. Below, we describe how the absolute prohibition on forcible annexations, along with the associated duty of non-recognition, was established during the globally transformative wave of decolonization that spanned the 1950s and 1960s. As new states pushed to end colonialism and establish their independence, free from external domination, they drew on all three of the normative projects that have historically been bound up with annexations—on territorial entrenchment, self-determination, and interstate peace. The broadest ambitions for their decolonization agenda did not, in the end, come to fruition; militarily powerful states pushed back on much of that agenda. But powerful states ultimately did accept and become important guarantors of the prohibition of annexations. The prohibition thus became anchored in the international legal order, with the Declaration on Friendly Relations marking an important turning point. In practice, too, annexations plummeted.

A. Open Questions in the UN Charter

Article 2(4) of the UN Charter, which is also widely understood to reflect customary international law, obligates states to refrain from "the threat or use of force against the territorial integrity or political independence of any state," with two exceptions.[89] States may use force in individual or collective self-defense, if an "armed attack" occurs, or pursuant to a decision of the UN Security Council.[90] Wars that result in the annexation of territory come within the terms of Article 2(4) because they involve the "use of force" against the "territorial integrity" of a state. But on its face, Article 2(4) regulates only the use of force; it does not address issues relating to the disposition of title to territory, as the prohibition of annexation does.

The reference in Article 2(4) to "territorial integrity" might be interpreted to prohibit all annexations following the use of force. As we have seen, that argument was advanced on the basis of comparable language in Article 10 of the Covenant of the League of Nations.[91] Alternatively, the text of Article 2(4) might be interpreted to prohibit annexations only after *unlawful* uses of force, on the ground that, if the initial use of force is unlawful, any territorial gains acquired from that use of force must also be unlawful.[92] This interpretation leaves open the question of annexations pursuant to lawful uses of force.

The Charter did not itself resolve this issue. In the years after the Charter's adoption, a number of prominent international lawyers suggested that annexations pursuant to lawful uses of force were permissible, citing the territorial reallocations at the end of World War II, the moral imperative to punish aggressors, and concerns that states acting in self-defense might need to take territory to ensure their future safety.[93] Indeed, in 1946, Sir Robert Jennings stated that, as a matter of positive law, "[a] successful belligerent may acquire title to his enemy's *imperium* either by treaty of cession or by subjugation," such that, "[i]f after the German surrender, the Allies had indeed annexed the German state there could have been no doubt about the nature of

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[89] UN Charter art. 2, ¶ 4.

[90] *Id.* arts. 51, 39–42.

[91] *Supra* notes 67–68 and accompanying text.

[92] *See supra* note 3 and accompanying text.

[93] BROWNLIE, *supra* note 45, at 408–409; ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 51–52 (1968); P. Malanczuk, *Das Golan-Gesetz im Lichte des Annexationsverbots und der occupatio bellica*, 42 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 261, 280-2 (1982); LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 574–75 (H. Lauterpacht ed. 8th ed. 1955); Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L 344–47 (1970).

their right in law to do so."[94] According to Jennings, their right to annex Germany also included the right *not* to annex Germany but to institute reforms in Germany that likely would have overstepped the bounds of a mere occupying power that had not completed the conquest and secured sovereign title.[95]

Moreover, when the UN International Law Commission (ILC) considered the question during its early years, it did not conclude that annexations were prohibited across the board. Instead, the Draft Code of Offences against the Peace and Security of Mankind that the ILC adopted in 1954 posited that international law prohibited "the annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law."[96] The ILC had adopted similar language in its 1949 Draft Declaration on Rights and Duties of States.[97] Thus, in the years after the Charter's adoption, the ILC condoned, even if only implicitly, annexations following lawful uses of force. During this period, influential commentators also recognized that forcible annexations might, in certain circumstances, be lawful.[98] But that was not the end of the matter.

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[94] Jennings, *supra* note 15, at 136, 137.

[95] *Id*. at 133–37.

[96] *Draft Code of Offences Against the Peace and Security of Mankind with Commentaries* (1954) art. 2(8), *printed in* [1951] 2 Y.B. INT'L L. COMM'N 134, 136, UN Doc. A/CN.4/SER.A/1951/Add.1. A 1951 draft of what would become the 1954 Draft Code suggests that the question of whether annexations were prohibited across the board or only after unlawful uses of force was squarely before governments. In the 1951 draft, which was circulated to states, the ILC recommended defining as an offense "[a]cts by authorities of a State resulting in or directed toward the forcible annexation of territory belonging to another State, or of territory under an international regime." *Id*. at 59. In making that recommendation, the ILC changed the special rapporteur's proposal to define the offense as "[t]he annexation of territories in violation of international law." *Id*. The 1954 Draft Code uses neither of those formulations and instead contains the "by means of acts contrary to international law" language. *See* generally Eugene Kontorovich, *Resolution 242 Revisited: New Evidence of the Required Scope of Israeli Withdrawal*, 16 CHI. J. INT'L L. 127, 141–44 (2015) (discussing the work of the ILC on the 1954 Draft Code).

[97] *See Draft Declaration on the Rights and Duties of States* (1949) arts. 9, 11, *reprinted in* [1949] 1 Y.B. INT'L L. COMM'N 287, UN Doc. A/CN.4/SER.A/1949 (establishing a duty not to recognize "any territorial acquisition by another State acting in violation of" "the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."). The accompany commentary explains that the duty of non-recognition applies to "any territorial acquisition resulting from war or other illegal use of force." *Id*. at 289.

[98] *See* sources at *supra* note 93; Kontorovich, *supra* note 96, at 141, 146 n.100 (2015); LAURI MÄLKSOO, ILLEGAL ANNEXATION AND STATE CONTINUITY: THE CASE OF THE INCORPORATION OF THE BALTIC STATES BY THE USSR 30 (2003) (explaining that "[t]he recognition of conquest by the community of States was not completely ruled out by Robert Jennings even as late as in 1963").

B. The Decolonization Agenda

As formerly colonized states increased in numbers and fought to secure the full benefits of statehood, they pushed for a variety of legal norms that linked the settlement of their territorial borders to their equal sovereignty, self-determination, and freedom from foreign domination. They fostered subsidiary regional norms on territorial surety and non-intervention in an effort to advance "common global norms of territorial sovereignty," to "challenge great powers' dominance and hypocrisy," and to "secure regional autonomy."[99]

These themes were all present at the Bandung Conference, a 1955 meeting between Asian and African states that the United States and Great Britain actively tried to undercut.[100] The Conference focused on territorial integrity, sovereignty, and security.[101] It was also motivated by the desire to address the perceived hypocrisy of powerful states with respect to the norms on non-intervention and by a concern that the United Nations would be ineffective in limiting superpower intervention, to the detriment of their full independence.[102] Participants at the Conference thus sought to advance "a new vision of international relations" based on principles of non-intervention and self-determination, broadly defined.[103]

The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly as Resolution 1514, ties together norms on territorial settlement, state sovereignty, self-determination, and interstate peace in the service of

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[99] Amitav Acharya, *Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World*, 55 INT'L STUD. Q. 95, 115 (2011).

[100] *See generally* KWEKU AMPIAH, THE POLITICAL AND MORAL IMPERATIVES OF THE BANDUNG CONFERENCE OF 1955: THE REACTIONS OF THE US, UK AND JAPAN 63–160 (2007).

[101] One observer describes the legacy of Bandung in these terms: "the international community will never recognize acquisition of territory not based on internationally and legally recognized means." Arif Havas Oegroseno, *The Bandung Declaration in the Twenty-First Century Are We There Yet?*, *in* BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 631, 634 (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017); *see also* Samuel L. Aber, *Worldmaking at the End of History: The Gulf Crisis of 1990–91 and International Law*, 117 AM. J. INT'L L. 201, 231 (2023) ("Anti-colonial international law thus 'focused especially on the principle of sovereign state equality and the related rule of non-intervention and the prohibition of the use of force.'") (quoting Jochen von Bernstorff & Philipp Dann, *The Battle for International Law: An Introduction*, *in* THE BATTLE FOR INTERNATIONAL LAW 15–16 (Jochen von Bernstorff & Philipp Dann eds. 2019)).

[102] Acharya, *supra* note 99, at 108–09; Antony Anghie, *Bandung and the Origins of Third World Sovereignty*, *in* BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 535, 536 (Luis Eslava, Michael Fakhri, and Vasuki Nesiah, eds. 2017).

[103] Anghie, *Bandung and the Origins of Third World Sovereignty*, *supra* note 103 at 539.

the decolonization agenda.[104] "Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory," the Declaration says, and "[c]onscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples," "[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[105] Here, territorial settlement is the basis for states' sovereign authority, self-determination, and "peaceful and friendly relations."

Although the decolonization agenda tied these norms together—and linked them to prohibiting annexations—it did not treat them as one and the same. Rather, it in various ways mediated the tensions among them. Perhaps most significantly, some non-aligned states separated their positions on decolonization from the broadest possible applications of Article 2(4). As Christine Gray explains, these states began "to claim a legal right not only to self-determination but also for national liberation movements to use force under international law, and for third states to help them," to end colonialism.[106] They claimed that using force to retake colonized territory was permissible—not a violation of Article 2(4)—because it restored the territorial integrity and realized the self-determination of peoples involved. India expressly advanced this position before the UN Security Council in 1961, when it forcibly removed colonial Portugal from Goa.[107] "[T]he situation with which we are faced," India said, "is a question of getting rid of the last vestiges of colonialism in India."[108] "[P]art of our country is illegally occupied by right of conquest by the Portuguese," and "since the whole occupation is illegal as an issue—it started in an illegal manner, it continues to be illegal today, and it is even more illegal in the light of resolution 1514 (XV)—there can be no question of aggression."[109] The

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[104] G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

[105] *Id*.; *see also* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, 2019 I.C.J. 95, ¶ 160 (Feb. 25) (emphasizing that respect for territorial integrity of a non-self-governing territory is a "key element" of the exercise of the right to self-determination); Acharya, *supra* note 99, at 113 (describing *uti posseditis* as a "Latin American subsidiary norm" that "clearly supported and contributed to the global territorial integrity norm"); Shaw, *Territory in International Law*, *supra* note 16, at 123-25.

[106] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 69 (4th ed. 2018).

[107] UN Doc. S/PV.987 (Dec. 18, 1961); *see generally* JAMIE TRINIDAD, SELF-DETERMINATION IN DISPUTED COLONIAL TERRITORIES 188–95 (2018).

[108] UN Doc. S/PV.987 (Dec. 18, 1961) at ¶ 40.

[109] *Id*. at ¶ 46.

debate on Goa ended without resolution. Colonial and Western states resisted such claims about the use of force on the ground that they undermined Article 2(4), but the claims continued to appear in General Assembly debates and, often with coded ambiguity, resolutions of the period.[110] As such, the question of whether "reverse annexations" were permissible to retake territory that colonial powers had annexed remained open—and very much debated—in the Charter era.

This question was, according to Georges Abi-Saab, "[t]he toughest battle which was fought by the Third World" in the negotiations for the 1970 Declaration on Friendly Relations.[111] Non-aligned states, as a group, sought "explicitly to establish the use of force in the exercise of the right of self-determination as one of the exceptions to the [Article 2(4)] prohibition," despite the strong objections of Western states.[112] The final text of the Declaration does not recognize the right to use force in such circumstances, but it arguably reaches the same result with different language. It purports to prohibit any use of force that "deprives peoples [fighting colonialism] of their right to self-determination and freedom and independence," while at the same time entitling such peoples "to seek and receive support in accordance with the purposes and principles of the Charter "[i]n their actions against, and resistance to, such forcible action."[113] Here, claims about self-determination took priority over—and worked to limit the broadest possible applications of—the norms on territorial entrenchment and interstate peace.[114]

At the same time, these norms on territorial entrenchment and interstate peace worked to limit the broadest possible applications of ideas about self-determination.[115] The Friendly Relations Declaration

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[110] GRAY, *supra* note 106, at 68–73.

[111] Georges Abi-Saab, *The Third World and the Future of the International Legal Order*, 29 REVUE EGYPTIENNE DE DROIT INT'L 27, 45 (1973).

[112] *Id*.

[113] Friendly Relations Declaration, *supra* note 1.

[114] Rosalyn Higgins nicely captures the serious implications of this position for Article 2(4):

> The Charter reference in Article 2(4) to 'territorial integrity' must be taken to refer to well established *de facto* possession, and not to *de jure* title. Were this not so, attacks would be permitted in every boundary dispute, in every dispute to territorial title. Consequently, even if Portuguese title to Goa was in doubt, an attack against its *de facto* possession is not justifiable under the Charter.

ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 187 (1963).

[115] *See* TIMOTHY WILLIAM WATERS, BOXING PANDORA: RETHINKING BORDERS, STATES, AND SECESSION IN A DEMOCRATIC WORLD 39–53 (2020).

endorses the principle of self-determination to end "the subjugation of peoples to alien subjugation, domination and exploitation" and posits that "its effective application" "is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality."[116] However, the Declaration also ties self-determination to sovereign states with settled territories.[117] It provides that "[e]very state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country," and that nothing contained in the Declaration "shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States, conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory." [118] Self-determination was to be exercised within the borders of decolonized states and as against external powers that might intrude on their independence.

In addition to addressing the appropriate responses to past annexations, the Declaration articulates a blanket prohibition of annexations going forward: "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force."[119] This blanket prohibition represented a victory for previously colonized states, Abi-Saab explains, because it applies "regardless of whether the use of force in question was in itself justified or unjustified."[120] In other words, it resolves the question that the ILC had earlier considered about the lawfulness of annexations following lawful uses of force—and it resolves that question differently than the ILC did.

The Declaration also articulates the duty not to recognize territorial annexations: "No territorial acquisition resulting from the threat

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[116] Friendly Relations Declaration, *supra* note 1, pmbl.

[117] *See* UMUT ÖZSU, COMPLETING HUMANITY 60 (2023) ("The compromise that was eventually registered in the Friendly Relations Declaration's fifth principle canonized a vision of world order in which self-determination was useful mainly as a way of achieving and consolidating states that would be responsive to the claims of (some but not all) 'peoples'"); Marcelo G. Kohen, *Self-Determination*, in THE UN FRIENDLY RELATIONS DECLARATION AT 50: AN ASSESSMENT OF THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW 133, 157–58 (Jorge E. Viñuales ed. 2020) (the Declaration makes clear "the self-determination would not run against the territorial integrity of existing states").

[118] Friendly Relations Declaration, *supra* note 1, ¶ 1.

[119] *Id*.

[120] Abi-Saab, *supra* note 111, at 48.

or use of force shall be recognized as legal."[121] Non-aligned states wanted an even broader duty of non-recognition. They opposed the "as legal" language because they wanted not only a duty not to recognize the legality of an annexation, but also a duty not to acknowledge any *de facto* control that aggressor states might exercise over conquered territory.[122] For example, the Syrian representative said that "'the words "as legal" [. . .] were unacceptable to his delegation, which was deeply concerned at attempts to interpret the statement as excluding de facto situations created by the illicit use of force.'"[123] In support of this position, the representative of Mexico spoke on behalf of other Latin American countries to refer to the long history in the region of denying recognition to forcible territorial acquisitions.[124] However, states from the global North did not accept this broader formulation.[125] Today, the duty not to recognize "as legal" territorial annexations is a well-established international legal norm; it applies no matter whether the UN Security Council takes any action on the issue and without regard to questions about the lawfulness of the associated use of force.[126]

The Declaration was drafted over the resistance of some states from the global North, especially the United States, that were concerned about diminishing the significance and terms of the Charter.[127] These states resisted norms that would limit their conduct beyond what the Charter had already prohibited or that would otherwise circumscribe the scope of the Charter, under which they had outsized power

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[121] Friendly Relations Declaration, *supra* note 1, ¶ 1. Although the Friendly Relations Declaration distinguishes between occupation following lawful or unlawful uses of force, it does not draw a comparable distinction for the forcible acquisition of territory. *See also* G.A. Res 3314 (XXIX), Definition of Aggression, annex art. 3 (Dec. 14, 1974) (defining as an act of aggression "[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such attack or any annexation by the use of force of the territory of another State or part thereof").

[122] Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance*?, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES 99, 108–10 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006) [hereinafter "Talmon, *The Duty not to Recognize*"].

[123] Quoted in *id*. at 109.

[124] *Id.* at 109–10.

[125] *Id.* at 110.

[126] *Draft Articles on Responsibility of States for Internationally Wrongful Acts* art. 41(2), Commentary to art. 41, (5)–(12), *reprinted in* [2001] 2 Y.B. INT'L L. COMM'N 26, UN Doc. A/CN.4/SER.A/2001/Add.1.

[127] Christine Gray, *The principle of the Non-Use of Force*, *in* THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST 33, 36 (Vaughan Lowe & Colin Warbrick eds. 1994).

by virtue of the French, U.K., and U.S. positions on the Security Council. Their initial resistance notwithstanding, the Declaration was eventually adopted by consensus, without a vote. Even after it was adopted, some states continued to suggest, both in concrete cases and in more general declarations, a right to use force to reclaim territory that had unlawfully been colonized or seized—and thereby to restore the acting state's territorial integrity.[128] With time, however, this claim lost traction and faded from view.[129] And the blanket prohibition of annexations took hold.[130] Perhaps because the Declaration of Friendly Relations was a consensus document, it played a significant role in establishing the prohibition and related norms in international law, as is evident in the International Court of Justice's citations to it.[131] The UN Security Council and the UN General Assembly have also helped to solidify the prohibition by condemning forcible acquisitions of territory in concrete cases.[132]

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[128] G.A. Res. 36/103 (Dec. 9, 1981) (articulating a "right and duty of States fully to support the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes, as well as the right of these peoples to wage both political and armed struggle to that end, in accordance with the purposes and principles of the Charter of the United Nations").

[129] *See* GRAY, *supra* note 106, at 72–73; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1627–28 (1984).

[130] *See infra* note 153; Charter of the Organization of American States art. 17, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S 3 ("The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."); The Final Act of the Conference on Security and Cooperation in Europe (Helsinki Declaration) art. 1(a)(IV), Aug. 1, 1975, 14 I.L.M. 1292 ("The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.").

[131] *E.g.*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95, ¶¶ 155, 180 (Feb. 25); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 87 (July 9).

[132] S.C. Res. 242 (Nov. 22, 1967) (on Israeli-Arab conflict); S.C. Res. 874 (Oct. 14, 1993) (on foreign-assisted coup d'etat in Azerbaijan); S.C. Res. 896 (Jan. 31, 1994) (on Abkhaz–Georgian conflict); S.C. Res. 380 (Nov. 6, 1975) (on Kingdom of Morocco in Western Sahara); S.C. Res. 389 (Apr. 22, 1976) (on Indonesia in East Timor); S.C. Res 478 (Aug. 20, 1980) (condemning Israel's enactment of a "basic law" on Jerusalem); S.C. Res. 497 (Dec. 17, 1981) (condemning Israel's imposition of Israeli law, jurisdiction, and administration in occupied Syrian Golan Heights); S.C. Res. 541 (Nov. 18, 1983) (condemning the "declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus").

C. The Post-War Security Architecture

Militarily powerful states did not share the ambitious agenda to create a "more egalitarian world order" on the basis of expansive claims of non-intervention and political and economic self-determination.[133] But these states eventually did support—and act as guarantors of—the prohibition of annexations. For them, the prohibition was more directly tied to the world's security architecture and the regulation of the use of force.

The UN Charter provides only the starting framework for global security architecture that the most powerful states built following World War II. After the Charter was adopted, the two superpowers quickly fell into the Cold War, and each entered into collective defense arrangements with other states to try to secure their own footing—and establish their own global dominance. In 1955, the Soviet Union entered into the Warsaw Pact with seven other states in Eastern and Central Europe.[134] U.S. security arrangements were more expansive and proved to be more resilient. In 1949, the United States and eleven other countries created the North Atlantic Treaty Organization (NATO).[135] Twenty other countries have since also joined NATO.[136] In addition, the United States entered into defense arrangements with Australia and

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[133] Samuel Moyn & Umut Özsu, *The Historical Origins and Setting of the Friendly Relations Declaration*, *in* THE UN FRIENDLY RELATIONS DECLARATION AT 50 THE UN FRIENDLY RELATIONS DECLARATION AT 50: AN ASSESSMENT OF THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW, *supra* note 117, 23, 25; *see also* Aber, *supra* note 101, at 250.

[134] Treaty of Friendship, Cooperation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Rumanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic, May 14, 1955, *available at* http://avalon.law.yale.edu/20th_century/warsaw.asp.

[135] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; *see also NATO Member Countries*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_52044.htm (Apr. 2, 2024).

[136] *Id.*

New Zealand (signed in 1951),[137] the Philippines (1951),[138] South Korea (1953),[139] Thailand (1950),[140] Japan (1960),[141] and most of the Americas (1947).[142] It has separately entered into dozens of other security arrangements with territorial entities across the globe, including Taiwan.[143] These security arrangements were built on the right to use force with the consent of the territorial state and in collective self-defense, as reflected in the Charter. They in effect bolstered the prohibition of annexations because they protected from attack states that might have been unable to protect their own territories, without the heft of a superpower behind them. Put differently, although they were tied to competition for dominance among powerful states, they also secured the territorial integrity of dozens of other states—although, of course, not of the masses from the non-aligned group.[144]

Once the absolute prohibition of annexations was crystallized, with the 1970 Friendly Relations Declaration, the most blatant challenge to it, before Russia began invading Ukraine in 2014, came at the end of the Cold War, with Iraq's 1990 invasion of Kuwait. The invasion was, in the words of the UN Secretary-General, "the first instance since the founding of the Organization in which one Member State

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[137] Mutual Defense Assistance Agreement, Austl.–U.S., Feb. 1, 1951/Feb. 20, 1951, 2 U.S.T. 644; Agreement relating to Mutual Defense Assistance, N.Z.–U.S., June 19, 1952, 3 U.S.T. 4408.

[138] Mutual Defense Treaty, Phil.–U.S., Aug. 30, 1951, 3 U.S.T. 3947.

[139] Mutual Defense Treaty, S. Kor.–U.S., Oct. 1, 1953, 5 U.S.T. 2368.

[140] Agreement Respecting Military Assistance, Thai.–U.S., Oct. 17, 1950, 3 U.S.T. 2675.

[141] Understanding revising references to the mutual security treaty (T.I.A.S. 4509) and the administrative agreement in the mutual defense assistance agreement of March 8, 1954 (T.I.A.S. 2957), Jap.–U.S., Jan. 19, 1960, 11 U.S.T. 1758.

[142] Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, T.I.A.S. 1838, 21 U.N.T.S. 77.

[143] On Taiwan, see Mutual Defense Treaty Between the United States and the Republic of China, U.S.-Rep. of China, Dec. 2, 1954, 6 U.S.T. 433; *see also* Goldwater v. Carter, 444 U.S. 996 (1979) (on U.S. termination). For evidence of "the massive size and wide variety of types of security cooperation constituting the U.S. portfolio," see MICHAEL J. MAZARR, ET. AL., RAND CORP., SECURITY COOPERATION IN A STRATEGIC COMPETITION 5, 11 (2022), https://www.rand.org/pubs/research_reports/RRA650-1.html#:~:text=The%20researchers%20found%20that%20security,geopolitical%20and%20an%20operational%20focus.

[144] Some of these states even tried to establish a "duty of States to refrain from any measure which would lead to the strengthening of existing military blocs or the creation or strengthening of new military alliances, interlocking arrangements, the deployment of interventionist forces or military bases and other related military installations conceived in the context of great-Power confrontation." G.A. Res. 36/103, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, annex, ¶ II(i) (Dec. 9, 1981).

sought to completely overpower and annex another."[145] As the incident unfolded, states broadly accepted that it presented a historic moment and a threat to state sovereignty and territorial integrity.[146] But here again, agreement on the significance of this prohibition masked fundamentally different visions about its normative premises. Non-aligned states tended to link the prohibition to their broader agendas of political and economic self-determination. For them, repelling Iraq's invasion of Kuwait meant that more should also be done to help realize the statehood and self-determination of the Palestinian people.[147]

By contrast, the United States, which led the military campaign against Iraq, framed the war in narrower peace-and-security terms, tied to the importance of oil in the world economy and the power of the UN Security Council. The United States used Iraq's invasion as an occasion to breathe new life into the Security Council after years of Cold-War dormancy and to assert its own dominance. As Samuel Aber has explained, the UN Security Council became a "source of authority" for the United States to make itself the guarantor of global security, as defined by it, "simply because no one else can do the job."[148] It was, even among the powerful permanent members of the Council, the undisputed hyperpower—"the world's P-1."[149] Enforcing the prohibition of annexations in the Kuwait case thus was consistent with the visions both of non-aligned states that sought to entrench their authority in their own territories, free from external interference, and of the United States, which sought to use the Charter's collective security system to reinforce its own dominance. On the need to enforce the prohibition of annexations and expel Iraq from Kuwait, these two distinct agendas for the international order converged.[150]

Indeed, throughout this entire period, the world's most militarily powerful states did not try to annex foreign territory to expand their own dominions. Perhaps they no longer needed to annex foreign terri-

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[145] *See* GRAY, *supra* note 106, at 298.

[146] Aber, *supra* note 101, at 210.

[147] *Id*. at 209, 212–13, 238.

[148] *Id*. at 250.

[149] *Id*. at 201, 250 (citing W. Michael Reisman's description of UN Security Council dynamics); *see* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 83 (1993).

[150] S.C. Res. 662, ¶ 2 (Aug. 9, 1990) ("Decid[ing] that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void.").

tory because they could satisfy their interests in other ways—for example, through economic domination or regime change.[151] The point still stands. Throughout the Cold War, the United States and the Soviet Union repeatedly intervened forcibly in the affairs of other states. Sometimes, they did so directly; other times, indirectly. Sometimes, with the support of the extant government; other times, against it. They were, in any event, quite willing to use force across national borders. Once the Cold War ended and the UN Security Council was reinvigorated, they, along with the Council's other members, used it to license more force across national borders. Moreover, the United States, which became the undisputed hyperpower, repeatedly pushed the boundaries on or exceeded the terms of the Charter to use still more force across national borders. In short, militarily powerful states did not stop using force across national borders with the adoption of the Charter. But even as they continued to use force, they stopped using it, or even claiming the right to use it, to annex foreign territory.[152] They were not alone. Efforts to annex the territories of other states, whether in whole or in part, dropped precipitously after World War II and especially after the 1960s.[153] On this particular prohibition, if on little else in the global security architecture, states broadly converged.

As we have shown, this convergence is evident both in states' normative pronouncements and in their operational practice. Because it reflects the point of intersection among three separate normative projects—on territorial entrenchment, interstate peace, and self-determination—support for it might have been thin or fragile, a product of the

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[151] *Cf.* Anastasiya Kotova & Ntina Tzouvala, *In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law*, 116 AM. J. INT'L L. 710, 719 (2022) (noting that "modern imperialism" tends "to work through (semi-)peripheral sovereignty rather than openly against it"); Umut Özsu, reviewing SUSAN PEDERSEN, THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE, 34 LAW & HIST. REV. 827, 829 (2016) (arguing that, with the League of Nations mandates, which were instituted instead of outright annexations, "the line between formal and informal domination is always a highly fluid one, and the distinction between colonialism sensu stricto and the League's regime of mandatory administration has typically been overdrawn and exaggerated.").

[152] Others have also noticed this trend. *E.g.*, WATERS, *supra* note 115, at 87 (explaining that, although the prohibition of the use of force is "leaky," "we find few examples of annexation").

[153] *See* Dan Altman, *The Evolution of Territorial Conquest After 1945 and the Limits of the Territorial Integrity Norm*, 74 INT'L ORG. 490, 501 (2020). The data show three significant trends. First, fewer states have attempted to annex entire other states since the end of World War II, with the trend line dropping to almost zero at the end of the 1950s. *Id*; *see also* TANISHA FAZAL, THE POLITICS AND GEOGRAPHY OF CONQUEST, OCCUPATION, AND ANNEXATION 228 (2017) (arguing that "the emergence and strengthening of the norm against conquest accounts for the virtual cessation of violent state death after 1945"). Second, efforts to annex parts of other states have also gradually declined, with the exception of a slight uptick in the 1960s. Third, starting in the 1970s, annexations of territory shifted to areas with "little strategic value" and without "significant populations," and did not necessarily involve visible uses of force. *Id.* at 502, 504–05, 510-11.

particular social and political forces of the moment. No doubt, not everyone was equally committed to all three projects, or to the particular balance that has been struck among them, where their policy rationales have diverged. But however contingent this prohibition might have been, it became firmly rooted in the international legal and pollical order.

In the end, its crystallization should not be attributed only, or even primarily, to the purported aversion of powerful countries to war following the horrors of the World Wars.[154] The prohibition of annexations was also driven by the decolonization movement, which worked to address the horrors that *they* had experienced and to create a new international order with less domination and more space for broad visions of self-determination.[155] The decolonization movement sought to achieve far more than just the prohibition of annexations, but prohibiting annexations was a basic precondition for the rest of that agenda. So long as annexations remained lawful, their independent statehood would be at risk. Perhaps because so much of the rest of the decolonization agenda failed, however, even legal historians who focus on it tend not to highlight its significance in helping to establish this prohibition.[156]

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[154] *See* Fazal, *supra* note 11 ("It is not an accident that the norm against territorial conquest emerged after World War II. The horrors of that conflict, combined with the dawn of the nuclear age, incentivized the great powers to avoid future wars"). Our analysis also differs from that offered by Mark W. Zacher in *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215, 241-44 (2001). He attributes support for the norm in developing countries largely to their military weakness, concerns about territorial irredentism, and the norm's enforcement by Western states. We emphasize the norm's connection to the broader agenda on self-determination and to countering and resisting Western assertion of power.

[155] To be sure, not all newly decolonized and non-aligned states were fully committed in practice to the broadly emancipatory agenda that they together advanced. For example, Morocco used force to claim territory in Western Sahara, *see infra* notes 234–238 and accompanying text; Indonesia, to take East Timor, *see* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2d ed. 2006) [hereinafter, "CRAWFORD, The CREATION OF STATES"]; and China, in Tibet, *see id.* at 324–25. But as we have shown, newly decolonized and non-aligned states, as a group, still advanced such an agenda on the world stage. Indonesia's attempted annexation of East Timor was ultimately unsuccessful. *Id.* at 561. Morocco still occupies Western Sahara, and China controls Tibet.

[156] They tend instead to emphasize the failure of the broader agenda and the repurposing of international law to reproduce, in different forms, the structures for domination. *E.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 215 (2014) ("[E]ven while the West asserted that colonialism was a thing of the past, it nevertheless relied precisely on those relationships of power and inequality that had been created by that colonial past to maintain its economic and political superiority."); GETACHEW, *supra* note 13, at 13 (highlighting "the normative erosion of self-determination," as understood by these states, and "the resurgence of international hierarchy and a newly unrestrained American imperialism"); Margot E. Solomon, *From NIEO to Now and the Unfinished Story of Economic Justice*, 62 INT'L & COMP. L. Q. 31, 34, 36 (2013) (arguing that proposals for a new international economic order sought to refashion "a system that was premised on acutely asymmetrical relationships,

IV. SIGNIFICANCE

The Friendly Relations Declaration was the culmination of more than a century of efforts to prohibit forcible annexations. The Declaration articulates the prohibition both as a distinct norm, separate from others on the use of force, and as absolute, admitting no exception for annexations committed with lawful uses of force. We argue here that that is how the prohibition should be understood today—as both doctrinally distinct from other, related norms and absolute in its scope of application. It should also be recognized as foundational to the international legal order, warranting the status of *jus cogens*. It ties together all three of the normative projects with which it has historically been intertwined. As each of these three projects is widely understood as being independently foundational in contemporary international law, the prohibition of annexations, which brings them together, is as well. Because it is distinct, its full content cannot be captured by any one of them.

A. Interstate Peace

The prohibition of annexations is central to the project to outlaw aggressive wars and thus to promote interstate peace. As research in political science shows, the desire to acquire territory has for centuries been a principal impetus for acts of military aggression.[157] States routinely disagree about a range of issues, including trade policy, regime type, the proliferation of weapons of mass destruction, and human rights, but numerous studies show that disputes over territory are more likely than other kinds of disputes to become violent.[158] Once militarized, territorial disputes are also more likely than other kinds of disputes to escalate into longer-term and larger-scale wars.[159] Thus, despite the drop in annexations since the end of World War II, even annexations of "lower value" territory "remain central to the causes of interstate wars."[160] To the extent that the prohibition of annexations reduces the prospects of acquiring territory through war, it likely also

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which found reflection in international law[,]" and "failed to embed any positive requirements to advance a comprehensive system of equitable benefit-sharing").

[157] *See* Monica Duffy Toft, *Territory and War*, 51 J. OF PEACE RESEARCH 185, 186 (2014).

[158] *See* Altman, *supra* note 153, at 505–07; Ingrid (Wuerth) Brunk, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 308 (2017); GARY GOERTZ, PAUL F. DIEHL & ALEXANDERU BALAS, THE PUZZLE OF PEACE: THE EVOLUTION OF PEACE IN THE INTERNATIONAL SYSTEM 94 (2016).

[159] *See* Marc L. Hutchinson & Daniel G. Starr, *The Territorial Peace: Theory, Evidence, and Implications*, *in* THE OXFORD ENCYCLOPEDIA OF EMPIRICAL INTERNATIONAL RELATIONS THEORY (2018); Shoko Kohama, *Territorial Acquisition, Commitment, and Recurrent War*, 19 INT'L RELS. ASIA-PACIFIC 269, 269–295 (2019).

[160] Altman, *supra* note 153, at 502, 517.

reduces the incentives to go to war[161]—a point that the UN General Assembly seemed to recognize when, in its 1974 definition of aggression, it provided that "[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."[162]

As we have explained, some international lawyers situate the prohibition of annexations, as a doctrinal matter, in Article 2(4) of the UN Charter.[163] The two have a close relationship. But they remain distinct. The prohibition of annexations, like the old right of conquest, regulates the acquisition of sovereign title to territory. Article 2(4) regulates the use of force. Take Russia's 2014 and 2022 actions against Ukraine. Its uses of force in Ukraine violated Article 2(4), while its purported acquisitions of Ukrainian territory concerned the transfer of sovereign title and violated the prohibition of annexations.

The precise relationship between the prohibition and Article 2(4) might be described in different ways. Recall that the text of Article 2(4), which prohibits "the threat or use of force against the territorial integrity" of any state, can be interpreted to prohibit any annexation of territory following any threat or use of force, whether lawful or unlawful. This interpretation was not sufficiently dominant for the ILC to accept it in the years following the Charter's adoption, but now that the Friendly Relations Declaration has articulated it, one might read it back into Article 2(4), as some scholars do.[164] Alternatively, some link the prohibition to Article 2(4) by reasoning that, if the use of force is unlawful, any annexation resulting from that use of force must also be unlawful.[165] Others lump the prohibition, the Charter, and the Friendly Relations Declaration together, without explaining the relationships among them.[166]

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[161] The support is symbiotic. Just as the prohibition of annexations helps to support the general prohibition on the use of force by reducing an incentive to use force, the one on the use of force helps to support the prohibition of annexations because prohibiting force in general terms also prohibits some uses of force that result in territorial changes. *Compare* Altman, *supra* note 153, at 493–97 (arguing that the decline in conquest is a product of the decline in interstate war); *with* Zacher, *supra* note 154, at 243 (arguing that the decline in interstate war is a product of the decline in conquest). On the decline of war generally, see Azar Gat, *Is War Declining and Why*? 50 J. OF PEACE RES. 149 (2012). Uncontested, however, is that conflict over territory has been—and apparently still is—a central cause of interstate war.

[162] G.A. Res. 3314 (XXIX), Definition of Aggression, annex ¶ 5(3) (Dec. 14, 1974).

[163] *See supra* notes 2–4 and accompanying text.

[164] *E.g.*, AUST, *supra* note 2, at 36; Fox, *supra* note 2, at 294; *see also* KORMAN, *supra* note 14, at 209 (suggesting that the language in the Friendly Relations Declaration that prohibits annexations shows "how states interpret the Charter's prohibition of the use of force").

[165] *E.g.*, sources at *supra* note 3.

[166] *E.g.*, Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 622 (2006) ("The prohibition on annexations is part of

For three reasons, however, the prohibition of annexations should be treated as distinct, not subsumed into the general prohibition of the use of force in Article 2(4) and customary international law. First, as discussed, the Charter recognizes two exceptions to Article 2(4), leaving open the possibility that it permits annexations pursuant to lawful uses of force. This possibility generates uncertainty about the permissibility of annexations following lawful uses of force, especially in self-defense,[167] an argument with contemporary significance in situations such as the attempted annexation of the Golan Heights and East Jerusalem by Israel. International law should be clear that annexations are prohibited across the board, even when the use of force that brings them about is permissible. Relying on Article 2(4) or the analogue in customary international law does not by itself satisfy this objective.

Second, the scope of application of Article 2(4), which in general prohibits threats or uses of force, is itself open to debate. The ICJ has "coupled" threats and uses of force together, such that, "[i]f the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4."[168] But the question of what amounts to a threat to use force, as opposed to just a display of capacity to use force, lacks a clear answer.[169] Likewise, there are questions, especially in the cyber context, about when conduct that does not involve kinetic force nevertheless qualifies as a use of force, in contravention of Article 2(4).[170] Interpreting the prohibition of annexations into Article 2(4) would tie its scope of application to that of Article 2(4), leaving unaddressed annexations that are attempted through coercive behavior that does not clearly cross whatever the threshold for a threat or use of force under Article 2(4) is. The issue

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customary law and finds expression in Article 2(4) of the UN Charter and in the [Friendly Relations Declaration]."); MALCOLM N. SHAW, INTERNATIONAL LAW 425 (9th ed. 2021) (noting that the prohibition of annexations "may be stated in view of article 2(4) of the UN Charter and other practice" without explaining the relationship between Article 2(4) and this "other practice").

[167] *E.g.,* ORAKHELASHVILI, *supra* note 3, at 147 (suggesting that the legality of annexations by "innocent" parties to war is still an unresolved issue, although noting that General Assembly and Security Council Resolutions provide "support for the view that the modern prohibition of the acquisition of territory by force applies to all States, and not merely aggressor States"); *see also* notes 93–98 and accompanying text (discussing historical claims that annexations pursuant to lawful uses of force are permissible).

[168] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

[169] *See, e.g.*, OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 93 (2010).

[170] *See* NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW 3–5 (2007). Judge Higgins identified a similar threshold question under a different part of the Charter when she questioned whether measures such as the "building of a wall" fall within the meaning of "self-defense under Article 51." Separate Opinion of Judge Higgins, P. 35.

has implications, for example, in the South China Sea, where China is engaged in coercive behavior that does not necessarily entail a use of force with respect to the land features in the maritime zones of other states.[171] Again, we think the right answer is to prohibit annexations realized through any coercive measures no matter whether that threat or use of force also fits within the terms of Article 2(4).[172] In other words, the prohibition of annexations should not be limited by debates about the scope of application of Article 2(4), given that the policy considerations for each are distinct.

Third, the Charter does not in any obvious way distinguish between a use of force that violates a state's territorial integrity simply by occurring in that state and a use of force that violates its territorial integrity by annexing all or part of its territory. Neither does the Charter in any obvious way distinguish uses of force for the purpose of annexing territory from other uses of force against the state's "political independence." All of these actions violate Article 2(4). But again, the prohibition of forcible annexations is distinct from each of them; it regulates title to territory. And that regulation of title to territory ties it to the other two projects that we have discussed: on territorial entrenchment and self-determination.

B. Territorial Entrenchment and Self-Determination

The significance of territorial entrenchment is evident in several basic doctrines in international law. States collectively have provided that interstate borders, once settled, should be fixed—without regard to any use of force. For example, the 1969 Vienna Convention on the Law of Treaties permits states to invoke "[a] fundamental change of circumstances" to terminate or withdraw from a treaty in limited conditions.[173] However, even in these limited situations, states may not invoke a fundamental change of circumstances to terminate or withdraw from a treaty that "establishes a boundary."[174] The 1978 Vienna Convention on the Succession of Treaties similarly protects treaties that establish interstate borders upon the breakup or dissolution of

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[171] For a recent discussion, see Rob McLaughlin, *The Law of the Sea and PRC Gray-Zone Operations in the South China Sea*, 116 AM. J. INT'L L. 821 (2022).

[172] An ILC commentary to the 1954 Draft Code of Offenses Against the Peace and security of Mankind similarly notes that "[i]llegal annexation may also be achieved without overt threat or use of force." [1951] 2 Y.B. INT'L L. COMM'N 134, 136, UN Doc. A/CN.4/SER.A/1951/Add.1.

[173] Vienna Convention on the Law of Treaties art. 62(1), May 23, 1969, 1155 U.N.T.S. 331.

[174] *Id*. art. 62(2)(a).

a state.[175] These treaties demonstrate that international law prioritizes territorial entrenchment, even relative to other important objectives.

The ICJ has reinforced that position. When states enter into a treaty that settles an interstate border, that settlement survives the life of the treaty. "It is a principle of international law," the ICJ has explained, "that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed."[176] The ICJ's justification for this position is that "any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized."[177] Indeed, much of the ICJ's case law over the years has focused on clarifying states' territorial or, as a corollary, maritime borders—and thereby defining which state may exercise authority in which territorial unit.[178]

The doctrine of *uti possidetis* is similarly defended by reference to the importance of territorial entrenchment. The ICJ has described this doctrine as "among the most important legal principles" in international law.[179] Its "essence," the Court has explained, "lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved."[180] It is closely tied to the "intangibility of frontiers" and to "the sovereignty and territorial integrity of every state," and provides the "essential requirement of stability" for states "to survive, to develop and gradually to consolidate their independence in all fields."[181] Although the doctrine is in some contexts controversial, it was applied in the 1990s to create new states on the basis of provincial borders after the dissolution of the Soviet Union,

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[175] Vienna Convention on Succession of States in Respect of Treaties art. 11, Aug. 23, 1978, 1946 U.N.T.S. 3.

[176] Territorial and Maritime Dispute (Nic. v. Colum.), Preliminary Objections, 2007 I.C.J. Rep. 832, ¶ 89 (Dec. 3) (quoting Territorial Dispute (Lib. v. Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 73 (Feb. 3)).

[177] Territorial Dispute (Lib. v. Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 73 (Feb. 3); *see also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 80 (July 22) ("[T]he principle of territorial integrity is an important part of the international legal order").

[178] Ratner, *supra* note 22, at 808; *see also* Alberto Alvarez-Jimenez, *Boundary Agreements in the International Court of Justice's Case Law*, *2000–2010,* 23 EUR. J. INT'L L. 495 (2012).

[179] Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 26 (Dec. 22).

[180] *Id*. at ¶ 23.

[181] *Id*. ¶¶ 20, 22, 25.

Yugoslavia, and Czechoslovakia.[182] It has since also been invoked in border disputes involving states that were formerly colonized.[183]

The law of occupation also entrenches state authority over territory. Recall that nineteenth century ideas about self-determination began to change perceptions of territorial conquest and occupation.[184] Since then, the law of occupation has distinguished between physical control over occupied territory (which may be lawful) and any transfer in sovereign title to that territory (which is unlawful).[185] Because an occupying power does not itself have sovereign title and instead acts as the temporary "trustee of the ousted sovereign,"[186] it must in general respect the laws in force in that state, provide basic protections for that state's population, and not exploit that state's resources for its own gain.[187] These rules, like the prohibition itself, help to ensure that each state's sovereign title remains entrenched and difficult to disrupt or change, even with a change in territorial control.

In addition, the ICJ has emphasized the importance of territory to the self-determination of colonized and non-self-governing peoples.[188] For example, in its Advisory Opinion on the Chagos Archipelago, the Court relied on the UN General Assembly Declaration 1514 to reason that "the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory"

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[182] Steven R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Border of New States*, 90 AM. J. INT'L L. 590, 590 (1996). On the application of *uti possedits* in Asia, see Vanshaj Ravi Jain, *Broken Boundaries: Border and Identity Formation in Post-Colonial Punjab*, 10 ASIAN J. INT'L L. 261 (2020).

[183] *See* Frontier Dispute (Benin v. Niger), Judgment, 2005 I.C.J. 90, ¶¶ 23 – 46, 102, 126–41 (July 12); Land and Maritime Boundary Between Cameroon and Nigeria (Camer. v. Nigeria; Equat. Guin., intervening), Judgment, 2002 I.C.J. 303, ¶¶ 16–18 (Oct. 10); Kasikili/Sedudu Island (Bots. v. Namib.), Judgment, 1999 I.C.J. 6, ¶¶ 19, 71, 82 (Dec. 13); Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, ¶ 20 (Dec. 22); *see also* Anne Peters, *The Principle of* Uti Possidetis Juris*: How Relevant Is It for Issues of Secession?*, *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 135 (Christian Walter et al. eds., 2014).

[184] *See supra* notes 55–56 and accompanying text.

[185] BENVENISTI & LIEBLICH, *supra* note 2, at 43 ("The basic point of departure of international law is that occupation does not confer sovereignty over territory"); *see also* ICRC, COMMENTARY: CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 275 (1958) ("[T]he occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied Power of neither its statehood nor its sovereignty.").

[186] *See* Levine-Schnur, Megiddo & Berda, *supra* note 2, at 8.

[187] Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277–309, art. 43; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, arts. 27, 47, 64,

[188] *E.g.*, Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. at ¶ 25; Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 54–55 (Oct. 12).

and that "the right to territorial integrity of a non-self-governing territory" is "a corollary of the right to self-determination."[189] Similarly, the ICJ determined in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that Israel's "construction of the wall and its associated régime" through occupied West Bank territory "create a 'fait accompli' on the ground that could well become permanent . . . [and] be tantamount to *de facto* annexation," in violation of the Palestinian right to self-determination.[190] Both cases underscore that territorial entrenchment is integral to realizing the right to self-determination, consistent with the Friendly Relations Declaration. Both also make clear that coercively altering territorial borders—as annexations do—violates the right of self-determination of the people who live there.

Finally, the prohibition of annexations remains important to the contemporary right to self-determination beyond the de-colonization context. The entire population of each independent state is entitled to self-determination, as a "people," within the borders of that state.[191] The prohibition of annexations is fundamental to this form of self-determination because it provides the conditions for the exercise of the right, free from external domination.[192] The right to self-determination also applies to other "peoples" and might be exercised in other ways. For example, it has been invoked by peoples who form political minorities in, and who seek internal self-determination through greater

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[189] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95, ¶ 160 (Feb. 25).

[190] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 121 (July 9). For a discussion of what constitutes a *de facto* annexation, see Levine-Schnur, Megiddo & Berda, *supra* note 2.

[191] *See* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95, ¶ 155 (Feb. 25) ("The nature and scope of the right to self-determination of peoples, including respect for 'the national unity and territorial integrity of a State or country', were reiterated in the [Declaration on Friendly Relations]."); *see also supra* note 117 and accompanying text; Umut Özsu, *Ukraine, International Law, and the Political Economy of Self-Determination*, 16 GER. L.J. 435, 444 (2015) (describing various claims to self-determination with respect to Ukraine, including the self-determination of the "Ukrainian people through the independent statehood of Ukraine"); *cf.* CRAWFORD, THE CREATION OF STATES, *supra* note 155, at 126 (2d ed. 2006) (self-determination "applies to existing States, excluding for the purposes of self-determination those parts of the States that are themselves self-determination units.").

[192] *See* Int'l L. Comm'n, *Draft Conclusions on Identification of Legal Consequences of Peremptory Norms of General International Law (jus cogens), with Commentaries*, [2022] 2 Y.B. Int'l L. Comm'n 16, 77 n.264, UN Doc. A/77/10 [hereinafter, "ILC *Draft Conclusions on Peremptory Norms*"]; ORAKHELASHVILI, *supra* note 3, at 375–6 (explaining that the right to self-determination applies to states after "the attainment of independence" and "continues as a safeguard against foreign occupation or intervention.").

autonomy within the institutional frameworks of, particular states.[193] It has also been invoked by peoples seeking external self-determination through controversial claims of a right to unilateral secession.[194] However, the importance of territorial entrenchment to the self-determination of the peoples within a state is such that the self-determination of non-state groups generally "cannot be used to further larger territorial claims in defiance of internationally accepted boundaries of sovereign states."[195]

C. Jus Cogens & Normative Obscurity

The prohibition of annexations thus is significant because it ties together three separate normative projects that have each been central to international law, and it is a distinct norm because it is not the same as any one of them. The irony is that, as it became embedded in the international order, such that it could finally be taken for granted, its legal significance also became obscured. The broad convergence on it, combined with the decline in annexations in practice, help to explain why, as time went on, it no longer occupied much international attention. The states that had most actively pushed for it with the last big wave of decolonization no longer had as much reason to focus on it. Other violations of Article 2(4), other security threats, other forms of intervention, other modes of subjugation, and other kinds of conflicts—especially, internal conflicts with outside influences—were still common and continued to receive international attention. But the prohibition of annexations both held firm and faded from view.

Legal experts have also, on the whole, failed to crystallize what makes this prohibition significant. As we have explained, many attach the prohibition to one normative project or another—usually, the Article 2(4) prohibition of the use of force[196] but sometimes the norms on territorial entrenchment[197] or the right to self-determination[198]—rather

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[193] *E.g.*, G.A. Res. 61/295, UN Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[194] *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 282, ¶ 126 (Can.); FISCH, *supra* note 50, at 42–46.

[195] SHAW, *supra* note 166, at 447.

[196] *See supra* notes 2–4 and accompanying text.

[197] *E.g.*, GRANT, AGRESSION AGAINST UKRAINE, *supra* note 11, at 9 (arguing "that the preservation of the territorial settlement among States—that is, the maintenance of the proposition that boundaries are not to be changed by force—is a foundational value of the international system").

[198] *E.g.*, ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995) ("One of the consequences of the body of international law on self-determination is that at present no legal title over territory can be acquired in breach of self-determination.").

than recognize that it is a distinct norm, with its own historical pedigree and normative reach. Meanwhile, those who analyze it as distinct tend to narrow the field of vision, focusing on specific settings in which it is directly at issue, not on establishing its broader significance in the legal system writ large.[199] Although these approaches are in some sense understandable because the norm developed piecemeal and in connection with several other norms, the practical effect has been to obscure its centrality to international law.

Its obscurity is apparent in the discourse on what are labeled "*jus cogens*" or "peremptory" norms. The label designates certain norms with special status in international law because they "reflect and protect fundamental values of the international community," "are universally applicable," and are "hierarchically superior to other rules of international law."[200] The set of norms that qualify as *jus cogens* has never been exactly clear, but in its Draft Conclusions on the topic, adopted in 2022, the ILC presented a non-exhaustive list of the norms that it had previously identified as such.[201] The ILC's 2022 list does not include the prohibition of annexations as among the norms that qualify as *jus cogens*, even though the ILC has previously suggested that it does.[202] The 2022 list includes both the prohibition of aggression—in other words, violations of Article 2(4)—and the right of self-determination. And it cites attempted annexations as examples of violations of the right of self-determination.[203] But again, it does not recognize the distinct *jus cogens* status of the prohibition of annexations,

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[199] *E.g.*, Juergen Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 NYU J. INT'L L. & POL. 747 (2017); Omar M. Dajani, *Israel's Creeping Annexation*, 111 AJIL UNBOUND 51 (2017); WŁADYSŁAW CZAPLIŃSKI, SŁAWOMIR DĘBSKI, RAFAŁ TARNOGÓRSKI & KAROLINA WIERCZYŃSKA, THE CASE OF CRIMEA'S ANNEXATION UNDER INTERNATIONAL LAW (2017); Levine-Schnur, Megiddo & Berda, *supra* note 2.

[200] ILC, *Draft Conclusions on Peremptory Norms*, *supra* note 192, at 18.

[201] *Id.* at 89.

[202] Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *reprinted in* [2001] 2 Y.B. INT'L L. COMM'N 26, 98, 114, UN Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter, "ILC, *Draft Articles on State Responsibility*"]; *see also Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for Advisory Opinion),* Written Submission of the League of Arab States p. 17, n. 53 (20 July 2023) ("On the particular prohibition of the use of force to purportedly acquire title over/annex territory having *jus cogens* status, see, e.g., Human Rights Council Res. 49/28, 11 April 2022, Preamble, para. 7, characterizing the "prohibition of the acquisition of territory by force" as a breach of a peremptory norm of international law; *Furundžija* Trial Chamber Judgment (1988), para. 147."); *Public sitting held on Monday 19 February 2024, at 10 a.m., at the Peace Palace, President Salam presiding, on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for advisory opinion)*, Verbatim Record at p. 73 (Paul Reichler, on behalf of the State of Palestine) (describing "the prohibition on acquisition of territory by force" as a "peremptory norm").

[203] ILC, *Draft Conclusions on Peremptory Norms*, *supra* note 192, at 77 n.264.

which overlaps with both of the other two but is coextensive with neither of them. The failure to list this prohibition as a stand-alone *jus cogens* norm obscures—or even implicitly discounts—its significance.

The prohibition is also often associated with the duty of non-recognition. But here, too, its content and import are obscured. The ILC's influential Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that "no State shall recognize as lawful a situation created by a serious breach" of peremptory norms.[204] As we just mentioned, the ILC's subsequent work casts doubt on the *jus cogens* status of the prohibition of annexations and thus on the application of this duty of non-recognition to annexations. This is true, even though the duty of non-recognition developed historically as a response to unlawful acquisitions of territory, and even though its application outside that context to other *jus cogens* violations has been questioned.[205] As such, contemporary articulations of the duty of non-recognition are abstracted away from—and further obscure—the prohibition of annexations that lies at its heart.

V. EROSION

Resituating the prohibition of annexations in international law—placing it at the intersection of three normative projects and highlighting that it is for that reason foundational—is not only historically accurate and normatively justifiable but also analytically fruitful. By putting the norm in proper context, we can better identify and evaluate its evolution. In particular, we can appreciate that this prohibition is specifically about forcible acquisitions of territory. Incidents that involve such acquisitions thus are useful bellwethers of its future trajectory.[206]

To be sure, we cannot know exactly how it might be shifting. A long line of social and legal theory instructs, and our own history of the prohibition betrays, that the processes of normative evolution tend to be non-linear. Norms do not just rise or fall; they take new shape and become more or less salient over time, as states and other actors engage with or disregard them. As such, the impact on a norm's future trajectory of any particular incident or set of incidents can be difficult to evaluate, especially if the norm is in the process of evolution. Nevertheless, the signs concerning this norm are troubling. After decades

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[204] ILC, *Draft Articles on State Responsibility*, *supra* note 202, art. 41(2).

[205] Talmon, *The Duty not Recognize*, *supra* note 122, at 103.

[206] On the instructive value of incidents, as units of analysis, see W. MICHAEL REISMAN & ANDREW R. WILLARD, INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 15–16 (1988).

of being well, if invisibly, ensconced in the international legal order, it appears to be at serious, under-appreciated risk of erosion.

As we will explain, the threats to it are wide-ranging and have been building for some time, although they did not receive sustained attention until February 2022, when Russia invaded Ukraine with the apparent objective of annexing the entire country.[207] Even since that invasion, analysts have not focused on the risks to this prohibition or addressed the dynamics that suggest that it is at risk. If history is any guide, however, its erosion could have dramatic, potentially catastrophic consequences for the future world. After all, it is closely correlated with the decline both in wars of aggression among militarily powerful states and in colonial expansions, with the associated domination of others. Thus, although we cannot be sure of how serious the risk to it is, the trendline on territorial conflicts that we identify is cause for concern and warrants sustained attention.

A. Identifying Annexations

Defining an annexation as the forcible taking of the territory of another state or non-self-governing entity requires establishing a baseline of territorial entrenchment for each. We set that baseline at the time the new state is formed or the non-self-governing territory is identified through the process established under Chapter XI of the UN Charter.

To illustrate, consider the contested and ethnically mixed Nagorno-Karabakh region, part of the Caucasus that lies at the outer edges of what were the Russian, Persian, and Ottoman empires. In 1921, Nagorno-Karabakh was incorporated into the newly established Azerbaijan Republic, which became part of the Soviet Union.[208] Thus, Nagorno-Karabakh was part of Azerbaijan when Azerbaijan became an

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[207] For early warnings, see (Wuerth) Brunk , *supra* note 158, at 309–10 (arguing in 2017 that interstate territorial conflict is a real danger: the decline of U.S. power, the growth of Chinese and Russian power, and territorial ambitions of these two powers which aim to shake up the existing global order, is a recipe for large-scale armed conflict") GRANT, *supra* note 11, at 5 (noting threats to the "stability and finality of territorial settlement"); Monica Hakimi, *What Might (Finally) Kill the* Jus ad Bellum*?*, 74 CURRENT LEGAL PROBS. 101, 116–20 (2021) (describing as an "embryonic" trend "a retreat from the norm that lies at the very heart of Article 2(4)—the prohibition on acquiring territory by force"—and discussing some examples); *but cf.* Frédéric Mégret, *Having it Both Ways*, https://texaslawreview.org/having-it-both-ways/ (2018) (arguing that International law has "remarkable resilience" and "is sturdier than it seems" without mentioning developments in Ukraine or other threats to territorial integrity)..

[208] *See* Heiko Krüger, *Nagorno-Karabakh*, *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW, *supra* note 183, at 214–15.

independent state upon its secession from the Soviet Union.[209] Armed conflict over the region broke out between Armenia and Azerbaijan in the late 1980s, and a 1994 ceasefire left Armenia in control of a portion of Azerbaijani territory that included Nagorno-Karabkh and surrounding territories.[210] Taking territorial entrenchment at the time of statehood, Armenia occupied Azerbaijani territory under the 1994 ceasefire, in what appears to have been an attempted annexation. If Nagorno-Karabakh were instead part of Armenia at the time the two states were established, then Armenia's taking of this territory would not have constituted an annexation.

The conflict between Azerbaijan and Armenia also illustrates some of the competing policy considerations that come into play, once annexations (or attempted annexations) occur. In early 2020, this conflict again flared up.[211] Azerbaijani forces, with strong support from Turkey, acted to recapture the territory that Armenia had seized decades earlier,[212] culminating in a November 2020 ceasefire with Azerbaijan back in control of some of this territory.[213] At the time, Azerbaijani and Turkish officials suggested that force was an acceptable instrument for reclaiming the territory because it had been unlawfully taken.[214] Scholars, too, have debated whether Azerbaijan's action violated Article 2(4) or was instead permissible because it acted to reclaim "its" own territory.[215] That debate concerns the scope of Article 2(4),

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[209] *Id.* at 225–27.

[210] Tom Ruys, Nele Verlinden & Luca Ferro, *Digest of State Practice: 1 January–30 June 2015*, 2 J. USE FORCE & INT'L L. 257, 290–91 (2015); *see also* Tom Ruys, Luca Ferro & Nele Verlinden, *Digest of State Practice: 1 January–30 June 2016*, 3 J. USE FORCE & INT'L L. 290, 312 (2016); Tom Ruys, Luca Ferro, Nele Verlinden & Carl Vander Maelen, *Digest of State Practice: 1 July–31 December 2016*, 4 J. USE FORCE & INT'L L. 131, 156–57 (2017).

[211] Letter Dated 22 July 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/74/963–S/2020/732 (July 23, 2020); *see* Patrick M. Butchard & Jasmin Johurun Nessa, *Digest of State Practice: 1 July–31 December 2020*, 8 J. USE FORCE & INT'L L. 164, 214 (2021).

[212] Laurence Broers, *Armenia-Azerbiajan Conflict: Why Caucasus Flare-Up Risks Wider War*, BBC NEWS (Sept. 30, 2020), https://www.bbc.com/news/world-europe-54356336.

[213] *See* Patrick M. Butchard & Jasmin Johurun Nessa, *supra* note 211, at 214; *Nagorno Karabakh Conflict*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict (Aug. 10, 2023).

[214] *See, e.g.,* Lucian Kim, *Nagorno-Karabakh: Turkey's Support for Azerbaijan Challenges Russian Leverage*, NPR NEWS (Oct. 2, 2020), https://www.npr.org/2020/10/02/919467165/nagorno-karabakh-turkeys-support-for-azerbaijan-challenges-russian-leverage.

[215] *See* Dapo Akande & Antonios Tzanakopoulos, *Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?,* EJIL:TALK! (Nov. 18, 2020); Eliav Lieblich, *Wars of Recovery*, 34 EUR. J. INT'L L. 349 (2023); Tom Ruys & Felipe Rodríguez Silvestre, *Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War,* 32 EUR. J. INT'L L. 1287 (2021).

not the prohibition of annexations, but it highlights the difficult questions that arise in the face of unlawfully acquired territory. What may or should be done to correct the unlawful acquisition, once it has occurred? More specifically, may force be used to reclaim lost territory, in a "reverse annexation," or is that use of force unlawful, such that the spoils go to the victors? Such questions are avoided so long as annexations are averted, but once annexations occur, the distinct reasons for prohibiting them push in different directions, and international law provides little guidance for resolving them. In this case, the 2020 ceasefire between Azerbaijan and Armenia did not hold; the conflict erupted again in 2023, when Azerbaijan acted to seize control of the remaining lost territory, with harsh consequences for many people in the region.[216]

B. Recent Annexations

Even before Russia launched its full-scale invasion of Ukraine in 2022, the prohibition of annexations was under threat in three distinct arenas: Crimea, the Golan Heights, and Western Sahara. First, Russia acted to annex the Crimea region of Ukraine in 2014.[217] At the time, Russia talked around the prohibition of annexations. Much like Japan in Manchuria in 1932, Russia claimed that it intervened in Crimea on the invitation of local officials and to further the self-determination of the people living there, as expressed in a highly disputed referendum that was expressly modeled after Kosovo's declaration of independence.[218] Most states rejected Russia's claim in a UN General

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[216] *Nagorno Karabakh Conflict*, *supra* note 213; Patrick M. Butchard & Jasmin Johurun Nessa, *Digest of State Practice: 1 January–30 June 2021*, 8 J. USE FORCE & INT'L L. 343, 382–84 (2021); Ivan Nechepurenko & Anton Troianovski, *Azerbaijan Reclaims Armenian Enclave, Shifting Region's Political Dynamics*, N.Y. TIMES (Sept. 20, 2023), https://www.nytimes.com/2023/09/20/world/europe/azerbaijan-armenia-cease-fire.html.

[217] *See* Tom Ruys & Nele Verlinden, *Digest of State Practice 1 January–30 June 2014*, 1 J. USE FORCE & INT'L L. 323, 324–28 (2014).

[218] *See* UN SCOR, 69th Sess., 7138th mtg., at 2–3, UN Doc. S/PV.7138 (Mar. 15, 2014); *see also* Masha Gessen, *Crimea Is Putin's Revenge*, Slate (Mar. 21, 2014, 11:51 AM), https://slate.com/news-and-politics/2014/03/putins-crimea-revenge-ever-since-the-u-s-bombed-kosovo-in-1999-putin-has-been-planning-to-get-even.html. Kosovo's declaration of independence, in 2008, followed the 1999 NATO bombing of Yugoslavia. That operation is widely understood to have violated Article 2(4) of the UN Charter and was justified on humanitarian grounds. It led to the establishment of Kosovo as a new state, with underappreciated effects on the norms on territorial entrenchment. Russia has repeatedly invoked the incident not only to justify its own annexation of Crimea but also to justify its recognition of the rights of formerly autonomous units in states in the "post-Soviet space" to secede. See (Wuerth) Brunk, *supra* note 158, at 308–11, 337–39, 343, 349 (describing Russia's reliance on the Kosovo precedent and arguing that the doctrine of humanitarian intervention was part of a broader effort to reframe sovereignty around human rights, one that undermined territorial integrity of existing states); Jade McGlyn, *Why Putin Keeps Talking About Kosovo*, FOREIGN POL'Y (Mar. 3, 2022), https://foreignpolicy.com/2022/03/03/putin-ukraine-russia-nato-kosovo/.

Assembly resolution, adopted by a vote of 100 to eleven with fifty-eight abstentions.[219] The resolution, entitled "Territorial Integrity of Ukraine":

> reaffirm[s] the principles . . . that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter.[220]

In addition, this resolution calls on all States "not to recognize any alteration of the status of [Crimea] on the basis of the . . . referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status."[221] The UN Security Council would have adopted a similar resolution, if not for Russia's veto.[222] Multiple states responded by imposing sanctions on Russia.[223] However, Russia has maintained control of Crimea and used it as the base to wage a broader conflict in Ukraine, eventually trying to annex additional Ukrainian territory, as we discuss below.

Second, Israel emphasized its intention to keep the Golan Heights, which it has occupied since acquiring the territory by force during the 1967 Arab-Israeli War.[224] In April 2016, Israeli Prime Minister Benjamin Netanyahu for the first time held a cabinet meeting in the Golan Heights so as "to send a clear message: The Golan will always remain in Israel's hands. . . . [T]he Golan is an integral part of the State of Israel."[225] Moreover, the United States, which had declined

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[219] UN GAOR., 68th Sess., UN Doc. A/RES/68/262 (Mar. 27, 2014).

[220] *Id.*

[221] *Id.*; *see also* UN GAOR, 71st Sess., UN Doc. A/RES/71/205 (Feb. 1, 2017) ("Condemning the temporary occupation of part of the territory of Ukraine . . . and reaffirming the non-recognition of its annexation").

[222] *See* S.C., Draft Resolution, UN Doc. S/2014/189 (Mar. 15, 2014).

[223] *See, e.g.*, Blocking Property of Certain Persons Contributing to the Situation in Ukraine, Exec. Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 6, 2014), as amended; Ukraine Freedom Support Act of 2014, Pub. L. No. 113–272, 128 Stat. 2952 (2014).

[224] There is some debate on when Israel acted to annex the Golan Heights—and specifically, whether it did so when it enacted The Golan Heights Law, 5742–1981, 1981– 1982 Sefer Ha-Chukkim (S.H.) 61, translated in 36 Laws of the State of Israel 7 (1981–82); *compare* Leon Sheleff, *The Application of Israeli Law to the Golan Heights is Not Annexation*, 20 BROOK. J. INT'L L. 333 (1994); *with* Asher Maoz, *The Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOK. J. INT'L L. 355 (1994).

[225] Raphael Ahern, *Netanyahu Vows Golan Heights Will Remain Part of Israel Forever*, TIMES ISRAEL (Apr. 17, 2016), https://www.timesofisrael.com/netanyahu-vows-golan-heights-will-remain-part-of-israel-forever/; *see also* Hakan Ceyhan Aydogan, *Golan Heights Israel's Red*

to recognize Israel's sovereignty over the Golan Heights, changed course.[226] In March 2019, it recognized Israel's sovereignty over the territory in violation of the duty of non-recognition.[227]

Immediately after the White House signing ceremony to recognize Israel's sovereignty, Netanyahu reinvigorated the old claim that annexations pursuant to self-defense are lawful. According to Netanyahu, the U.S. recognition of Golan reflects "a very important principle in international life."[228] "When you start wars of aggression, you lose territory, do not come and claim it afterwards. It belongs to us."[229] The U.S. recognition decision openly undercut the prohibition of annexations. The remarks by Netanyahu also underscore the dangers of mischaracterizing the prohibition as one that is derived from the illegality of the use of force.[230] Those who do are not making a harmless error. They are misrepresenting the norm's significance—and obscuring the stakes in acts, such as the U.S. recognition decision, that undercut it.

Apart from the Golan Heights, Israeli officials have also increasingly claimed sovereignty in the West Bank and East Jerusalem.[231] Indeed, others have concluded that "Israel has, to all intents and purposes, 'annexed' wholly or partly the Occupied Palestinian territory," not just the Golan Heights.[232] Israel's actions in the West Bank

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Line, Netanyahu Tells Putin, ANADOLU AJANSI, https://www.aa.com.tr/en/politics/golan-heights-israel-s-red-line-netanyahu-tells-putin/559228 (Apr. 22, 2016)

[226] *See* Kristen Eichensehr, *Contemporary Practice of the United States*, 113 AM. J. INT'L L. 613 (2019); *see also* Edward Wong & Catie Edmondson, *Pompeo Refuses to Say What U.S. Would Do if Israel Annexes West Bank*, N.Y. TIMES (Apr. 9, 2019), https://www.nytimes.com/2019/04/09/us/politics/pompeo-israel-west-bank.html.

[227] Proclamation No. 9852, 84 Fed. Reg. 11875 (Mar. 25, 2019). In December 2017, President Trump also recognized Jerusalem as the capital of Israel, although he did so in a way that hedged on Jerusalem's "final status." He said that "[t]he United States continues to take no position on any final status issues. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties." Proclamation No. 9683, 82 Fed. Reg. 58,331 (Dec. 6, 2017).

[228] David M. Halbfinger & Isabel Kershner, *Netanyahu Says Golan Heights Move 'Proves You Can' Keep Occupied Territories*, N.Y. TIMES (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/wordld/middleeast/golan-heights-israel-netanyahu.html.

[229] *Id.*

[230] *See supra* notes 3–4.

[231] *See* Dahlia Scheindlin & Yael Berda, *Israel's Annexation of the West Bank Has Already Begun*, FOREIGN AFFS. (June 9, 2023), https://www-foreignaffairs-com.ezproxy.cul.columbia.edu/israel/israels-annexation-west-bank-has-already-begun.

[232] Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/77/328 (Sept. 14, 2022); *Public sitting held on Monday 19 February 2024, at 10 a.m., at the Peace Palace, President Salam presiding, on the Legal Consequences arising from the Policies and Practices of Israel*

and East Jerusalem might not qualify as an "annexation" in the sense in which we use the term, because Palestine was arguably neither a state nor a non-self-governing territory at the time that Israel's occupation began. But in any event, Israel has been acting to entrench its authority and control over occupied territories and has violated the right of the Palestinian people to self-determination.[233]

Third, Morocco has also moved closer to finalizing its annexation of Western Sahara, a Non-Self-Governing Territory in North Africa, with the apparent support of numerous other states.[234] Morocco occupies Western Sahara and claims title to it based on historic ties. However, a 1975 Advisory Opinion by the International Court of Justice reasoned to the contrary and called for "the free and genuine expression of the will of the peoples of the Territory,"[235] as part of their right to self-determination. A referendum to express their will has never been held.[236]

Between 2019 and 2021, over two dozen Arab and African states broke with the practice of not recognizing Morocco's sovereignty in Western Sahara by opening in the region consulates to Morocco; the implication was that these states would acquiesce in, and might formally recognize, Morocco's sovereign title.[237] In December 2020, the United States formally recognized Morocco's sovereignty over "the entire Western Sahara territory."[238] Since then, Algeria, which has long backed the independence movement in Western Sahara, cut off diplomatic ties with, and took other unfriendly measures against, Morocco.[239] These events and others undercut the prohibition

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in the Occupied Palestinian Territory, including East Jerusalem (Request for advisory opinion submitted by the General Assembly of the United Nations), Verbatim Record at p. 73 (Paul Reichler, on behalf of the State of Palestine) (noting that many countries take the position that Israel's occupation of Palestinian territory is unlawful because it constitutes an annexation).

[233] ICJ Advisory Opinion on the Wall.

[234] *See* UN, *Western Sahara*, *at* https://www.un.org/dppa/decolonization/en/nsgt/western-sahara.

[235] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 162 (Oct. 12).

[236] *See* STEPHEN ALLEN & JAMIE TRINIDAD, THE WESTERN SAHARA QUESTION AND INTERNATIONAL LAW: RECOGNITION DOCTRINE AND SELF-DETERMINATION 8-21 (2024).

[237] *See* also *id*. at 68–82 (discussing whether the establishment of consulates in Western Sahara violates the Duty of non-Recognition).

[238] Proclamation No. 10126, 85 Fed. Reg. 81329 (Dec. 10, 2020); *see also* Kristen Eichensehr, *Contemporary Practice of the United States*, 115 AM. J. INT'L L. 318 (2021).

[239] Anthony Sworkin, *North African Standoff: How the Western Sahara Conflict is Fueling New Tensions Between Morocco and Algeria*, EUR. COUNCIL FOR. REL. (Apr. 8, 2022),

of annexations and implicates all three of the normative projects with which it has historically been intertwined. Moreover, by recognizing Morocco's sovereignty over the territory, the United States violated the duty of non-recognition that is critical to sustaining this prohibition.

C. The Full-Scale Assault

Russia's full-scale invasion of Ukraine, in February 2022, came on the heels of these other actions. As Tanisha Fazal has written, "with Russia's invasion, the norm against territorial conquest has been tested in the most threatening and vivid way since the end of World War II."[240] In the lead-up to the 2022 invasion, Russian President Vladimir Putin underscored that Russia would not recognize Ukraine's right to exist as an independent state, free to determine its own fate.[241] The message was clear: "[T]rue sovereignty of Ukraine is possible only in partnership with Russia."[242] Then, in February 2022, Russia recognized the independence of the Donetsk and Luhansk regions of Ukraine and announced that its troops would soon intervene.

The UN Security Council held an emergency meeting to discuss the situation.[243] The United States was the first state to speak, and although it did not use the word "annexation," it clearly articulated that this prohibition was at stake:

> President Putin asserted that Russia today has a rightful claim to all territories—all territories—from the Russian Empire; the same Russian Empire from before the Soviet Union, from over 100 years ago. That includes all of Ukraine. It includes Finland. It includes Belarus and Georgia and Moldova; Kazakhstan, Kyrgyzstan and Tajikistan; Turkmenistan, Uzbekistan and Lithuania; Latvia, and Estonia. It includes parts of Poland and Turkey.[244]

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https://ecfr.eu/publication/north-african-standoff-how-the-western-sahara-conflict-is-fuelling-new-tensions-between-morocco-and-algeria/.

[240] Fazal, *supra* note 11.

[241] Russia has also cloaked its invasion in some of the language of international law. For a review of its "legality claims," *see* Paulina Starski & Friedrich Arndt, *The Russian Aggression against Ukraine—Putin and His 'Legality Claims*," 25 MAX PLANCK Y.B. U.N. L. ONLINE 756 (2022).

[242] Vladimir Putin, Pres. of Russia, *On the Historical Unity of Russians and Ukrainians* (July 12, 2021), http://en.kremlin.ru/events/president/news/66181.

[243] UN SCOR, 77th Sess., 8970th mtg., UN Doc. S/PV.8970 (Feb. 21, 2022).

[244] *Id*.

Kenya and Ghana echoed these themes. As Kenya pointedly put it:

> Kenya and almost every African country were birthed by the ending of empire. . . . At independence, had we chosen to pursue States on the basis of ethnic, racial or religious homogeneity, we would still be waging bloody wars these many decades later. Instead, we agreed that we would settle for the borders that we inherited . . . because we wanted something greater forged in peace.[245]

Others also pushed back on Russia's conduct, using more generic language. They highlighted, for example, Ukraine's "sovereign equality and territorial integrity," the "core principles enshrined in the Charter," the prohibition of the use of force, and "the importance of de-escalation and restraint."[246]

The reactions to Russia's 2022 invasion have been swift, intense, and overwhelmingly negative. States, international courts, and other international institutions have repeatedly condemned Russia's conduct in Ukraine.[247] While they have occasionally drawn specific attention to the prohibition of annexations, they usually have spoken in generic terms and lumped this prohibition together with other norms that Russia has also violated. What they have not done is send the consistent message that the invasion violates not only Article 2(4) but also the norm that has for decades been—we think it's fair to say—at the heart of the international order.[248]

A few days after the full-on invasion began, the Security Council met again. Eighty-two countries submitted a draft resolution condemning Russia's conduct and calling for an immediate ceasefire in Ukraine. The resolution would have reaffirmed a "commitment to the sovereignty, independence, unity, and territorial integrity of Ukraine within its internationally recognized borders" and would have deplored "in the strongest terms the Russian federation's aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter."[249] It would not, however, have made specific reference to the prohibition of annexations. When it failed on account of Russia's veto,

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[245] *Id*. at 8–9.

[246] *Id*. at 7, 8.

[247] Kristen Eichensehr, *Contemporary Practice of the United States*, 116 AM. J. INT'L L. 593 (2022).

[248] We have previously described the norm in these terms. *See* Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT'L L. 687, 688 (2022).

[249] S.C. Draft Resolution, UN Doc. S/2022/155 (Feb. 25, 2022).

the General Assembly adopted a Resolution that *did* mention the prohibition: "the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force."[250] But even the General Assembly resolution lumped this prohibition together with a number of other norms that Russia also violated without identifying the prohibition as distinctly significant.

The General Assembly has since adopted five other resolutions on Ukraine.[251] All of them either mention Article 2(4) or speak of Russia's aggression, but only one specifically focuses on its "attempted illegal annexation."[252] This one was adopted by the widest margin of any of the General Assembly resolutions on Ukraine, with a vote of 143 in favor, five against, and thirty-five abstentions.[253] It came after Russia purported to annex four regions of Ukraine through dubious referenda, and it calls on states not to recognize Russia's attempted annexation.[254] It reflects a strong endorsement of the prohibition of annexations.

Outside the UN bodies, states have also widely denounced Russia's act of aggression, including through the G7,[255] NATO,[256] and the

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[250] *Id.*

[251] UN GAOR, 11th Emergency Special Sess., Principles of the Charter of the United Nations Underlying a Comprehensive, Just and Lasting Peace in Ukraine, UN Doc. A/RES/ES-11/6 (Feb. 23, 2023); UN GAOR, 11th Emergency Special Sess., Furtherance of Remedy and Reparation for Aggression against Ukraine, UN Doc. A/RES/ES-11/5 (Nov. 14, 2022); UN GAOR, 11th Emergency Special Sess., Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations, UN Doc. A/RES/ES-11/4 (Oct. 12, 2022); UN GAOR, 11th Emergency Special Sess., Suspension of the Rights of Membership of the Russian Federation in the Human Rights Council, UN Doc. A/RES/ES-11/3 (Apr. 7, 2022); UN GAOR, 11th Emergency Special Sess., Humanitarian Consequences of the Aggression against Ukraine, UN Doc. A/RES/ES-11/2 (Mar. 22, 2022).

[252] UN GAOR, 11th Emergency Special Sess., Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations, U.N. Doc. A/RES/ES-11/4 (Oct. 12, 2022).

[253] *Id*.

[254] G.A. Res. ES-11/4, ¶ 4 (Oct. 13, 2022).

[255] Press Release, *G7 Foreign Ministers' Statement on Russia's War Against Ukraine,* U.S. DEP'T OF STATE (May 14, 2022), https://www.state.gov/g7-foreign-ministers-statement-on-russias-war-against-ukraine.

[256] Press Release, *Statement by NATO Heads of State and Government on Russia's Attack on Ukraine,* N. ATL. TREATY ORG. (Feb. 25, 2022), https://www.nato.int/cps/en/atohq/official_texts_192489.htm?selectedLocale=en.

Organization of American States.[257] The vocal condemnation of Russia's violation has come with concrete other actions. States and international institutions have excluded Russia from a number of international organizations and imposed on it "one of the most expansive" set of economic sanctions "the world has seen outside of Security Council-ordered sanctions."[258] The United States and its security allies have also extensively armed Ukraine so that it could defend itself in the face of Russia's assault.[259] And there have been numerous efforts, including through the International Criminal Court, to hold Russia and Russian officials accountable for their acts of aggression and other atrocities in Ukraine.[260]

Because the negative reactions to Russia's invasion have been fairly widespread, analysts might conclude that the prohibition of annexations has withstood the test of time. Although the international discourse has focused more on Article 2(4) and the term "aggression" than it has on this prohibition per se, the reasoning might go, the former includes the latter, and states and commentators have also occasionally called specific attention to the latter.[261] Indeed, many international legal norms do persist, even in the face of occasional violations, especially where, as here, violations are strongly condemned. But for reasons we explain next, we believe that the prohibition of annexations has become weaker as a result of the Ukraine War—and that states and commentators who do not appreciate that it is distinct from Article 2(4) have continued to miss the signs of its erosion.

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[257] Press Release, *OAS Member States Condemn Russian Attack on Ukraine,* U.S. MISSION TO THE ORG. OF AM. STATES (Feb. 25, 2022), https://usoas.usmisison.gov/oas-member-states-condemn-russian-attack-on-ukraine.

[258] Oona A. Hathaway, Address, *How Russia's Invasion of Ukraine Tested the International Legal Order*, BROOKINGS INST. (Mar. 30, 2023), https://www.brookings.edu/on-the-record/how-russias-invasion-of-ukraine-tested-the-international-legal-order; *see also* Thomas Grant, *Russia in the United Nations Security Council: Charter Principles and Credentials Procedure*, VANDERBILT J. OF TRANSNATIONAL L., (listing organizations from which Russia has been excluded).

[259] *See U.S. Security Cooperation with Ukraine*, U.S. DEP'T OF STATE (July 25, 2023), https://www.state.gov/u-s-security-cooperation-with-ukraine/.

[260] *See* Irina Paliashvili, *Calls Mount for Russia to Face Tribunal for Aggression Against Ukraine*, ATL. COUNCIL (Feb. 28, 2023), https://www.atlanticcouncil.org/blogs/ukrainealert/calls-mount-for-russia-to-face-tribunal-for-aggression-against-ukraine/.

[261] *See, e.g.*, Sofia Cavandoli & Gary Wilson, *Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine*, 69 NETH. L. REV. 383, 405–406 (2022); Elena Chachko & Katerina Linos, *International Law After Ukraine: Introduction to the Symposium*, 116 AM. J. INT'L L. UNBOUND 124, 124 (2022).

D. The Worldmaking Contest

As far as we can tell, the principal threat to the prohibition of annexations does not come from a sudden sea change in states' overall positions on it. To the contrary, the overwhelming vote on the General Assembly resolution that specifically addresses it suggests that states on the whole still support it. However, they have not rallied behind and taken meaningful steps to sustain it. Part of the reason why, we suspect, is that it has gotten caught up in a broader contest over the future of the world—and specifically, over the U.S. position of dominance.

1. The Staging Ground

The Ukraine War has become a staging ground for this broader worldmaking contest. As early as 2007, President Putin said at the Munich Conference on Security Policy that "we have reached that decisive moment when we must seriously think about the architecture of global security."[262] He criticized NATO and especially the United States, which, in his words, "has overstepped its national borders in every way" and tried to create a "unipolar world" with "one centre of authority, one centre of force, one centre of decision-making."[263] That's the international order that the United States, as "the world's P-1," helped to solidify when the Cold War ended, especially with Iraq's invasion of Kuwait.[264] It is also the international order that Putin, with the invasion of Ukraine, is trying to change.[265]

Indeed, Putin's speeches describe these two things as one and the same. He speaks of reclaiming Ukraine *from the United States*, as if Ukrainian territory must be an offshoot of either Russia or the United States, not the site of an independent state free for its people to realize their own self-determination. Putin has blamed Ukraine's separation from Russia on "those forces that have always sought to undermine our unity."[266] He has characterized Ukraine as part of an "anti-Russia

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[262] Vladimir Putin, Pres. of Russ., *Speech and the Following Discussion at the Munich Conference on Security Policy* (Feb. 10, 2007), http://en.kremlin.ru/events/president/transcripts/24034.

[263] *Id.*

[264] *See infra* note 149 and accompanying text.

[265] For similar takes, see Michael Kimmage & Hanna Notte, *How Russia Globalized the War in Ukraine*, FOREIGN AFFS. (Sept. 1, 2023), https://www.foreignaffairs.com/russian-federation/how-russia-globalized-war-in-ukraine; Hanna Notte, *Russia's Axis of the Sanctioned*, FOREIGN AFFS. (Oct. 6, 2023), https://www.foreignaffairs.com/russian-federation/russias-axis-sanctioned#:~:text=The%20axis%20of%20the%20sanctioned,especially%20empowering%20for%20both%20countries

[266] Vladimir Putin, Pres. of Russia, *On the Historical Unity of Russians and Ukrainians* (July 12, 2021), http://en.kremlin.ru/events/president/news/66181.

project" "under the protection and control of Western powers."[267] Ukraine, Putin said on the day he launched the 2022 invasion, "has been reduced to a colony with a puppet regime" that is antagonistic to Russia.[268] His message was, again, clear. Russia invaded Ukraine as a direct challenge to NATO—and more specifically, to U.S. global dominance.[269]

The United States has also taken the invasion in these terms. From the start, the United States warned the world that Putin was planning to invade and led the effort to defend Ukraine.[270] The United States has given Ukraine more humanitarian, financial, and military aid than any other country has done.[271] Moreover, the other countries that have provided aid to Ukraine are almost all close security allies of the United States.[272]

The United States has at times tried to disentangle the normative principles at stake in Ukraine from the broader worldmaking contest that challenges its dominance. Its 2022 National Security Strategy insists, for example, that the conflict in Ukraine "is not about a struggle between the West and Russia" but instead about "respect for sovereignty, territorial integrity, and the prohibition against acquiring territory through force."[273] But the United States also acknowledges that the conflict is about its own dominance: "Strategic competition" with China and Russia "over what kind of world will emerge makes the next few years critical to determining who and what will shape the narrative perhaps most immediately in the context of Russia's actions in

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[267] *Id*.

[268] Vladimir Putin, Pres. of Russia, *Address by the President of the Russian Federation* (Feb. 21, 2022), http://en.kremlin.ru/events/president/transcripts/67828.

[269] Russia has continued to press these themes throughout the invasion. *See* Associated Press, *Putin Chides West, Defends Ukraine Invasion in Major Speech*, POLITICO (Feb. 21, 2023), https://www.politico.com/news/2023/02/21/putin-russia-ukraine-speech-00083730; *see also* Julia Davis (@JuliaDavisNews), X (TWITTER), https://twitter.com/JuliaDavisNews (last visited Jan. 29, 2024) (covering Russian media propaganda).

[270] For a description of this sequence of events, see Kristen Eichensehr, *Contemporary Practice of the United States*, 116 AM. J. INT'L L. 593 (2022).

[271] *See* Martin Armstrong, *The Countries Pledging the Most Military Aid to Ukraine*, STATISTA (Dec. 13, 2023), https://www.statista.com/chart/27278/military-aid-to-ukraine-by-country/; Kiel Institute for the World Economy, *Ukraine Support Tracker*, https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/ (last updated Oct. 31, 2023).

[272] Armstrong, *supra* note 271; Kiel Institute for the World Economy, *supra* note 271.

[273] U.S. WHITE HOUSE, NATIONAL SECURITY STRATEGY 25-26 (2022).

Ukraine."[274] With the conflict in Ukraine, the United States recognizes, "Russia is challenging the United States and some norms in the international order in its war of territorial aggression."[275] The assault on the prohibition of annexations and the challenge to U.S. dominance have become intertwined.

Countries outside the U.S. security umbrella are also participating in this contest and have hesitated to stand strongly behind Ukraine—or, therefore, for the prohibition of annexations. China's responses are especially illuminating because China has long been a key proponent of the international legal norms on territorial integrity. Not here. Although it has made bland statements to the effect that the "territorial integrity of all states should be respected, and that the purposes and principles of the UN Charter should be jointly upheld,"[276] it has steadfastly declined to condemn Russia for violating the prohibition of annexations.[277] Instead, it has strengthened its ties to Russia,[278] expressed sympathy for Russia's "legitimate security aspirations,"[279] and

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[274] U.S. OFF. OF THE DIR. OF NAT'L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 4 (2023), https://www.dni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf.

[275] *Id*.

[276] Chinese Mission to the UN, *Ambassador Zhang Jun: Any Action by the Security Council Should Be Truly Conducive to Defusing the Ukraine Crisis*, MINISTRY OF FOREIGN AFFS. OF THE PRC (Feb. 25, 2022), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/202202/t20220226_10645831.html; Chinese Mission to the UN, *Remarks by Ambassador Zhang Jun at the Emergency Special Session of the UN General Assembly on Ukraine*, MINISTRY OF FOREIGN AFFS. OF THE PRC (Feb. 28, 2022), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/202203/t20220301_10646521.html.

[277] Julian Ku, *China Has Ditched Its Own Principles to Back Russia*, FOREIGN POL'Y (Apr. 7, 2022), https://foreignpolicy.com/2022/04/07/china-ditched-principles-ukraine-russia-use-of-force/.

[278] *See, e.g.*, Bonny Lin, *The China-Russia Axis Takes Shape*, FOREIGN POL'Y (Sept. 11, 2023), https://foreignpolicy.com/2023/09/11/china-russia-alliance-cooperation-brics-sco-economy-military-war-ukraine-putin-xi/.

[279] *See* Chinese Mission to the UN, *Ambassador Zhang Jun: Any Action by the Security Council Should Be Truly Conducive to Defusing the Ukraine Crisis*, *supra* note 276; *see also, e.g.*, Chinese Mission to the UN, *Explanation of Vote by Ambassador Zhang Jun at the UN General Assembly on the Resolution on Ukraine*, MINISTRY OF FOREIGN AFFS. OF THE PRC (Mar. 2, 2022), https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/202203/t20220303_10647486.html.l ("It is important to give full attention and respect to the legitimate security concerns of all countries, and on that basis conduct negotiations to put in place a balanced, effective and sustainable European security mechanism.").

criticized the United States and NATO for the world's security problems, including in Ukraine.[280]

China, like Russia, is seeking to change the international order in which the United States has been dominant. Its support for the prohibition of annexations has taken a back seat to its broader geopolitical contest with the United States. Bonny Lin explains that Chinese experts have been "working to resolve the contradiction between Beijing's emphasis on respect for sovereignty and its refusal to describe the conflict as a Russian invasion of Ukraine."[281] In an effort to defend China's stance, "[s]ome Chinese scholars have suggested that sovereignty and territorial integrity should be viewed as only one of 12 core principles for China to balance—in other words, not the most important one, or a value that needs to be respected completely."[282] That alone reflects a retreat from China's historic position in support of the prohibition of annexations.

China has even questioned Ukraine's claim to statehood. China's Ambassador to France, Lu Shaye, publicly announced that the question of Crimea "depends on how the problem is perceived," since the region was "at the beginning Russian" and "offered to Ukraine during the Soviet era."[283] These "ex-Soviet Union countries don't have an effective status in international law," Lu Shaye proclaimed.[284] European officials quickly condemned Lu Shaye's remarks, and Beijing distanced itself from them.[285] But they seemed less like a gaffe than like a trial balloon for testing a theory that might have resolved the apparent contradiction in China's position. Lin explains that, "if China wanted to maintain its position that the principle of sovereignty and

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[280] Bonny Lin, *Can China Thread the Needle on Ukraine?*, FOREIGN AFFS. (May 17, 2023), https://www-foreignaffairs-com.ezproxy.cul.columbia.edu/china/can-china-thread-needle-ukraine; *Xi Slams Sanctions for 'Weaponizing' World Economy at BRICS Open*, BLOOMBERG NEWS (June 22, 2022), https://www.bloomberg.com/news/articles/2022-06-22/xi-slams-sanctions-for-weaponizing-world-economy-at-brics-open.

[281] Lin, *Can China Thread the Needle on Ukraine?*, *supra* note 280.

[282] *Id*.

[283] *See* Simone McCarthy, *Chinese Ambassador Sparkes European Outrage Over Suggestion Former Soviet States Don't Exist*, CNN (Apr. 25, 2023), https://www.cnn.com/2023/04/24/china/china-ambassador-lu-shaye-baltic-soviet-states-europe-intl-hnk/index.html (quoting Lu Shaye). For the full interview, see LCI, *The Controversial Interview of Lu Shaye, Chinese Ambassador to France—REPLAY*, YOUTUBE (Apr. 24, 2023), https://www.youtube.com/watch?v=8XYDYf1gmtA.

[284] McCarthy, *supra* note 283.

[285] Lin, *supra* note 289; Antonia Zimmermann, *Baltics Blast China Diplomat for Questioning Sovereignty of Ex-Soviet States*, POLITICO (Apr. 23, 2023), https://www.politico.eu/article/china-france-estonia-latvia-diplomat-under-fire-in-eu-for-questioning-sovereignty-of-ex-soviet-countries/.

territorial integrity is nonnegotiable, then Lu Shaye's questioning of the sovereignty of post-Soviet states might be the solution."[286]

Beyond China, states from the global South have almost uniformly stayed on the sidelines of the Ukraine conflict. "Across the globe, from India to Indonesia, Brazil to Turkey, Nigeria to South Africa, developing countries are increasingly seeking to avoid costly entanglements with the major powers."[287] Matias Spektor describes this stance as "a response to the rise of a new multipolar world," in which the United States' relative influence is in decline.[288] Sivshankar Menon asserts that "many developing countries see the war in Ukraine and the West's rivalry with China as distracting from urgent issues such as debt, climate change, and the effects of the pandemic."[289] Nirumpama Rao and Tim Muithi contend that these countries view the West's outrage about Russia as disingenuous or hypocritical, not reason to get faithfully in line.[290]

These explanations do not reflect a full retreat from the prohibition. But neither do they reflect a concerted effort to uphold it. The majority of states have instead communicated a compromised message: that Russia's assault on this norm is, of course, problematic but not worth the effort that would be required to uphold it, given everything else in play. It has become a casualty in the broader worldmaking contest.

Commentators have also largely failed to draw attention to this norm.[291] Many have noted that Russia's invasion violates Article

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[286] Lin, *Can China Thread the Needle on Ukraine?*, *supra* note 280.

[287] Matias Spektor, *In Defense of the Fence Sitters*, FOREIGN AFFS. (Apr. 18, 2023), https://www.foreignaffairs.com/world/global-south-defense-fence-sitters.

[288] *Id*.

[289] Shivshankar Menon, *Out of Alignment*, FOREIGN AFFS. (Feb. 9, 2023), https://www.foreignaffairs.com/world/out-alignment-war-in-ukraine-non-western-powers-shivshankar-menon; *see also* Howard W. French, *Why Ukraine Is Not a Priority for the Global South*, FOREIGN POL'Y (Sept. 19, 2023), https://foreignpolicy.com/2023/09/19/unga-ukraine-zelensky-speech-russia-global-south-support/ ("Increasingly, the poor are saying to the rich that your priorities won't mean more to us until ours mean much more to you.").

[290] Murithi, *supra* note 12; Nirumpama Rao, *The Upside of Rivalry*, FOREIGN AFFS. (Apr. 18, 2023), https://www.foreignaffairs.com/india/modi-new-delhi-upside-rivalry.

[291] Here, too, the worldmaking contest serves to frame the issues. As Patryk Labuda has argued:

> commentators in the post-2022 phase of the war have regularly triviliazed Ukraine's struggle for self-determination as a proxy war between the West and the Rest or the Global North against the South, denying the agency of Ukraine in a neo-colonial fashion.

2(4),[292] but they seem to lack even the vocabulary to explain, and at times they overtly deny, that this invasion is different from other uses of force that have occurred since the Charter was adopted because this one involves a claim to territory. The statement by the President and the Board of the European Society of International Law ("ESIL") is illustrative. It describes Russia's conduct as a "violation of the most basic principles of the UN Charter and rules of international law."[293] The statement seems to suggest that this violation is especially egregious, without any explanation for why. It simply asserts, in conclusory form, that "[t]o contend that other States—especially in the West—have no better record when it comes to respecting international law is a morally corrupt and irrelevant distraction."[294]

If the only relevant question for assessing the legal significance of the invasion is whether it amounts to a use of force in violation of Article 2(4)—or, to use the standard for the crime of aggression, in "manifest violation of the Charter"[295]—then the analysis can end there, as the ESIL statement did. Indeed, if that is the only relevant question, then this invasion is just another in a long string of violations of Article 2(4), as many other international lawyers and policy experts have suggested. They have variously asserted that it is legally indistinguishable from the others, especially the 2003 Iraq War;[296] that it reflects international law's same, old "structural failure" to address "the hegemony

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Patryk L. Labuda, *Countering Imperialism in International Law: Examining the Special Tribunal for Aggression against Ukraine through a Post-Colonial Eastern European Lens*, YALE J. OF INT'L L. *10 (forthcoming 2024) *available a*t https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4518498.

[292] *See, e.g.*, Claus Kreß, *The Ukraine War and the Prohibition of the Use of Force in International Law*, TORKEL OPSAHL ACAD. EPUBLISHER (2022), https://www.toaep.org/ops-pdf/13-kress/; Rachael Lorna Johnstone, *Is Ukraine the End of International Law as We Know It?*, J. N. ATL. & ARCTIC (Apr. 2022), https://www.jonaa.org/content/is-ukraine-the-end-of-international-law-as-we-know-it; *Statement by the President and the Board of the European Society of International Law on the Russian Aggression against Ukraine*, EUR. SOC'Y OF INT'L L. (Feb. 24, 2022), https://esil-sedi.eu/statement-by-the-president-and-the-board-of-the-european-society-of-international-law-on-the-russian-aggression-against-ukraine/ [hereinafter "ESIL Statement"]; Executive Council, Int'l L. Ass'n (@ILA_official), *Statement on the Ongoing and Evolving Aggression in and Against Ukraine*, X (TWITTER) (Mar. 3, 2022), https://twitter.com/ILA_official/status/1499824182061932545.

[293] ESIL Statement, *supra* note 292.

[294] *Id*.

[295] Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90.

[296] *E.g.*, Kai Ambos, *Ukraine and the Double Standards of the West*, 4 J. INT'L CRIM. JUST. 875, 891 (2022) ("While one may, arguably, see differences between the Russian war of aggression and the US-led invasion of Iraq . . . , these differences, if accepted at all, are at best ones of degree but not of principle."); Sâ Benjamin Traoré, *Ukraine and Beyond: The Need to Reaffirm Basic Principles and to Build a New Consensus on the Prohibition of the Use of Force in International Relations*, CIL DIALOGUES (Mar. 22, 2023), https://cil.nus.edu.sg/blogs/ukraine-

wielded by powerful States";[297] that it "is not a departure from this pattern" of militarily powerful states "impos[ing] their will on other countries . . . but a continuation of the reign of the powerful over the less powerful;"[298] that "Western powers have carried out similarly violent, unjust, and undemocratic interventions;"[299] or that the West's disproportionate attention to it, relative to other violations of international law, cannot adequately be explained except "along racial lines."[300]

These commentators are correct that the military adventurism of the West, and especially of the United States, has limited the effect of Article 2(4). Further, the international order in which the West has

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and-beyond-the-need-to-reaffirm-basic-principles-and-to-build-a-new-consensus-on-the-prohibition-of-the-use-of-force-in-international-relations/ (describing as "problematic" efforts to "distinguish[] between acts of aggression" and insisting that "[a]ll acts of aggression must be put on the same footing"); Alejandro Chehtman, *Unpacking the Comparison Between Ukraine and Iraq*, CIL DIALOGUES (Mar. 20, 2023), https://cil.nus.edu.sg/blogs/unpacking-the-comparison-between-ukraine-and-iraq/ ("[C]laiming that the Russian invasion of Ukraine is different in kind seems to me to be the wrong move, for it would indicate that the US-led use of force in Iraq need not be as strongly condemned."); Ardi Imseis, *Reflections on the Ukraine Moment and Western Selectivity: A Response to Ingrid (Wuerth) Brunk and Monica Hakimi*, CIL DIALOGUES (Mar. 27, 2023), https://cil.nus.edu.sg/blogs/reflections-on-the-ukraine-moment-and-western-selectivity-a-response-to-ingrid-wuerth-brunk-and-monica-hakimi/ ("[W]hen one scratches away at the surface of current claims that Russia's illegal actions in Ukraine are normatively different than those undertaken by the West and their allies, one is hard pressed to take such claims seriously."); *but cf*. Anastasiya Kotova & Ntina Tzouvala, *On Force, Territory, and Independence: How (Not) to Narrow Down a Rule*, CIL DIALOGUES (Mar. 24, 2023), https://cil.nus.edu.sg/blogs/on-force-territory-and-independence-how-not-to-narrow-down-a-rule/ ("We can (and should) be attuned to the distinctiveness of Russian imperialism and its territorial bend without turning this distinctiveness into moral and legal hierarchy.").

[297] Atul Alexander, *International Law's Failure to Halt Russia's Invasion of Ukraine Reflects Hegemony Wielded by Powerful Nations*, NAT'L HERALD (IND.) (Mar. 1, 2022), https://www.nationalheraldindia.com/india/international-laws-failure-to-halt-russias-invasion-of-ukraine-reflects-hegemony-wielded-by-powerful-nations; *see also, e.g.*, Nico Krisch, *After Hegemony: The Law on the Use of Force and the Ukraine Crisis*, EJIL:TALK! (Mar. 2, 2022), ("The result . . . may not be so much the death of Article 2(4) . . . as a demise of the effectiveness of the norm for some powerful actors.").

[298] Murithi, *supra* note 12; *see also* Traoré, *supra* note 296 ("[A]s far as the prohibition of the use of force is concerned, its persistent violations by Western military powerful states, in particular, have left the legitimate sentiment in the rest of the world that there is nothing new under the sun.").

[299] Rao, *supra* note 290.

[300] Ralphe Wilde, *Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting*, OPINIO JURIS (Mar. 17, 2022), http://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/. For an argument that the discourse around the war in Ukraine has ignored "anti-Slavic and anti-Eastern European racism as well as the 'inferior' cognitive status that Ukrainians occupy within the European imagery, rooted in nineteenth century race science," see Labuda, *supra* note 291, at *21.

dominated has been unjust to states in the global South, including through racist practices that have at times permeated the discipline. Nonetheless, this invasion is legally and practically distinct because it directly challenges the prohibition of annexations and seeks to extinguish an entire state, forcibly changing sovereign title and denying Ukrainians their self-determination. The failure of most commentators to call attention to this prohibition obscures what makes it distinct and that it is under pressure. And yet, it is under pressure. Even though it is directly at stake in the Ukraine War, it is widely being taken for granted as states position themselves in the larger worldmaking contest in play.

2. *Zooming Out*

Beyond the specific cases that we have discussed thus far, the apparent decline in U.S. global dominance threatens the prohibition of annexations at a more systemic level. The security arrangements that the United States has entered into since the adoption of the Charter provide for its military footprint—and its security umbrella—to be expansive.[301] This, of course, is the security architecture that Russia and China, and many other countries, are now challenging. Even before the 2022 invasion, commentators highlighted the geopolitical contest underway, with China, in particular, as "a rival of American hegemony in East Asia and beyond,"[302] and the U.S. capacity to shape world affairs in decline.[303] The Ukraine crisis simply kicked this contest into higher gear.[304] As such, the prohibition of annexations and U.S. global dominance are intertwined not only in Ukraine but also more deeply and broadly, such that challenging one increasingly threatens (or depending on your perspective, promises) to bring down the other.

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[301] MAZARR ET. AL., *supra* note 143, at 11.

[302] JOHN G. IKENBERRY, A WORLD SAFE FOR DEMOCRACY: LIBERAL INTERNATIONALISM AND THE CRISES OF GLOBAL ORDER 271–72 (2020); *see also, e.g.*, ALEXANDER COOLEY & DANIEL NEXON, EXIT FROM HEGEMONY: THE UNRAVELING OF THE AMERICAN GLOBAL ORDER 188 (2020); REBECCA LISSNER & MIRA RAPP-HOOPER, AN OPEN WORLD: HOW AMERICA CAN WIN THE CONTEST FOR TWENTY-FIRST-CENTURY ORDER 47, 49 (2020); Fareed Zakaria, *The Self-Destruction of American Power: Washington Squandered the Unipolar Moment*, FOREIGN AFFS., at 10 (June 11, 2019).

[303] COOLEY & NEXON, *supra* note 302, at 200–01; Daniel Drezner, *This Time is Different*, FOREIGN AFFS., Apr. 16, 2019, at 10; Jacob Lew & Richard Nephew, *The Use and Misuse of Economic Statecraft*, FOREIGN AFFS., Oct. 15, 2018, at 139; LISSNER & RAPP-HOOPER, *supra* note 302, at 44–45, 50; Jessica T. Mathews, *Present at the Re-creation?: U.S. Foreign Policy Must Be Remade, Not Restored*, FOREIGN AFFS., Feb. 16, 2021, at 10; Zakaria, *supra* note 302.

[304] *See, e.g.*, Ted Galen Carpenter, *US (Rightly) Calls for the Expansion of the UN Security Council*, RESPONSIBLE STATECRAFT (June 15, 2023), https://responsiblestatecraft.org/2023/06/15/us-rightly-calls-for-the-expansion-of-the-un-security-council/ ("One graphic indicator that the United States no longer automatically calls the shots on important issues is the global reaction to the Russia-Ukraine war.").

In a world in which US dominance is contestable, states that depend on the United States for their security are more vulnerable to attack from those who have claims on their territories. Unsurprisingly, these states have responded to Russia's 2022 invasion by ramping up their security commitments. NATO states have revitalized their alliance after a period of apparent listlessness.[305] Unsurprisingly, the states closest to Russia have been most adamant about reinforcing NATO and resisting Russian aggression—in Ukraine and beyond.[306]

Meanwhile in the Pacific, Japan has taken unprecedented steps to support Ukraine, to strengthen its ties to NATO, to build other alliances in its region,[307] and otherwise to reinforce its own security in light of China's looming threat.[308] "In Tokyo," one commentator reports, "officials fear what conclusions China might draw from the war, and are seeking to signal to Beijing that any similar attempt to forcibly change the status quo in East Asia will be met with fierce resistance."[309] In addition, the Philippines has acted to strengthen its security alliance with the United States as a bulwark against China, which has been threatening to annex Philippine territory in the South China Sea.[310] South Korea has also sought to strengthen its security

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[305] *See, e.g.*, Jonathan Guyer, *NATO Was in Crisis. Putin's War Made It Even More Powerful*, VOX (Mar. 25, 2022), https://www.vox.com/22994826/nato-resurgence-biden-trip-putin-ukraine; Lara Jakes, *NATO Nations Begin Giant Air Force Drills in Germany*, N.Y. TIMES (June 12, 2023), https://www.nytimes.com/2023/06/12/world/europe/nato-air-exercises-drills-germany.html?smid=nytcore-ios-share&referringSource=articleShare; Dan Kurtz-Phelan, *NATO's New Momentum: A Conversation with U.S. Ambassador to NATO Julianne Smith*, FOREIGN AFFS. (June 9, 2022), https://www.foreignaffairs.com/podcasts/natos-new-momentum.

[306] *See, e.g.*, Rank Langfitt, *After the Ukraine War, What Comes Next? NATO Allies Don't Agree*, NPR (Feb. 23, 2023), https://www.npr.org/2023/02/23/1158152004/ukraine-russia-war-nato-europe; David E. Sanger & Steven Erlanger, *Allies Pressure Biden to Hasten NATO Membership for Ukraine*, N.Y. TIMES (June 14, 2023), https://www.nytimes.com/2023/06/14/us/politics/biden-nato-ukraine.html.

[307] *See, e.g.*, Alexander Smith, *China and Ukraine Force Rivals Japan and South Korea to Rethink*, NBC NEWS (May 21, 2023), https://www.nbcnews.com/news/world/china-ukraine-force-rivals-japan-south-korea-rethink-rcna84424; Mari Yamaguchi, *US, Japan, Philippines Agree to Strengthen Security Ties Amid Tensions Over China, North Korea*, AP NEWS (June 16, 2023), https://apnews.com/article/japan-us-philippines-korea-security-talks-b4cdf9162563c60d89caa87bceb5ec26

[308] *See, e.g.*, James D.J. Brown, *The China Factor: Explaining Japan's Stance on Russia's Invasion of Ukraine*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 28, 2023), https://carnegieendowment.org/politika/89156#:~:text=In%202022%2C%20however%2C%20the%20Japanese,of%20Russian%20oil%20and%20coal; Gabriel Dominguez, *One Year On, Ukraine War Accelerating Changes in Japan's Defense Posture*, JAPAN TIMES (Feb. 20, 2023); Yoshimasa Hiayashi, *Japanese FM: It's Time to Deepen Cooperation*, POLITICO (Apr. 5, 2023), https://www.politico.eu/article/japan-foreign-minister-time-deepen-cooperation-nato-eu/.

[309] Brown, *supra* note 308.

[310] *See, e.g.*, Jeff Mason, Trevor Hunnicutt & David Brunnstrom, *Amid China Pressure, US and Philippines Recommit to Security Alliance*, REUTERS (May 2, 2023), https://www.reu-

alliance with the United States and other U.S. allies, especially on nuclear deterrence.[311] And because virtually everyone seems to see the situation in Ukraine as a test case for what might happen in Taiwan,[312] U.S. and Taiwanese officials have played a delicate dance to recommit to their partnership without sparking a full-blown war with China.

Time will tell whether these steps are sufficient to secure the territories under the U.S. security umbrella. That question is especially salient because U.S. domestic politics have recently heightened the uncertainty about what the United States would do in the face of an effort forcibly to seize territory from one of its security allies or from another state.[313] The growing sense that the United States would not, should not—or even could not—step in to protect the territorial status quo puts the prohibition at systemic risk, as others jockey for an upper hand.

The signs are troubling. Since Russia's full-scale invasion of Ukraine in 2022, territorial conflicts appear to be on the rise.[314] The conflict between Israel and Palestine has again erupted at massive scale, with Israel now claiming "exclusive and indisputable right to *all parts* of the Land of Israel," including the West Bank.[315] and Iran and

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ters.com/world/biden-reassure-philippines-marcos-china-tensions-flare-2023-05-01/; Susannah Patton, *Making the U.S.-Philippine Alliance Count*, WAR ON THE ROCKS (June 15, 2023), https://warontherocks.com/2023/06/making-the-u-s-philippines-alliance-count/.

311 *See, e.g.*, Joseph Clark, *U.S., South Korea Unveil Joint Declaration Outlining Steps to Bolster Deterrence,* DOD NEWS (Apr. 26, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3375770/us-south-korea-unveil-joint-declaration-outlining-steps-to-bolster-deterrence/; Philippe Mesmer, *Caught in China-US Rivalry, South Korea is Tempted by Military Nuclear Capacity*, LE MONDE (Fr.) (May 11, 2023), https://www.lemonde.fr/en/opinion/article/2023/05/11/caught-in-china-us-rivalry-south-korea-is-tempted-by-military-nuclear-capacity_6026343_23.html.

312 *See, e.g.*, Edward Wong, *Taiwan Ambassador Says Ukraine's Success Against Russia Will Help Deter China*, N.Y. TIMES (May 20, 2023), https://www.nytimes.com/2023/05/30/us/politics/taiwan-ambassador-ukraine-china.html.

313 See James Crabtree, *America's Strategy of Ambiguity Is Ending Now: The United States has expanded its security commitments around the world—and the bill is coming due*, Foreign Policy (Jan. 22, 2024); Joan E. Greve, *How the US Far Right and Progressives Ended Up Agreeing on Military Spending Cuts*, GUARDIAN (Jan. 23, 2023), https://www.theguardian.com/us-news/2023/jan/23/defense-spending-cuts-military-budget-congress-far-right-progressives; Jeffrey M. Jones, *Fewer Americans Want U.S. Taking Major Role in World Affairs*, GALLUP (Mar. 3, 2023), https://news.gallup.com/poll/471350/fewer-americans-taking-major-role-world-affairs.aspx.

314 *See, e.g.*, Editors, *Daily Review: A Return to Interstate Conflict*, WORLD POLITICS REV. (Dec. 18, 2023).

315 *See* Tamar Megiddo, Ronit Levine-Schnur & Yael Berda, *Israel is Annexing the West Bank. Don't be Misled by Its Gaslighting*, JUST SECURITY, Feb. 9, 2023, https://www.justsecurity.org/85093/israel-is-annexing-the-west-bank-dont-be-misled-by-its-gaslighting/ (quoting the founding documents of the Israeli government formed on December 29, 2022) (internal quotation marks omitted).

the militant groups that it supports repeating their vows to "eradicate" that state.[316] Venezuela has moved to realize its claims to an oil-rich region that Guyana also claims and has long administered.[317] Ethiopia has entered into a land deal with Somaliland, a breakaway region in Somalia, to gain access to the Red Sea in a move that Somalia has pledged to fight.[318] Transnistria, a breakaway region in Moldova, has asked Russia for protection, as Moldova has charged Russia with engaging in a "hybrid war" to derail its efforts to join the European Union and bring it under Russian control.[319] And China has increased its coercive pressure in a number of its longstanding territorial disputes with its neighbors.[320] Not all of these moves directly violate the prohibition of annexations, but each undercuts the policies behind that prohibition, and each suggests that territorial aggrandizement may again be on the rise.

VI. CONCLUSION

As the world is increasingly caught up in a contest about what comes next, the social forces that produced and sustained the prohibition of annexations—and the broader international order of which it was part—are waning. History, political science, and legal doctrine all instruct that this prohibition has been significant both to reducing interstate conflicts, including conflicts among military powerhouses that can lead to world wars, and to establishing the necessary, though by no

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[316] *Iran's Revolutionary Guard Chief Vows to 'Eradicate Zionist Regime' After Alleged Israeli Killing of Top Adviser*, HAARETZ, Dec. 29, 2023, https://www.haaretz.com/israel-news/2023-12-28/ty-article/irgc-chief-vows-to-eradicate-zionist-regime-after-alleged-israeli-killing-of-top-adviser/0000018c-afe2-d45c-a98e-afeee70e0000.

[317] *See* Arbitral Award of 3 October 1899 (Guyana v. Venez.), Provisional Measures, I.C.J., Order of 1 Dec. 2023; Bert Wilkinson, *Guyana Condemns Venezuela for Signing into Law a Referendum Approving Annexation of Disputed Region*, AP NEWS, Apr. 4, 2024, https://apnews.com/article/guyana-venezuela-essequibo-dispute-maduro-law-a72e94ed5417f99d090e1062c68017d7.

[318] *Somalia Rejects Mediation with Ethiopia Gov't over Somaliland Port Deal*, AL JAZEERA, Jan. 18, 2024, https://www.aljazeera.com/news/2024/1/18/somalia-rejects-mediation-with-ethiopia-govt-over-somaliland-port-deal; Abdi Latif Dahir, *Why a Port Deal Has the Horn of Africa on Edge*, NY TIMES, Jan. 2, 2024, https://www.nytimes.com/2024/01/02/world/africa/ethiopia-somaliland-port-deal.html.

[319] *See* Stephen McGrath, *How Events in Moldova's Breakaway Transnistria Region Raised Fears of Russian Interference*, AP NEWS, Mar. 27, 2024, https://apnews.com/article/transnistria-moldova-russia-ukraine-war-99575f5e67c222edced149031417bd5a.

[320] Lisa Curtis & Derek Grossman, *Trouble at the Roof of the World: Why America Can't Afford to Ignore India and China's Border Dispute*, FOREIGN AFFAIRS (Feb. 15, 2023); Anchal Vohra, *China is Quietly Expanding Its Land Grabs in the Himalayas*, FOREIGN POLICY (Feb. 1, 2024), https://foreignpolicy.com/2024/02/01/china-is-quietly-expanding-its-land-grabs-in-the-himalayas/; Mari Yamaguchi, *Japan Repeatedly Spots Chinese Coast Guard and Warships Near Disputed Waters*, AP NEWS (Feb. 8, 2024), https://apnews.com/article/japan-china-islands-dispute-islands-coast-guard-f75404c5a877abd823fd5fe1711f78b1.

means sufficient, conditions for states to entrench and sustain themselves as states, free from certain forms of external domination. The question that the world now confronts is whether a new set of social forces can and should emerge to sustain the prohibition and limit the associated conflicts over territory.

The norms on territorial entrenchment that this prohibition undergirds have always come with tradeoffs. For example, the way that international law has allocated territory—and state authority—has contributed to the arbitrary separation of peoples and ecosystems; may make internal or cross border ethnic conflict more likely;[321] limits to within the confines of existing states much of the emancipatory potential of the right to self-determination; has provided the grounds for shielding from redress human rights abuses within particular states and for limiting the migration of those fleeing war, poverty, and environmental devastation;[322] has allowed for shirking on measures to protect the environment and to provide other global public goods;[323] and has systematically and at a very large scale helped to reproduce past injustices to entire populations.[324] Now, with climate change threatening to eradicate the entire territories of some states,[325] and technological and other developments that reduce the relevance of territory for many forms human activity,[326] some might look to diminish further, rather than to entrench, the international legal significance of territory, as the basis for state authority.

But territorially-defined states have also been the building blocks of the international order. For better or for worse, states and

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[321] Mohammad Shahabuddin, *Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar*, 92 ASIAN J. INT'L L. 332, 336–37 (2019).

[322] Tendayi Achiumi, *Migration As Decolonization*, 71 STANFORD L. REV. 1509 (2019); *see also* Tendayi Achiume, *Racial Borders*, 110 GEO. LAW J. 445 (2022).

[323] Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651 (2012); Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014).

[324] Makau W. Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

[325] Maxine Burkett, *The Nation* Ex-Situ*: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345 (2011); Rosemary Rayfuse, *International Law and Disappearing States: Maritime Zones and the Criteria for Statehood*, 41 ENVT'L POL'Y & L. 281 (2011); Derek Wong*, Sovereignty Sunk? The Position of Sinking States at International Law*, 14 MELB. J. INT'L L. 346 (2013).

[326] Marcelo G. Kohen & Mamadou Hébié, *Introduction*, *in* RESEARCH HANDBOOK ON TERRITORIAL DISPUTES IN INTERNATIONAL LAW, *supra* note 5, at 1 ("Globalization, interdependence, and integration are contemporary phenomena that are supposed to render territoriality less important than before.").

international law have been constituted together. States depend on international law to reify their power in their designated territories, and international law, in turn, depends on them to exercise this power in the service of its governance projects, including its projects on peace, human rights, the economy, the environment, and global public goods.[327] How effective the various projects of international law have been, what promises they hold, and whom they will benefit or harm all remain deeply contested. And again, these projects have themselves been advanced in ways that have entrenched power in racial or economic terms and bolstered the U.S. position of dominance. But there are not, currently on the table, any plausible proposals for replacing states, defined by territory, as the main units for political organization in the world.

In the absence of any alternative, the erosion of the prohibition of annexations—and with it, the broader set of norms that protect states' territorial borders from forcible change—threatens to have negative and long-lasting consequences for many of the same peoples that such proposals are designed to protect. There is substantial evidence that conflicts over territory result in human suffering, as is illustrated by the persistent territorial conflicts between Ethiopia and Eritrea, and between Armenia and Azerbaijan; the movements of violent extremist groups across states in the Middle East and the African Sahel;[328] the longstanding occupation of the Palestinian territories; the incomplete decolonization in the Chagos Islands and Western Sahara; and of course, the brutal histories of war, conquest, and colonization. Preserving the prohibition of annexations is critically important, even if only because the currently available alternatives appear to be considerably worse.

For those who agree that the prohibition should be preserved, it will not sustain itself. States would have to decide together to support it. That is how international legal norms are, in the end, established and preserved.[329] In this case, the factors that drove states, especially non-aligned states in the post-World War II period, to focus together on it are evidently less salient than they once were. The processes for ending colonization, defined by the forcible acquisition and control of foreign

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[327] *See* GRANT, AGGRESSION AGAINST UKRAINE, *supra* note 11, at 1; *but cf*. WATERS, *supra* note 115, at 93 (questioning in the context of secession whether fixed borders and the territorial integrity of states is "being purchased at a high price in other things we value: human rights, autonomy, self-governance, justice.").

[328] *See Violent Extremism in the Sahel*, COUNCIL FOREIGN RELS. GLOB. CONFLICT TRACKER, https://www.cfr.org/global-conflict-tracker/conflict/violent-extremism-sahel (Aug. 1, 2023).

[329] *See, e.g.*, Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998); Nico Krisch, *The Dynamics of International Law Redux*, 74 CURRENT LEGAL PROBS. 269 (2021).

territory, are mostly (though not entirely) complete. And the significance of the prohibition to other longstanding projects in international law has faded from view.

In light of these trends, sustaining the prohibition will likely require a new global politics, one that redefines again the terms on which states exercise authority and control over territory.[330] Decisions about whether and how states, individually and collectively, should engage on these questions are obviously for them—not us—to decide. But states *should* in our view weigh carefully the costs and benefits of the prohibition, rather than let it casually slip away. As Naz Modirzadeh has recently explained, some emancipatory projects in international law have to date "left behind the Third World state as a vehicle for international law development or action."[331] "[G]iven the state's central role as an actor in international law," Modirzadeh persuasively argues, these projects will not realize their emancipatory goals "without an alternative vision for the role of the state" in mobilizing "a shift in the power structures of international law."[332] Rather than diminish the significance of territory as the basis for establishing state authority, efforts radically to improve the human condition through international law might instead focus on improving what happens in and across states' settled borders. This will not be easy to do, especially for states that are reluctant to reinforce the prohibition through measures that might inadvertently also work to bolster U.S. dominance. But without a concerted effort to sustain the prohibition (with or without U.S. dominance), it might continue to deteriorate, with potentially catastrophic consequences for the world.

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[330] For example, Patrick Labuda argues for a new "post-colonial perspective to illuminate the common interests of the Global South and Global East," linking Ukraine's struggle for self-determination to those in Western Sahara, Taiwan, and Palestine. Labuda, *supra* note 291, at *36-37.

[331] Naz K. Modirzadeh, *'[L]et Us All Agree to Die a Little': TWAIL's Unfulfilled Promise*, HARV. INT'L L. J., manuscript at 26 (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4406477.

[332] *Id.* at 27.