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Introduction: From Sovereign Equality to Mandatory Cooperation

Unilateralism or Cooperation?

On February 24, 2022, Russian President Vladimir Putin stunned the world by announcing in a televised address that Russia would conduct a "special military operation" against Ukraine. According to Putin, Russia would not stand idly by while "far-right nationalists and neo-Nazis in Ukraine" committed "genocide" against pro-Russian separatists. Military intervention was also a necessary exercise of self-defense, Putin argued, because Ukraine's warming relations with the North Atlantic Treaty Organization (NATO) could eventually bring advanced western weaponry to Russia's doorstep. "Russia cannot feel safe, develop, and exist while facing a permanent threat from the territory of today's Ukraine," Putin asserted.[1] Moments later, Russian tank columns pierced Ukraine's borders from multiple directions as missiles rained down on Kyiv.[2]

While Ukraine was resisting Russia on the battlefield, it also mounted a vigorous legal defense. Just two days after Russia launched its invasion, Ukraine instituted proceedings against Russia in the International Court of Justice (ICJ), a tribunal established under the United Nations (UN) Charter to adjudicate disputes between states.[3] Ukraine urged the Court to adjudge and declare that Russia's accusations of genocide against separatists in eastern Ukraine were unfounded, having no basis in fact or international law. Ukraine also asked the ICJ to grant provisional

[1] 'Transcript: Vladimir Putin's Televised Address on Ukraine', Bloomberg News, 24 February 2022. NATO countries denied the accusation that they planned to invite Ukraine to join the alliance.

[2] Jessie Yueng et al., 'Russia Attacks Ukraine', CNN, 24 February 2022.

[3] Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr./Russ.), Provisional Measures Order, 16 March 2022. The ICJ also occasionally issues advisory opinions at the request of UN bodies.

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measures requiring Russia to suspend its invasion while legal proceedings continued before the Court.[4] Russia declined to appear for oral argument but contested Ukraine's application, asserting that the ICJ lacked jurisdiction over the case.[5]

While Ukraine's application was pending before the ICJ, the international community rebuked Russia in the strongest possible terms. On March 2, 2022, the UN General Assembly met in emergency session and voted overwhelmingly in favor of a resolution condemning Putin's televised speech, deploring Russia's invasion, and demanding that Russia "immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders."[6] Two weeks later, the ICJ took note of the General Assembly's resolution in an order granting Ukraine's request for provisional measures and directed Russia to suspend its military operations in Ukraine.[7] The European Court of Human Rights (ECtHR) also granted interim measures at Ukraine's request, instructing Russia "to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects, such as schools and hospitals."[8]

Russia refused to change course. Shrugging off the interim orders from the ICJ and the ECtHR, Russia continued to pound Ukrainian cities with missiles, artillery, and aerial attacks. In his annual Victory Day speech from Red Square, Putin repeated his grievances against Ukraine and defended Russia's "pre-emptive strike" as "forced, timely, and the only correct decision. A decision by a sovereign, strong, and independent country."[9] According to Putin, Russia's status as an independent

[4] Ibid. pp. 2–3.

[5] Ibid. p. 5. On February 2, 2024, the ICJ concluded that it possessed jurisdiction over the dispute pursuant to the Genocide Convention. Allegations of Genocide Under the Convention on the Prevention and Punishment of Genocide (Ukr./Russ.), 2 Feb. 2024, pp. 36, 56–59, paras. 58, 149, 151.

[6] GA Res. A/RES/ES-11/1, paras. 1–4 (2 March 2022). The final vote was 141–5, with 35 abstaining. 'General Assembly Resolution Demands End to Russian Offensive in Ukraine', UN News, 2 March 2022, https://news.un.org/en/story/2022/03/1113152. The five votes against were cast by Russia, Belarus, North Korea, Syria, and Eritrea. The United States voted in favor.

[7] Ibid. p. 15, para. 76 and p. 17, para. 81.

[8] 'The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian Territory', Press Release, Eur. Ct. Hum. Rts., 1 March 2022.

[9] 'Transcript of President Vladimir Putin's Victory Parade Speech on Red Square', 9 May 2022, http://en.kremlin.ru/events/president/transcripts/68366.

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sovereign meant that it was entitled to decide for itself whether its attacks against Ukraine were legally justified – without regard to other states' views or the considered judgments of international courts.

On February 24, 2025, the third anniversary of the invasion, the UN General Assembly met in emergency session and passed two further resolutions. The first resolution reaffirmed the General Assembly's earlier condemnation of the invasion and reiterated "its demand that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine."[10] The resolution likewise called for a peaceful resolution to the conflict "consistent with the [UN] Charter, including its principles of sovereign equality and territorial integrity of States."[11]

Mariana Betsa, Ukraine's Deputy Foreign Minister, introduced this resolution on behalf of fifty-three state cosponsors. She accused Russia of aiming to replace "the world based on international law" with a "world based on the rule of force."[12] She characterized Ukraine's struggle as seeking a world in which states are not segregated into "predators and prey."[13] Denouncing the Great Power politics that preceded the United Nations, she said that Ukraine was "fighting for a world which cannot be divided by another Molotov-Ribbentrop Pact ... where a future of a nation cannot be determined [by foreign powers] at another Yalta Conference."[14] In other words, Betsa presented Ukraine as defending the world order envisioned in the UN Charter under which all sovereign states are entitled to equal recognition and respect under the rule of international law.

A second General Assembly resolution adopted the same day originated in a proposal from the United States. One week earlier, the United States had held talks with Russia in Saudi Arabia to discuss resolution of the Russia–Ukraine war, without inviting participation from Ukraine or other European nations.[15] At the subsequent General Assembly emergency session, the United States introduced a draft resolution that

[10] GA Res. A/RES/ES-11/7 (25 Feb. 2025), paras 1–4.
[11] Ibid. para. 2.
[12] 'Statement by Deputy Minister for Foreign Affairs of Ukraine H.E. Mariana Betsa at the 11th Emergency Special Session of the UN General Assembly', 24 Feb. 2025, https://un.mfa.gov.ua/en/news/statement-deputy-minister-foreign-affairs-ukraine-he-mariana-betsa-11th-emergency-special-session-un-general-assembly.
[13] Ibid.
[14] Ibid.
[15] 'US and Russia Agree to Explore Mutual Opportunities of End to Ukraine War', The Guardian (18 Feb. 2025).

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mourned the loss of life in Ukraine and reiterated the United Nations' mandate "to maintain international peace and security and to peacefully settle disputes," but declined to condemn Russia, demand Russian withdrawal, or affirm the core UN principles of sovereign equality and territorial integrity.[16] The US draft called for a "swift end to the conflict" and "a lasting peace," but without specifying anything about how this was to happen or the nature of the peace envisioned.[17] Ultimately, European states amended the draft to reaffirm the General Assembly's commitment to "the sovereignty, independence, unity and territorial integrity of Ukraine," with a further stipulation that the "swift end to the conflict" must take the form of a "just, lasting and comprehensive peace . . . in line with the Charter of the United Nations and the principles of sovereign equality and territorial integrity of States."[18]

The content of the two February 24, 2025, General Assembly resolutions was hardly groundbreaking; they essentially echoed previous resolutions. What made the resolutions remarkable was that the United States declined to support them, despite having voted for a resolution with near-identical content two years prior.[19] The United States stunned the world by joining Russia, Belarus, Hungary, Israel, North Korea, Sudan, and eleven other states in voting against the first resolution. Ninety-three states voted in favor while 65 abstained, marking a sharp overall decline from the 2023 resolution, which garnered 141 votes for, 7 against, and 32 abstentions.[20] When called to vote on the second resolution, the United States abstained. That resolution passed with ninety-three in favor, eight against, and seventy-three abstentions.[21]

The United States' votes on these resolutions reveal a dramatic shift under the Trump Administration toward an attitude of tolerance, if not outright support, for an international regime of Great Power dominance. The United States' policy shift also seems to have persuaded many other states to back away from expressly defending the UN Charter's vision of a world that is not divided into "predators and prey." By declining to support resolutions affirming the principles of sovereign equality and the

[16] A/ES-11/L.11 (21 Feb. 2025).
[17] Ibid.
[18] The Path to Peace, GA Res. A/RES/ES-11/8 (24 Feb. 2025).
[19] See Principles of the Charter of the United Nations Underlying a Comprehensive, Just and Lasting Peace in Ukraine, GA Res. A/RES/ES-11/6 (23 Feb. 2023). There were 141 in favor to 7 opposed, with 32 abstentions.
[20] Ibid.; GA Res. A/ES-11/7 (voting record).
[21] GA Res. A/ES-11/8 (voting record).

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territorial integrity of states, the United States breathed new life into a conception of state sovereignty that had fallen into disrepute during the twentieth century. According to that conception, espoused in Putin's public statements defending Russia's invasion of Ukraine, sovereigns as "uncommanded commanders" are not subject to any superior authority.[22] They therefore are free to choose whether to undertake international obligations, as well as to interpret those obligations for themselves. On this understanding, sovereigns have unqualified discretion to decide whether to cooperate with other states on matters of common concern or adopt a recalcitrant or even belligerent approach. In recognition of its salient features, throughout this book we refer to this conception of state sovereignty as *unilateralist*, *absolutist*, or *voluntarist*. A distinguishing feature of this conception is the idea that states are entitled to exercise their sovereign rights and authority however they wish, subject only to those limitations that they voluntarily embrace.

Ukraine's appeal to international institutions in response to Russia's invasion reflects a different conception of state sovereignty. International institutions like the General Assembly, the ICJ, and the ECtHR are predicated on understanding sovereigns as legal equals interacting within an international legal system that imposes certain obligations on all states. Under this conception of international legal order, the principle that states are equally sovereign means that they are not entitled to exercise authority over one another unilaterally, including by asserting the prerogative to act as final arbiters for the international legality of their own actions (*nemo iudex in causa sua*). Instead, to respect sovereign equality under international law, states sometimes *must* engage cooperatively with others. That is, they must engage in what we will call *mandatory cooperation*. This means that states must pursue peaceful dispute resolution and may resort to force only for limited reasons, such as self-defense, and then only in a limited manner. We generally refer to this conception of international legal order as *constitutional*, although we also sometimes describe it as *equitable*.

The argument of this book is that when states disagree over matters of mutual or common concern, the constitutional model now undergirds and constitutes international law's dominant framework for interstate dispute resolution, establishing requirements of mandatory

[22] H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HLR 593, 603 (critiquing John Austin's command theory of law according to which law consists in commands backed by force of an uncommanded commander).

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cooperation. Procedurally, mandatory cooperation imposes an obligation to consult and investigate, negotiate in good faith, and seek third-party dispute resolution if negotiation fails to yield an amicable outcome. Substantively, mandatory cooperation looks to equitable principles to limit the exercise of sovereign rights in order to take account of the legitimate interests of other states and foreign peoples. For instance, we shall see that mandatory cooperation limits how upstream states may use a waterway on which foreign nationals in a downstream state depend. Mandatory cooperation also limits states' authority to apportion migratory fisheries, conduct maritime delimitation, and regulate transit through their territory. Exploring these and other topics, we will show that mandatory cooperation reflects an equitable conception of sovereignty. Conceptualizing sovereignty in this manner not only clarifies international law's current requirements (*lex lata*) but also offers legal principles to guide the law's progressive development in areas where mandatory cooperation has yet to take firm hold (*lex ferenda*).

To illustrate the continuing tensions between the voluntarist and constitutional conceptions of sovereignty, this chapter further explores how these dueling approaches have been expressed throughout the blood-soaked history of Russia's efforts to establish sovereignty over Ukraine. We then flesh out what we mean by a "constitutional" conception of sovereignty, and we explain how this conception supports the equitable requirements of mandatory cooperation under contemporary international law. The chapter concludes with a brief roadmap for the remainder of the book.

Into the Valley of Death

With territory extending into the Black Sea from southern Ukraine, the Crimean Peninsula has been a theatre of frequent and brutal wars for centuries. Catherine the Great of Russia annexed Crimea in 1783 after several decades of territorial conflict with the Ottoman Empire.[23] Seventy years later, the Crimean War (1853–1856) pitted Russia against the combined might of the Ottoman Empire, France, Britain, and Sardinia, with devastating results. Russia lost 400,000 soldiers in the conflict, and the verdant peninsula was laid waste as "[w]ar devoured every vine, tree,

[23] Kelly O'Neal, *Claiming Crimea: A History of Catherine the Great's Southern Empire* (New Haven: Yale University Press, 2017), pp. 1–2, 16–18.

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or blade of grass in its path."[24] The brute ferocity of the conflict inspired Lord Tennyson's iconic 1854 poem, *The Charge of the Light Brigade*, which begins:

Half a league, half a league,
Half a league onward,
All in the valley of Death
Rode the six hundred.
"Forward, the Light Brigade!
Charge for the guns!" he said.
Into the valley of Death
Rode the six hundred.
"Forward, the Light Brigade!"
Was there a man dismayed?
Not though the soldier knew
Someone had blundered.
Theirs not to make reply,
Theirs not to reason why,
Theirs but to do and die.
Into the valley of Death
Rode the six hundred.[25]

To Tennyson, the errant charge of the Light Brigade into withering cannon fire captured the heroism of individual soldiers caught up in a seemingly senseless international conflict marked by savage violence, extreme misery, and frequent mishaps. Reflecting on his service as a Russian captain in Sevastopol during this period, Leo Tolstoy offered a similarly bleak assessment of the prospects for enduring peace, observing that a dispute that had "not been solved by diplomacy will still less be solved by powder and blood."[26]

The subsequent history of Russian involvement in Crimea confirmed Tolstoy's fears. In the Treaty of Paris, which ended the Crimean War, Russia agreed to refrain from establishing military bases on the Black Sea in exchange for retaining sovereignty over much of Crimea, but the promised demilitarization did not last. In 1870, Russia unilaterally repudiated the Treaty's Black Sea clauses and proceeded to rebuild its

[24] Mara Kozelsky, *Crimea in War and Transformation* (New York: Oxford University Press, 2018), pp. 2–3.
[25] Alfred, Lord Tennyson, 'The Charge of the Light Brigade'.
[26] Leo Tolstoy, 'Sevastopol in May 1855', *Sevastopol (Stories)*, translated by Isabel F. Hapgood (London: Walter Scott Publishing Co., 1888), p. 38.

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navy, reigniting regional tensions.[27] Decades later, in 1954, the Soviet Union incorporated Crimea into what was then the Ukrainian Soviet Socialist Republic. When the Soviet Union collapsed in 1991, Crimea became part of the newly independent Ukraine as an autonomous republic. The 1997 Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine officially recognized Ukraine's sovereignty over Crimea.[28] As with the Treaty of Paris, however, this agreement proved to be fragile.

On February 22, 2014, the Euromaidan protests in Ukraine prompted pro-Kremlin President Viktor Yanukovych and many of his ministers to flee Kyiv. An interim government in favor of integration with the European Union replaced the Yanukovych regime and repealed the official status of the Russian language, sparking pro-Russian demonstrations in the south and east of Ukraine, including in Crimea.[29] On February 27, armed soldiers operating without identifying markings on their fatigues seized control of the Crimean legislature and other government buildings, raising the Russian flag. Although Putin described these "little green men" as self-defense units created by residents of Crimea,[30] they were later identified as Russian special forces.[31]

Already hostile to the pro-EU government in Kyiv, and with yet-unidentified soldiers arriving in greater numbers daily to occupy airfields, ports, and other public venues, the Crimean provincial legislature organized a referendum on independence. The reported vote on March 16, 2014, was 95.5 percent in favor of seceding from Ukraine and joining Russia, with 83 percent turnout, though the process and its results were widely condemned.[32] On March 17, the provincial legislature declared the Republic of Crimea an independent nation, and on that

[27] W. E. Mosse, 'The End of the Crimean System: England, Russia and the Neutrality of the Black Sea 1870–71' (1961) IV *Hist. J.* 164, 167.

[28] Treaty of Friendship, Cooperation and Partnership between the Russian Federation and Ukraine, Kyiv, 31 May 1997, Rus.-Ukr., ceased to operate from 1 April 2019 onward ("Treaty of Friendship").

[29] Michael Kofman et al., 'Lessons from Russia's Operations in Crimea and Eastern Ukraine', *Santa Monica: RAND Corporation* (2017), p. 33.

[30] 'Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine', Presidential Press Service, 4 March 2014, http://en.kremlin.ru/events/president/news/20366.

[31] Alexey Nikolsky, 'Little, Green and Polite: the Creation of Russian Special Operations Forces', in Colby Howard and Ruslan Pukhov (eds.), *Brothers Armed: Military Aspects of the Crisis in Ukraine* (Minneapolis: East View Press, 2014), pp. 124–125.

[32] Ilya Somin, 'Russian Government Agency Reveals Fraudulent Nature of the Crimean Referendum Results', Washington Post, 6 May 2014.

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same day renounced its independence and applied to join the Russian Federation.[33] Putin immediately granted the request, purporting to annex Crimea into the Russian Federation.[34]

The next day, the European Union denounced Russia's aggression and the Crimean referendum, declaring that "the sovereignty, territorial integrity and independence of Ukraine must be respected. The European Union does neither recognize the illegal and illegitimate referendum in Crimea nor its outcome. The European Union does not and will not recognize the annexation of Crimea and Sevastopol to the Russian Federation."[35]

Russia was subsequently ousted from the Group of Eight, and both the Russian state and key national leaders faced economic sanctions.[36] The UN General Assembly also rejected the referendum and affirmed "the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders."[37]

Russia's aggression against Ukraine extended that same year to the eastern Donetsk and Luhansk provinces, known collectively as the Donbas. In March 2014, ethnic Russians in the Donbas launched protests in response to the Euromaidan protests and the ousting of Yanukovych. Armed separatist groups supported by Russia seized provincial legislatures and government buildings across the Donbas.[38] Separatists in Donetsk proclaimed the Donetsk People's Republic on April 7, 2014. Other insurgents in Luhansk declared the Luhansk People's Republic on April 27.[39] Ukraine replied with an "Anti-Terrorist Operation" that would eventually retake much of the territory that had been lost in the preceding months.[40] Russian support for the separatists escalated. Russia

[33] Luke Harding and Shaun Walker, 'Crimea Applies to Be Part of Russian Federation After Vote to Leave Ukraine', Guardian, 17 March 2014.
[34] 'Ukraine Crisis: Putin Signs Russia-Crimea Treaty', BBC, 18 March 2014.
[35] Herman Van Rompuy and José Manuel Barroso, 'Joint Statement on Crimea', European Union Delegation to the United Nations, 18 March 2014.
[36] European Commission, 'The Hague Declaration Following the G7 Meeting' 24 March 2014; 'Council Implementing Regulation (EU) No 477/2014' Official Journal of the European Union 137, no. 3. 5 December 2014; 'Treasury Sanctions Russian Officials, Members of the Russian Leadership's Inner Circle, and an Entity for Involvement in the Situation in Ukraine', US Treasury Department, 20 March 2014.
[37] GA Res. A/Res/68/262, Territorial Integrity of Ukraine, art. 1 (27 March 2014).
[38] Oksana Grytsenko, 'Armed Pro-Russian Insurgents in Luhansk Say They Are Ready for Police Raid', Kyiv Post, 12 April 2014.
[39] 'Ukraine Crisis: Protesters Declare Donetsk "Republic"', BBC News, 7 April 2014.
[40] 'Lessons from Russia's Operations in Crimea and Eastern Ukraine', p. 44.

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deployed some 4,000 regular troops across the border, where they defeated Ukrainian forces in the Battle of Ilovaisk.[41]

Shortly thereafter, the Organization for Security and Cooperation in Europe organized peace talks in Minsk, Belarus, leading to the two sides concluding the Minsk Protocol ceasefire agreement on September 5, 2014.[42] The agreement drew a demarcation line across roughly the eastern third of the Donbas, leaving control of the ceasefire territory (and the Ukraine–Russian border within it) with separatists and Russia.[43] The agreement soon collapsed when Donbas separatists began a fresh offensive in January 2015.[44] A subsequent and more comprehensive ceasefire agreement (Minsk II) was concluded on February 12, 2015, but sporadic fighting continued in the Donbas.[45]

Five years later, the twenty-ninth attempt at a "full ceasefire" came into effect on July 27, 2020.[46] A period of relative calm followed the truce, with Ukraine reporting just twenty-five soldiers killed in the conflict zone in the first three months of 2021, compared with fifty the year before.[47] This brief lull would prove to be the calm before the storm. The following year, Putin's February 24 speech launched Russia's full-scale invasion of Ukraine.

At the time of writing, the conflict in Ukraine has ground on for nearly three years with no end in sight. Although Ukraine managed to repulse Russia's initial drive to take Kyiv,[48] Russia has continued its offensive operations in Ukraine's eastern and southern regions, seeking to extend its control from the Donbas to Crimea and beyond.[49] The war has taken a heavy human toll. By May 2022, the UN High Commissioner for Refugees reported that more than six million people had fled Ukraine

[41] 'Serving Russian Soldiers on Leave Fighting Ukrainian Troops Alongside Rebels, Pro-Russian Separatist Leader Says', Telegraph, 28 August 2014.
[42] Protocol on the outcome of consultations of the Trilateral Contact Group on joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of the Russian Federation, V. Putin, S/2015/135.
[43] 'Ukraine Deal with Pro-Russian Rebels at Minsk Talks', BBC News, 20 September 2014.
[44] Shaun Walker and Oksana Grytsenko, 'Ukraine Forces Admit Loss of Donetsk Airport to Rebels', Guardian, 21 January 2015.
[45] 'Ukraine Crisis: Leaders Agree Peace Roadmap', BBC News, 12 February 2015.
[46] 'Deal Reached for East Ukraine Ceasefire from July 27', Reuters, 22 July 2020.
[47] 'Ukraine Conflict: Moscow Could "Defend" Russia-backed Rebels', BBC News, 9 April 2021.
[48] 'What's Happened in the 100 Days Since Russia Invaded Ukraine', CBC News, 3 June 2022.
[49] 'Ukraine War in Maps: Tracking the Russian Invasion', BBC News, 19 November 2024.

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and a total of eight million had been displaced.[50] The numbers of dead and wounded are contested, but on all accounts reach into the hundreds of thousands.[51] Scores of Ukraine's cities, or large parts of them, have been reduced to rubble.

Two Models of Sovereignty

We have spent some time recounting Russia's tumultuous history in Ukraine because it illuminates vividly two models of state sovereignty under international law. Russia's annexation of Crimea under Catherine the Great and the subsequent prosecution of the Crimean War took place under what Oona Hathaway and Scott Shapiro have called the rules of the "Old World Order."[52] The Old World Order accepted war as a permissible means for redressing wrongs and accorded sovereigns absolute and unreviewable authority to determine whether there was just cause for war.[53] Hence, when Catherine first annexed Crimea, and when Nicholas I later battled the Ottomans and their allies in the Crimean War, the sovereigns involved had exclusive and absolute power to go to war, annex foreign lands, or sue for peace. Cooperation with allies was based on good will and a common purpose, while cooperation with the counterparties to a peace treaty was based on assent to the treaty and its terms. Properly understood, then, the legal permissibility of war and conquest under the Old World Order was not its foundational or organizing principle, but rather a consequence of the absolute, exclusive, and unilaterally enforceable sovereign power held by states.

Russia's purported annexation of Crimea in 2014 suggests a commitment on Russia's part to the same unilateralist understanding of its sovereign power.[54] Russia intervened solely and unilaterally – amid widespread international condemnation – seizing control of public institutions to stage a faux referendum and annex Crimea to the Russian Federation. As noted above, however, both the UN General Assembly and the European Union have refused to recognize Russia's attempted

[50] 'Ukraine, Other Conflicts Push Forcibly Displaced Total over 100 Million for First Time', UNHCR, 23 May 2022, www.unhcr.org/us/news/news-releases/unhcr-ukraine-other-conflicts-push-forcibly-displaced-total-over-100-million.

[51] 'Troop Deaths, Injuries in Ukraine War Nearing 500,000—NYT Citing US Officials', Reuters, 18 August 2023.

[52] Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017) pt. I.

[53] Ibid. p. 47.

[54] See ibid. pp. 309–311, 328 (emphasizing this point).

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annexation. Moreover, the prevailing international legal context was one in which decisions over Crimea and access to her ports had to be decided by treaty between Ukraine and Russia, as they had been, for a time, with the 1997 Treaty of Friendship.[55] It is noteworthy that Russia and her allies in Crimea went ahead with a referendum in 2014 which, even if in reality just a sham, suggests that Russia did not believe it could simply raise its flag over Crimea and expect the world to recognize its annexation. Although decision-makers in Moscow might have subscribed to a unilateralist understanding of sovereignty, they plainly knew that the international community did not. To receive broader international recognition, any settlement of the Crimean crisis would have to be achieved through free negotiation or third-party dispute settlement rather than military conquest or other unilateral coercion.

Much the same can be said of the Russian intervention in the Donbas between 2014 and 2022. Although fighting in the Donbas continued sporadically from 2014 onward, the parties negotiated and agreed to a host of admittedly short-lived ceasefire agreements. In other words, there was available all along an international legal framework to support a pacific end to the conflict. It is revealing that despite the outright wartime violence and the frequent collapse of ceasefires, the parties nonetheless continued to engage in regular negotiations. Such steady participation in peace talks during a time of active fighting reflected the parties' recognition that the international community now regards negotiation and mediation – not armed conflict – as the preferred means to resolve even entrenched territorial disputes. With international law requiring peaceful dispute settlement, both Russia and Ukraine appreciated that they would suffer reputational harm if they refused to participate in peace negotiations, whatever their views of their sovereign prerogatives.

The 2022 invasion of Ukraine essentially enlarged and extended Russian operations that began in the Donbas and Crimea in 2014. Here, too, Russia's invasion was undertaken as a unilateral exercise of force, reflecting Putin's ostensible commitment to an absolutist and exclusive sovereign entitlement to go to war. Nonetheless, Russia has gone to great lengths to attempt to justify its invasion based on settled rules of international law. As noted, Putin claims that Russia is acting in self-defense under Article 51 of the UN Charter,[56] alleging NATO

[55] See Treaty of Friendship, above, n. 28.

[56] UN Charter art. 51 (recognizing "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations").

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encroachment and danger to Russia from Ukraine. He also justifies Russia's action as humanitarian intervention on behalf of ethnic Russians in the Donbas. While Russia has reserved to itself the prerogative to interpret and apply international norms to its case (e.g., self-defense, humanitarian intervention), it at least pays lip service to those norms as general principles of international law. Russia thus implicitly acknowledges that there is an international legal order that requires states to justify the use of force on limited terms, and it seeks to justify its actions in accordance with those limited terms – including in the United Nations, where it continues to participate alongside other states. Additionally, Russia continues to engage in sponsored talks with Ukraine, discussing matters such as humanitarian corridors and prisoner exchanges. This too suggests a recognition on Russia's part that the international community takes international legal order seriously, and that good faith dialogue and negotiation during times of crisis is part of what it means to be a state in good standing within that order. Thus, even as Russia's invasion reflects a unilateralist assertion of power, flouting the UN Charter's strict prohibition against aggression,[57] its rhetoric demonstrates that in the public forum, at least, it accepts the prevalent international legal framework on the use of force, as well as the expectation that it must cooperate with other states to resolve the conflict in Ukraine by participating in UN meetings and peace talks.

The tension between Russia's unilateral actions and its rhetorical commitment to multilateral norms and institutions reflects two competing understandings of sovereignty. Under one account, sovereignty confers exclusive authority on states to determine their own legal rights and obligations and entitles them to decide for themselves whether those rights and obligations have been violated. This voluntarist conception of sovereignty was a central organizing principle of the Old World Order, which authorized territorial conquest and enabled colonial rule. Some contemporary international legal materials – treaty law, customary law, judicial decisions, and scholarship – continue to presuppose a voluntarist account of sovereign equality. In contrast, the second account of sovereignty envisions states as equal participants within an international legal system that imposes limits on their exercise of sovereign rights and powers. According to this constitutionalist account, states are subject to certain positive

[57] See ibid. art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State").

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obligations simply in virtue of their membership and participation in the international legal system, including obligations to resolve their disputes peacefully through good faith negotiation or third-party dispute resolution. Over the past century, the constitutionalist account of sovereignty has emerged as a serious rival to – and, in many respects, has eclipsed – the voluntarist account. Although both accounts endorse sovereign equality as a foundational and organizing principle of international law, they conceptualize the principle differently and draw different implications from it. This is because the two accounts are premised upon fundamentally different visions of international legal order, as we shall now explain.

Voluntarism

Hugo Grotius, the great Dutch international lawyer and diplomat, laid the groundwork for the voluntarist theory of sovereign equality in the early seventeenth century. For Grotius, states on the international stage are akin to individuals in the state of nature; in both contexts, there is no common public authority to offer protection and vindicate rights. However, Grotius did not think that the state of nature was a condition bereft of moral rights and duties. In the state of nature, Grotius claimed, individuals possessed natural rights and powers under the law of nature, including rights to life and bodily integrity.[58] The law of nature likewise recognized in individuals a capacity to possess things rightfully, eventually as property, and to enter binding agreements.[59] In addition to these substantive rights, individuals in the state of nature enjoyed enforcement powers to seek redress for wrongs and act in self-defense.[60] Importantly, individuals under Grotius's law of nature possessed these kinds of natural rights and powers *equally*.[61] They could also transfer these rights and powers to states through "collective agreement."[62]

By analogizing states in international affairs to individuals in the state of nature, Grotius was well placed to model the law of nations on the law of nature.[63] According to Grotius's account, states enjoy sovereign

[58] Hugo Grotius, *The Rights of War and Peace* (Richard Tuck ed., Indianapolis: Liberty Fund, 2005) (1625) 1.2.3.
[59] Ibid. 1.1.10.1–7; 2.11.1.1.
[60] Ibid. 2.20.8.1–5.
[61] Ibid. 2.20.9.1–6.
[62] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, 2006) (1603), p. 87.
[63] Grotius, *The Rights of War and Peace*, 1.2.4.

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equality in the limited sense that they have equal rights to territorial integrity and equal capacity to enter treaties with other states. They also possess equal enforcement rights exercisable through war to pursue redress for wrongs committed against them or their subjects (including unpaid debts and treaty breaches), self-defense, and punishment of transgressors of the law of nations (sometimes called "punitive war").[64] Crucially, under Grotius's theory states alone were the arbiters of whether they had been wronged, imperiled, or whether the law of nations had been violated; that is, states were entitled to decide unilaterally whether there was just cause to go to war. Furthermore, when states went to war and a victor annexed territory or took spoils, Grotius's solution to the legality of conquest or taking of booty was that might makes right; battlefield success determined and secured title.[65] The main justification Grotius offered was that title to territory and goods taken by the victor had to be settled conclusively so as not "to lay a Foundation for a new War" to recover lost lands and chattels, potentially *ad infinitum*.[66] In the absence of courts or other institutions capable of governing international affairs, Grotius filled the void with the equal sovereign powers of states to assess unilaterally the fitness of their causes, go to war as they deemed justified, and acquire good title to any territory they conquered or prizes they seized. Sovereign equality on Grotius's model was thus fully consistent with an absolutist, voluntarist, and unilateralist understanding of state sovereignty under international law.

For centuries after Grotius, international publicists continued to analogize states in international relations to individuals in the state of nature.[67] Reasoning from this premise, Emmerich de Vattel offered a classic statement of sovereign equality:

> Since men are by nature equal, and their individual rights and obligations the same, as equally coming from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing.

[64] Ibid. 2.1.2.2.
[65] Ibid. 3.6.2.1.
[66] Ibid. 3.9.4.3.
[67] See Richard Tuck, *Natural Rights Theories: Their Origins and Development* (Cambridge: Cambridge University Press, 1979); Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).

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> A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.[68]

Significantly, Vattel disputed Grotius's assertion that might makes right – "Strength or weakness . . . counts for nothing" – insisting that "a small Republic is no less a sovereign state than the most powerful Kingdom."[69] On Vattel's view, therefore, no state was entitled to impose legal obligations on another state unilaterally.[70] Nonetheless, Vattel agreed that because there were no international institutions in a position of authority to establish legal order among states, when disputes arose concerning the interpretation and application of international legal norms, states remained the ultimate arbiters of the legality of their actions.[71] This voluntarist conception of sovereign equality, which Vattel bequeathed to subsequent generations of international lawyers, gives pride of place to the thought that sovereigns exercise power without being subject to the authority of any other sovereign. As the Permanent Court of International Justice (PCIJ) put it in the 1923 *Status of Eastern Carelia* case, "[i]t is well-established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or any other kind of pacific settlement."[72] On this view, sovereigns are supreme within their jurisdiction and independent in their relations to other sovereigns. The voluntarist view captures some of modern international law's prohibition on unilateralism in that no sovereign state is entitled to dictate terms to another, for such an entitlement would compromise the formal principle of sovereign equality. However, for voluntarists the independence of states also implies that "States have the right to be the judge in their own case" and that without their assent "they are subject to no court or tribunal for the interpretation of the rights conferred upon them by international law."[73] Thus, voluntarists view state consent as the *sine*

[68] Emmerich de Vattel, *The Law of Nations, Or The Principles Of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns* (Charles D. Fenwick trans., Dobbs Ferry, New York: Oceana Publications, 1964) (1758), Preliminaries, § 18.

[69] Ibid.

[70] Ibid. § 15.

[71] Ibid. §§ 16, 20 (asserting that because states were free, independent, and equal, each possesses the "right of judging" its own actions).

[72] Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (Ser B) No. 5, p. 27 (23 July).

[73] P. J. Baker, 'The Doctrine of Legal Equality of States' (1923–1924) 4 BYBIL 1, 11 (quoting Sir Frederick Pollock).

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qua non – the necessary and sufficient normative condition – of all international obligations.[74]

Voluntarists often invoke *The Lotus*, a 1927 judgment of the PCIJ, as their doctrinal touchstone.[75] In a passage of the judgment that has been endlessly debated, a narrow majority of the Court opined that all "rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . Restrictions upon the independence of States cannot therefore be presumed."[76] According to the Court, states enjoy "a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[77] From these broad pronouncements, voluntarists have extrapolated a general principle that "whatever is not explicitly prohibited by international law is permitted."[78] Thus, Prosper Weil celebrates *The Lotus* for endorsing a "voluntarist conception of international law" under which states "are bound by a rule of law only because, and to the extent that, they have consented to it. Freedom to act remains the basic principle."[79]

There are significant conceptual problems with this account of international legal order.[80] Recall that an attraction of the theory is that it purports to subscribe to international law's prohibition on unilateralism under which no state can impose terms on another. However, because states are subject only to legal rules or norms to which they consent, it follows that consent is the only means of establishing a rule or norm under international law. Recalcitrant and nonconsenting states therefore

[74] What we characterize as "voluntarism" has also described elsewhere as "consensualism" or "classical international legal positivism," i.e., the idea that "consent is the (pre-legal) criterion giving law its binding force and legitimacy." Jean d'Aspremont and Jörg Kammerhofer, 'Introduction: The Future of International Legal Positivism', in Jean d'Aspremont and Jörg Kammerhofer (eds.), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), p. 3.

[75] Some more radical political voluntarists are sceptics regarding international law, arguing that treaties and customary law are not really law but rather expressions of, at most, political or moral obligations. See, e.g., John R. Bolton, 'Is There Really "Law" in International Affairs?' (2000) 10 TLCP 1, 4–7.

[76] The Lotus, 1927 PCIJ (Ser. A) No. 10 (7 September), at p. 18.

[77] Ibid. p. 19.

[78] Prosper Weil, "'The Court Cannot Conclude Definitively' . . . Non Liquet Revisited', (1998) 36 CJTL 109, 112.

[79] Weil, "The Court Cannot Decide," p. 113.

[80] Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29 LJIL 289; Allain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988–1989) 12 AYBIL 22.

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would find themselves subject to few, if any, international legal obligations. They would find themselves effectively outside international legal order, and with a virtually unlimited liberty-right of action – the absolute discretion of the uncommanded commander. Yet, by ceding to nonconsenting states a potentially unlimited liberty-right of action, voluntarism gives these states the liberty-right to decide for themselves the terms on which they will interact with others, regardless of whether the counterparty consents. If a recalcitrant state refuses to agree to fair and equal terms, voluntarism lacks the resources to censure that state from a legal point of view. Under voluntarism, the intractable state will have breached no legal rule to which it was subject.

Our point is not to equate voluntarism with unilateralism, but rather to explain why voluntarism, taken seriously, may permit or collapse into unilateralism within the conception of international legal order it endorses. During the colonial era, voluntarism emboldened states from the Global North to exploit and dominate other political communities for their own gain. In the absence of "prohibitive rules" affirmatively outlawing territorial conquest and colonialism, states used war as an instrument of national policy and built overseas empires on the backs of foreign peoples.[81] While international law no longer permits territorial conquest and colonialism, the voluntarist thinking that enabled those practices continues to drive the idea that states are subject only to legal requirements they have affirmatively endorsed. Voluntarism also lends credence to the idea that states are entitled to judge for themselves whether their conduct is consistent with their obligations under international law. Rather than resolve disputes over the meaning or application of international law through dialogue, negotiation, or third-party dispute resolution, voluntarism suggests that if states have not actively opted in to international cooperation, they are free to go it alone. It is this aspect of voluntarism – the notion that states are entitled to judge the legality of their own actions – that Putin has brandished as both sword and shield to rationalize Russia's aggression against Ukraine and deflect international criticism.

Whatever merit the voluntarist approach may have had in the age of Grotius and Vattel, it no longer accurately describes international legal order in the twenty-first century. Voluntarism stands in tension with international law's contemporary understanding of sovereign equality

[81] Antony Anghie argues that European states and their legal advisers "improvised" the doctrine of sovereignty to deal with "problems relating to colonial order." Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), pp. 6–7.

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because sovereign equality, we explain now, denotes equal sovereign authority and a formal right to independence from foreign intervention and domination. As formal equals under international law, states are subject to reciprocal duties that safeguard their equal independence. These duties apply to all states, regardless of whether they have affirmatively accepted them via treaty or customary international law.

Constitutionalism

During the same period when the PCIJ was endorsing voluntarism in *The Lotus*, an alternative account of sovereignty was emerging based on the idea that states are members of an international legal order that constrains how they may exercise their rights and powers. In an influential 1920 monograph titled *The Equality of States in International Law*, Professor Edwin DeWitt Dickinson derived sovereign equality from the formal international legal personality of states.[82] Dickinson's conception of sovereign equality was formal, rather than substantive, in that it focused on states' legal status and standing rather than, say, the allocation of military power or material resources. This formal account of sovereign equality had important substantive implications. Like Grotius and Vattel, Dickinson accepted that states were entitled to participate as equals in establishing international law by concluding treaties and contributing to the formation of customary international law. But Dickinson disagreed that each state was entitled to decide for itself whether its conduct satisfied international law. "International persons are equal before the law when they are equally protected in the enjoyment of their rights and equally compelled to fulfill their obligations," Dickinson observed.[83] To respect the principle of sovereign equality, in other words, states must exercise their rights and powers in a way that respects the rights and powers of other states. And when disputes arise, states are entitled to be treated by their peers as formal equals under the rule of law. Accordingly, no state is entitled to hold itself out as the final arbiter of the international legality of its own actions.[84]

[82] Edwin DeWitt Dickinson, *The Equality of States in International Law* (Cambridge: Harvard University Press, 1920), pp. 3, 102; see also American Institute of International Law, 'Declaration of the Rights and Duties of Nations' (1916) 10 AJIL 124, 125 ("Every nation is in law and before law the equal of every other nation belonging to the society of nations").

[83] Edwin DeWitt Dickinson, *The Equality of States in International Law* (Cambridge: Harvard University Press, 1920), p. 3.

[84] Dickinson was not the first international lawyer to frame sovereign equality as a formal legal constraint against great power domination. For decades, Latin American international lawyers had urged great powers of the Global North to take seriously the formal

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Implicit in this formal account of sovereign equality is the idea that states interact with one another within an international legal system, not a state of nature. Dickinson observed that "equality before the law is essential to any legal system," and this principle held special significance for international legal order as "the necessary consequence of the denial [to states] of universal empire, and of the claim of separate states to live together in an international society controlled by law."[85] The alternatives to equality before the law for separate states, Dickinson warned, were "universal empire or universal anarchy."[86] Whereas Grotius and Vattel believed that states could judge the legality of their own actions for themselves, Dickinson anticipated that the legitimacy of international legal order would depend on international institutions playing an active role in interpreting international law and resolving international disputes.

The idea that states could look to international institutions for assistance in resolving their disputes had become plausible by the 1920s, when Dickinson published his monograph. A generation earlier, during the Hague Peace Conference of 1899, the international community had established the first Permanent Court of Arbitration (PCA) to handle interstate disputes. Argentina's delegate to the Conference celebrated this development as ensuring "that the political equality of states has ceased to be a fiction and that it abides, established as an obvious reality."[87] The PCA would be followed by the creation of the League of Nations in 1920, and the establishment of the PCIJ, which held its inaugural sitting in 1922. Hence, by the time the PCIJ decided *The Lotus* five years later, the majority's vision of international relations as a state of nature wherein states could generally do as they please was rapidly falling out of favor. The following year witnessed the signing of the Kellogg-Briand Pact, also known as the Pact of Paris, which outlawed "recourse to war for the solution of international controversies" and committed states to settle their disputes exclusively "by pacific means."[88] With the obligation to resolve disputes peacefully and the establishment of international courts and

equality of states when designing international institutions. Robert A. Klein, *Sovereign Equality Among States: The History of an Idea* (Toronto: University of Toronto Press, 1974), pp. 54–85.

[85] Ibid.

[86] Ibid. p. 335.

[87] Ibid. p. 181.

[88] Treaty for Renunciation of War arts. I & II, 27 August 1928, 46 Stat. 2343, 94 LNTS 57.

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tribunals like the PCA and the PCIJ, states became equal members of an international legal system in which they were no longer free to rely solely on their own independent judgment to determine what international law required of them. By the end of World War II, Dickinson's account of sovereign equality had become the prevailing wisdom among international publicists.[89]

Some members of the *Lotus* Court anticipated and embraced this paradigm shift. The dissenting opinion of Judge Bernard Loder offers an especially clear account. Judge Loder held that states, as equal participants in the international legal system, relate to each other on terms of "mutual independence."[90] For states to be sovereign, they must be independent, and for them all to be independent, they must be independent *mutually* or *equally*. At the heart of Loder's opinion, then, is the constitutional insight that universal independence in a community of formally equal states implies mutual or equal independence. If independence is a necessary condition of sovereignty, then sovereign equality must secure states' independence on equal terms. One sense in which all sovereigns are *equal* is that none are entitled to dictate terms to others unilaterally, and conversely, none can be made to suffer such terms. Under international law, sovereign states are *independent* within their respective spheres of exclusive jurisdiction: none depends on the permission of another to exercise domestic or international public functions.[91] Thus, as Judge Charles Andre Weiss observed in a separate dissenting opinion, international law serves "to harmonize and reconcile the different sovereignties over which it exercises sway."[92]

On this constitutional reading of sovereign equality, international law both empowers states as international legal actors and constrains them in their dealings with other states and nonstate actors. There is now a considerable literature on the constitutionalization of international law, much of which emphasizes how international law

[89] See Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht ed., London: Longmans, Green & Co., 6th ed., 1947) vol. 1, p. 238, § 115 ("The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their international personality.").

[90] The Case of the S.S. Lotus, 1927 PCIJ (Ser. A) No. 10, p. 35, para. 106 (7 September) [hereinafter Lotus].

[91] See Schooner Exchange v. McFaddon, 11 US 116, 136–37 (1812) (reasoning based on the "perfect equality and absolute independence of sovereigns" that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute").

[92] Lotus, above, pp. 40, 44 (Weiss, J., dissenting, but not on this point).

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shares with national law certain core commitments to human rights, self-determination, and the rule of law.[93] The constitutional perspective offers a congenial framework within which international law empowers states by recognizing them as the de jure governors of their people at the domestic level and as the de jure representatives of their people in international affairs. International recognition empowers states to establish political and legal order nationally, as well as to enter binding treaties and otherwise represent their people internationally. Crucially, the constitutional perspective foregrounds international legal norms that are constitutive of international legal order as a legal system. In *The Lotus*, Judge Weiss observed that among "these rules there is one which is paramount and which does not even require to be embodied in a treaty: that is the rule sanctioning the *sovereignty of States*," without which "no international law would be possible."[94] This "paramount" rule of state sovereignty is defined, in part, by the principle of sovereign equality, as affirmed in the UN Charter and other authoritative instruments.[95] Thus, the principle of sovereign equality has become a constitutional norm of international law, subjecting states to reciprocal limits that reflect their equal status and secure their mutual independence vis-à-vis one another.

Two Threats to Sovereign Equality

The mutual independence that states enjoy under international law constitutes a form of freedom or liberty. On our view, the liberty of independence has two constitutive elements: a principle of noninterference and

[93] See, e.g., Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press 2009); Stephen Gardbaum, 'Human Rights and International Constitutionalism', in Jeffrey L. Dunoff and Joel Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2012); Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579.

[94] Lotus, above, pp. 40, 44 (italics original).

[95] See, e.g., UN Charter art. 2(1) (stipulating that the United Nations "is based on the principle of the sovereignty equality of all its Members"); UN General Assembly, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', UN Doc. A/RES/25/2625 (24 October 1970) [hereinafter Friendly Relations Declaration] (affirming that all states are "judicially equal" and that each "enjoys the rights inherent in full sovereignty").

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a principle of nondomination.[96] The principle of noninterference prohibits states from wrongfully interfering with each other through any unilateral act that infringes another state's legal interests or authority. International law's principle of nonintervention can be seen as a salient legal expression of the normative principle of noninterference. The most general formulation of this legal principle in the UN Declaration on Non-Interference provides that "[n]o state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[97] Consistent with the UN Charter,[98] the Declaration specifically decries "armed intervention" as a prohibited form of conduct, as well as "the use of force to deprive peoples of their national identity" and efforts "directed towards the violent overthrow of the regime of another State."[99] Military aggression, such as Russia's invasion of Ukraine, is an especially striking example of wrongful interference, since one state violates the territorial integrity of another through the unilateral use of force.

The Declaration makes clear, however, that the principle of nonintervention is broader than the principle of noninterference. Specifically, the Declaration avows that *threats* of unilateral acts – and not just unilateral acts themselves – are legally wrongful. The Declaration stipulates that "attempted threats against the personality of the State or against its political, economic and cultural elements are condemned."[100] States may not "use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind."[101] Because the principle of noninterference only explains how actual and wrongful unilateral acts compromise freedom, it cannot explain how unrealized *threats* of those acts compromise

[96] We discuss this conception of freedom as independence as it pertains to human rights bearers in Evan Fox-Decent and Evan J. Criddle, 'The Fiduciary Constitution of Human Rights' (2009) 15 *Legal Theory* 301, 310–311.

[97] UN General Assembly, 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty', UN Doc. A/RES/2131(XX) (21 December 1965), para. 1 [hereinafter Declaration on Non-Intervention].

[98] UN Charter art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

[99] Declaration on Non-Intervention, paras. 1–3.

[100] Ibid. para. 1.

[101] Ibid. para. 2. References to "subordination" and securing "advantages" suggest that the coercion referred to in this provision relates more to the threat than the use of force.

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freedom.[102] For an account of the wrongfulness of threats and their infringement of liberty, we need the principle of nondomination.

For republicans, domination consists in subjection to the arbitrary will of another and is the chief cause of unfreedom.[103] In the classic example of the enslaved person and the benevolent master, republicanism invites us to imagine a master who wishes only the best for the person enslaved. She treats him like family, supports his hopes and aspirations, encourages his projects, and so on. In short, the master does not interfere with, but rather supports, the enslaved person and his choices. Nonetheless, the individual enslaved is still unfree, republicans assert, because the master is entitled to crack the whip at any time, for any reason (including malicious or spiteful reasons), and to do so with impunity. Republicans point out that this asymmetrical power structure ordinarily leads to bowing, scraping, and a constant sense of unease (if not terror) on the part of the dominated party.[104] But the distinct evil of domination – the evil and unfreedom suffered by the enslaved person of the benevolent master – is simply subjection to the looming threat of arbitrary force against which there is no recourse.

When the Declaration on Non-Intervention prohibits "threats" against a state's "personality" or against its "political, economic, and cultural elements," the Declaration puts into positive legal form the principle of nondomination. A state's personality is the law-created artificial entity to which the words and actions of the state's representatives are attributed when they act in the name of the state.[105] Consequently, certain threats against the state's personality may constitute existential threats. The threat of military aggression and occupation is this kind of threat. And

[102] One can attack the unilateral-act/threat-of-unilateral-act distinction by saying that a threat to act unilaterally is itself a unilateral act. See Matthew H. Kramer, *The Quality of Freedom* (Oxford: Oxford University Press, 2003), ch. 2. The distinction we are making, however, is substantive rather than linguistic or semantic, and could be recast as "actual unilateralism" versus "promised-and-realizable-but-as-yet-unrealized unilateralism." For simplicity, we will stick with "act" and "threat" to mark these categories.

[103] See, e.g., Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press,1999) ; Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998).

[104] Ibid.

[105] See Thomas Hobbes, *Leviathan with Selected Variants from the Latin Edition of 1668* (Cambridge: Hackett Publishing, Edwin Curely ed., 1994) (1651) ch. 16. Compare Quentin Skinner, 'Hobbes and the Purely Artificial Person of the State' (1999) 7 J. *Pol. Phil.* 1, with David Runciman, 'What Kind of Person Is Hobbes's State? A Reply to Skinner' (2000) 8 *J. Pol. Phil.* 268.

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threats against a state's "political, economic, and cultural elements" are likewise threats of wrongful unilateralism. A powerful state may threaten valued public goods in order to impose terms on a weaker state – for example, by threatening to cut off the weaker state's access to fresh water or natural gas if the weaker state does not capitulate to its demands. Notably, Russia used these tactics in 2022, seeking to deter European countries from opposing its aggression against Ukraine.[106] Such threats are arbitrary in the sense that they aim to secure through a unilateral assertion of will the "subordination" of another state or the gaining of "advantages" to which the dominating state has no entitlement.

These features of the Declaration on Non-Intervention reflect a paradigm shift that reshaped international legal order during the middle decades of the twentieth century, one driven in large part by global pressures for decolonization. Throughout the colonial era, international publicists offered pious tributes to the principle of sovereign equality as all the while European nations declined to recognize other peoples around the world as equal sovereigns. As Edward Keene has observed, this approach led to a bifurcated international legal order:

> The European order of toleration [among recognized states] was predicated on the principle that states should respect each other's territorial sovereignty, and hence their equality and independence. By contrast, the extra-European order was based on the principle that sovereignty should be divided across national and territorial boundaries, creating hierarchical institutions through which colonial and imperial powers transmitted the supposed benefits of their civilization to the rest of the world.[107]

By the early twentieth century, this division of the world into fully sovereign states, on the one hand, and "semi-sovereign" states and colonial possessions, on the other, had become conventional wisdom among Western legal scholars, cementing as a formal legal hierarchy the practical subordination of non-Western peoples.[108]

[106] See Emily Rauhala et al., 'Russia Cuts Off Gas to Poland, Bulgaria, Stoking Tensions with EU', Washington Post, 27 April 2022.

[107] Edward Keene, *Beyond the Anarchical State: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002) xi.

[108] See, e.g., John Westlake, *International Law*, in Lassa Oppenhaim (ed.), *The Collected Papers of John Westlake on Public International Law* (Cambridge: Cambridge University Press, 1914), pp. 86–101 (distinguishing equal and independent states from "semi-sovereign states"); Baker, 'The Doctrine of Legal Equality of States', pp. 8–10 (arguing for this reason that "the doctrine of equality has never been consistent with the facts of the international system to which the rules of international law are supposed to apply").

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The decolonization movement sought to dismantle these features of the colonial era – not only by extending formally equal statehood to former colonies but also by outlawing foreign intervention and domination wherever and however they might manifest in international relations.[109] In the celebrated 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Declaration on Colonial Independence), the UN General Assembly solemnly declared that "[t]he subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."[110] Hence, states must "observe faithfully and strictly" their obligations under the UN Charter to respect the principles of self-determination and nonintervention "on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."[111] A decade later, the General Assembly reaffirmed these principles in its unanimous Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration):

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among States; and
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind

[109] See Adom Getachew, *Worldmaking After Empire* (Princeton: Princeton University Press, 2019), p. 2 (arguing "that decolonization was a project of reordering the world . . . to create a domination free and egalitarian international order").

[110] Declaration on the Granting of Independence to Colonial Countries and Peoples para. 1, GA Res. 1514(XV), UN Doc A/4684 (14 December 1960) [hereinafter Declaration on Colonial Independence].

[111] Ibid. para. 7.

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> that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.[112]

The Declaration on Colonial Independence and the Friendly Relations Declaration underscore that international intervention and domination violate two bedrock norms of contemporary international law. First, intervention and domination are incompatible with the principle of sovereign equality because they subordinate a state's sovereign authority to another's unilateral will. A state that is subject to foreign coercion does not enjoy the mutual independence of sovereign equality. Second, intervention and domination violate the right to self-determination – a people's exclusive privilege to choose the laws and institutions by which it is governed.[113] Whenever a state intervenes unilaterally in another state's exclusive territorial jurisdiction, or threatens to do so, it denies a foreign people their legal privilege to decide for themselves how they will arrange their internal affairs. It consigns them to live under "alien subjugation, domination and exploitation."[114] By prohibiting foreign intervention and domination, contemporary international law prohibits powerful states from reviving territorial conquest and other features of colonial-era unilateralism. Thus, sovereign equality and self-determination complement one another as constitutional foundations for a postcolonial international legal order.

[112] Friendly Relations Declaration; see also Declaration on the Occasion of the Fiftieth Anniversary of the United Nations ¶ 1, GA Res. 50/6, UN GAOR, 50th Sess., Supp. No. 49, UN Doc. A/50/49 (1995) [hereinafter 50th Anniversary Declaration] (declaring that states "reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination").

[113] Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provide that self-determination is a "right" that belongs to "[a]ll peoples." International Covenant on Civil and Political Rights art. 1, 16 December 1966, S. Exec. Doc. E, 95-2 (1978), 999 UNTS 171, 174; International Covenant on Economic, Social and Cultural Rights art. 1, 3 January 1976, 993 UNTS 3. While international lawyers have debated which peoples may claim the right to self-determination, it is uncontroversial that the right can be claimed (at a minimum) by national polities within their territorial jurisdiction vis-à-vis foreign states. See Tom Sparks, *Self-Determination in the International System: Whose Claim, to What Right?* (Oxford: Hart Publishing, 2023), pp. 4, 19, 22 (explaining how this national polity-based formulation has become firmly established in international law).

[114] Friendly Relations Declaration.

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Mandatory Cooperation

By preserving domains within which states are mutually independent, international law aims to safeguard sovereign equality and facilitate national self-determination.[115] During the colonial era, the close connection between independence and sovereign equality led some voluntarists to conflate the two concepts, suggesting that they were synonymous.[116] However, in some contexts, mutual independence is not enough to support a constitutional approach to sovereign equality. The ideal of mutual independence presupposes that state jurisdiction is settled and mutually exclusive, but this premise does not always hold true. Sometimes, state jurisdiction is unsettled, concurrent, or shared jointly. At other times, states hold rights and powers that are in tension with one another, raising the possibility that the exercise of a right or power by one state would adversely impact another state's legal entitlements. In these cases, a state cannot act unilaterally without violating the principle of sovereign equality because any steps it takes on its own with respect to such matters would effectively subordinate another state's legal rights or authority to its policy choices and decisions.

Consider the following scenarios:

- *Unsettled Jurisdiction* – Two neighboring states disagree in good faith over the location of their common border. An important function of international borders is to define the territories within which states are entitled to claim mutual independence. Nonetheless, as long as the location of a border remains unsettled, it may be unclear which state has jurisdiction over the disputed territory. Both states may view the other's territorial claim as wrongful interference with their sovereignty. Without an international legal framework in place to address the dispute, each state may plausibly claim to suffer domination and interference from the other's unilateral assertion of sovereign power.

[115] See Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2009), p. 49 (observing that under "a view of international law as the law of a society of states or a 'Family of Nations', . . . each state enjoy[s] a measure of independence from other states and the powers of supreme government over its territory and its people").

[116] See, e.g., Lassa Oppenheim, *International Law: A Treatise*, vol. 1 (London: Longman, Green & Co., 1905), p. 101 (defining sovereignty as "an authority which is independent of any other earthly authority . . . [and] includes therefore independence all around, within and without the borders of the country"); Westlake, *International Law*, pt. I, ch. 87 p. 87 (asserting that "the independence and the full sovereignty of a state are identical").

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- *Concurrent Jurisdiction* – A large oil field straddles the maritime boundary between two states. Each state in the exercise of its territorial jurisdiction is entitled to determine how much oil it will extract from the field. However, due to the unitary nature of the field, any oil extracted on one side of the boundary will reduce the volume available on the other side. In this scenario, the sovereign interests of the neighboring states are inextricably connected. Neither can drill for oil without adversely affecting the other's sovereign interests, and either could dominate the other simply by threatening to drill unilaterally.
- *Jointly Shared Jurisdiction* – An international river flows through multiple states on route to the sea. The states concerned conclude a treaty designating the river as a shared resource subject to their joint stewardship and collective administration. Having placed the river under their joint jurisdiction in this manner, any unilateral regulation, use, diversion, or adulteration of the river by a single state would undermine the other states' equal rights and authority under the collective regime.
- *Rights Conflicts* – An organized crime group in State A counterfeits the national currency of State B. International law obligates State A to exercise due diligence to suppress counterfeiting.[117] However, State A is unable to eradicate the counterfeiting operation without foreign assistance due to the organized crime group's power. If State B offered to dispatch police to State A to disrupt the counterfeiting operation, State A might object, invoking its territorial sovereignty as a basis for withholding consent to foreign intervention. However, by exercising its sovereign right to exclude in this way, State A would undermine State B's sovereign authority over its own currency.

At first glance, these scenarios might seem like exceptional cases at the periphery of international legal order. Yet nothing could be further from the truth. As we show in subsequent chapters, states frequently encounter circumstances where their sovereign rights and powers are unsettled, concurrent, shared jointly, or in tension with one another. States rely on international law "to harmonize and reconcile" their "different sovereignties" in these cases of sovereign interdependence, just as in settings where their sovereignties are mutually independent.[118] International law performs this service, for example, when international disputes arise over

[117] United States v. Arjona, 120 US 479, 484 (1887) (citing Vattel).
[118] Lotus, above, pp. 40, 44 (Weiss, J., dissenting).

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transboundary rivers, oceanic fisheries, and maritime delimitation. Other relevant disputes include controversies about transboundary pollution, global cartels, transnational terrorism, piracy, cybercrime, and atrocity crimes. The jurisprudence of international courts and tribunals is replete with cases in which states have tangled over unsettled jurisdiction, concurrent jurisdiction, jointly shared jurisdiction, or conflicting legal entitlements. An inventory of these cases reads like a "greatest hits" collection of international case law, including the *Alabama Arbitration*,[119] the *Trail Smelter Case*,[120] the *River Oder Case*,[121] the *Lake Lanoux Arbitration*,[122] the *Corfu Channel Case*,[123] the *Fisheries Jurisdiction Cases*,[124] the *North Sea Continental Shelf Cases*,[125] and the *Bosnian Genocide Case*.[126] Far from being outlier exceptions to the general rule of mutually independent sovereignty, these cases involving unsettled jurisdiction, concurrent jurisdiction, jointly shared jurisdiction, and conflicting rights are ubiquitous in international legal practice. Thus, addressing the challenges these cases pose to sovereign equality has become a major preoccupation of international law.

The voluntarist and constitutionalist conceptions of sovereign equality respond to these challenges in different ways. Under the voluntarist approach, states are free to avoid the norms of mandatory cooperation arising from nonexclusive forms of jurisdiction and rights conflicts, even at the expense of dominating their neighbors' sovereign interests. In practice, this gives great powers like China, the European Union, Russia, and the United States license to exercise their sovereign rights and powers as they see fit, subject only to international law's limited set of prohibitive rules. By allowing more powerful states to dictate the terms of their relationships with foreign nations in this manner, voluntarism exposes foreign peoples to "alien subjugation, domination and exploitation," arguably in violation of

[119] Thomas Willing Balch, *The Alabama Arbitration* (Philadelphia: Allen, Lane & Scott 1900), p. 135 (reprinting the *Alabama* Decision and Award).
[120] Trail Smelter Case (US v. Can.), 3 RIAA 1905, 1917 (Trail Smelter Arb. Trib. 1941).
[121] River Oder Case, 1929 PCIJ (ser. A) No. 23, p. 27.
[122] Lake Lanoux Arbitration (Fr./Sp.), 24 ILR 101 (1957).
[123] Corfu Channel Case (U.K. v. Alb.), 1949 ICJ Rep. 4 (9 Apr.).
[124] Fisheries Jurisdiction Case (UK/Iceland), Merits, 1974 ICJ Rep. 3 (25 July).
[125] North Sea Continental Shelf Case (FRG/Den., FRG/Neth.), 1969 ICJ Rep. 3 (20 February).
[126] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serbia & Montenegro), 2007 ICJ Rep. 43, 49, para. 1 (26 February).

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the right to self-determination.[127] In this respect, the voluntarist account of sovereign equality is a recipe for great power domination.

The constitutionalist approach, in contrast, holds that when sovereign rights and powers clash or the equitable use of a sovereign entitlement is otherwise in question, no state may claim the prerogative to resolve the matter on its own because doing so would dominate other states by threatening to subject them to its unilateral will. Even if a state acted in perfectly good faith, imposing a solution that favored its neighbors, its unilateral decision-making would undermine sovereign equality by arrogating to itself a prerogative and standing that is not held by others. The constitutional approach to sovereign equality therefore requires that states refrain from dictating the terms of their interactions with other states unilaterally. Instead, they must resolve international disputes cooperatively through dialogue, negotiation, or third-party dispute resolution. A simple refusal to negotiate with other states on a matter that calls for multilateral cooperation would undermine sovereign equality because it would frustrate the authority of other states to negotiate fair terms of cooperation jointly for all concerned.[128] Hence, states must cooperate with one another to resolve disagreements about, among other things, the location of shared land borders[129] and the coordinated exploitation of border-straddling oil fields.[130] The tensions inherent in unsettled jurisdiction, concurrent jurisdiction, jointly shared jurisdiction, and conflicting rights can be resolved only through international cooperation. Constitutionalism thus embraces mandatory cooperation as the institutional framework for safeguarding sovereign equality when states operate outside their exclusive jurisdiction or when the equity of an otherwise ordinary use of sovereign power is in question.

[127] Friendly Relations Declaration.

[128] By "fair terms of cooperation" we have in mind something like the reciprocal terms on which free and equal persons might interact under Rawls's conception of justice as fairness. See, e.g., John Rawls, *Justice as Fairness* (Cambridge: Harvard University Press, 2001), p. 6 (distinguishing social coordination from social cooperation).

[129] See PCA Case No. 2012-04, Arbitration Between the Republic of Croatia and the Republic of Slovenia, Final Award, 29 June 2017, at 108, para. 334 (describing mutual state consent as "the fundamental principle applicable to the establishment of land boundaries between sovereign States").

[130] See Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), UN Doc. A/9631, 29 UN GAOR Supp. (No. 31), art. 3 (1974) ("In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.").

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Substantive Obligations – Mandatory cooperation requires states to pursue equitable solutions to international controversies with an eye to balancing their own legal rights and authority, on the one hand, with the legal rights and authority of other individual states and the international community collectively, on the other. International treaties and judicial decisions refer to this as an equitable requirement that states accord "due regard" to other states' sovereign rights and authority.[131] Due regard does not demand "total or maximum regard" for foreign interests, but rather "reasonable, appropriate, optimal regard."[132] States must pursue "an objectively positive interaction with another [state]'s interests and with those of the international community"[133] for the purpose "of reconciling them in as equitable a manner as possible."[134] Mandatory cooperation thus aims to harmonize conflicting sovereign rights and powers through a proportionality analysis that equitably balances contending national interests.[135]

The due regard standard is often linked to other legal concepts, such as "abuse of right," signaling that states must avoid exercising their rights in a manner that causes arbitrary or disproportionate injury to others' rights.[136] An abuse of right is acting within the scope of a right but in

[131] See, e.g., UN Convention on the Law of the Sea arts. 56, 58, 60, 66, 87, 142, UN Doc. A/CONF. 62/122(1982); Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Rep. 2015, para. 219; *Chagos Marine Protected Area Arbitration (Mauritius/U.K.)*, Case No. 2011-03, Award, para. 534 (Perm. Ct. Arb. 2015); *Fisheries-Germany*, 1974 ICJ Rep. p. 198, para. 60.

[132] Jonathan B. Wiener, 'Disregard and Due Regard' (2021) 29 *NYU Envt'l L.J.* 437, 461.

[133] Julia Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' (2018) 32 *Ocean Y.B.* 27.

[134] Fisheries Jurisdiction Case, p. 30, para. 70; see also Lake Lanoux Arbitration (Sp./Fr.), 124 I.L.R. 101, 139, para. 22, XII UNRIAA 281 (French), at 315 (explaining that states must "take into consideration the various interests involved, . . . seek to give [other states] every satisfaction compatible with the pursuit of its own interest, and . . . show that it is genuinely concerned to reconcile the interests of the other . . . State with its own.").

[135] See Chagos, para. 534 (observing that the duty of "due regard" for another state's interests "entails, at least, both consultation and a balancing exercise with its own rights and interests").

[136] See, e.g., World Trade Organization, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, paras. 158, 160, AB-1998-4, WT/DS58/AB/R (Oct. 12, 1998); WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 by Malaysia, Report of the Panel, paras. 5.51–.60, WT/DS58/RW (June 15, 2001) [hereinafter Shrimp/Turtle Panel Report II]; see generally Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing, 2017), pp. 142–145 (discussing international "abuse of right" as including "manifest disproportion of interests" and "arbitrary action").

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a way that produces manifest inequity.[137] Accordingly, in contexts where states' rights and powers are unsettled or enmeshed, the constitutional approach suggests that these rights and powers must be porous to equitable principles and peaceful dispute resolution to prevent an abuse of right. Thus, mandatory cooperation ensures that ordinary exercises of sovereign power and assertions of sovereign rights are equitable rather than abusive.

Procedural Obligations – Mandatory cooperation also imposes procedural obligations. Within mandatory cooperation's domain, states must investigate,[138] consult,[139] and negotiate with one another in good faith.[140] The duty of good faith negotiation demands initiative and sustained commitment.[141] Good faith negotiation "entail[s] more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims."[142] Instead, negotiations must be "meaningful" in the sense that each side demonstrates a willingness to pursue agreement, not merely to go through the motions.[143] Good faith negotiation also requires openness to "compromise, even if that mean[s]

[137] Typically, the inequity is only made possible by the generality of the right. For example, building owners are sometimes enjoined from stopping cranes from passing over their property even though, strictly speaking, they own the airspace above their property and possess a right to exclude. *Woollerton & Wilson, Ltd. v. Richard Costain, Ltd* [1970] 1 WLR 411 (Eng.); see generally Larissa Katz, 'Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right' (2013) 122 YLJ 100 (arguing that owners abuse property rights if they exercise them solely for the sake of spite or extortion).

[138] See Fisheries-Iceland, p. 31, para. 72 (emphasizing the parties' obligation "to keep under review the fishery resources in [a maritime zone where they have conflicting rights] and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources").

[139] See Chagos Case, para. 519 ("In the majority of cases, [due regard for other states' rights] will necessarily involve at least some consultation with the rights-holding State.").

[140] See North Sea Continental Shelf (Germ./Den.; Germ./Neth.), 1969 ICJ Rep. 3, 47, para. 86 (20 February) (characterizing the duty to negotiate as "a special application of a principle which underlies all international relations").

[141] See WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 of the DSU by Malaysia [Shrimp-Turtle Dispute], Report of the Appellate Body, para. 133, AB-2001-4, WT/DS58/RW, Oct. 22, 2001 [Shrimp-Turtle Appellate Body II] (concluding that the duty of negotiation requires "serious, good faith efforts").

[142] Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia/Russ.), Prelim. Objections, 2011 ICJ Rep. 70, 132, para. 157 (1 April).

[143] Application of the Interim Accord Case (FYROM/Gr.), Judgment, 2011 ICJ Rep. 644, 685, para. 132 (Dec. 5) [hereinafter Interim Accord Case], p. 685, para. 132 (internal citation and quotation marks omitted).

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the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way."[144] Hence, the idea that one side would "insist upon the complete capitulation of the other side" is "inconsistent with . . . 'negotiation.'"[145] States must undertake a "persevering quest for an acceptable compromise,"[146] demonstrating that they are "internally concerned with balancing the [relevant] rights and interests," rather than simply going through the motions.[147]

In the end, however, the requirement of good faith negotiation does not obligate states to actually conclude an agreement resolving their disputes.[148] Mandatory cooperation imposes obligations of conduct, not result.[149] Sometimes states disagree in perfectly good faith about the terms of an equitable solution. To require states to accept an agreement that they genuinely believe is inequitable would subject them to the unilateral will of the other side, which is inconsistent with sovereign equality and joint stewardship. Accordingly, mandatory cooperation does not require states to conclude agreements, provided they persevere in pursuing an equitable resolution in good faith.[150]

International courts and tribunals have been reluctant to find bad faith absent "clear and convincing evidence" that a state seeks "to prevent any reasonable agreement."[151] Bad faith might be established if a state arbitrarily breaks off or delays negotiations, declines to follow established procedures for negotiation, or refuses to consider counter-proposals or relevant equitable considerations.[152] Under any of these circumstances,

[144] German External Debts Case (Greece/Germ.), 19 RIAA 27 (1972), p. 56, para. 62.
[145] Ibid.
[146] Kuwait v. AMINOIL, 66 ILR 578, 1017, para. 70(i) (1982) (emphasis added).
[147] See Chagos, para. 528.
[148] See Pulp Mills on the River Uruguay (Arg./Ur.), Judgment, 2010 ICJ Rep. 14, 68, para. 150 (20 April) (observing that the duty of good faith negotiation "does not imply an obligation to reach an agreement" (internal citation and quotation marks omitted).
[149] Rüdiger Wolfrum, 'Obligations of Result Versus Obligations of Conduct: Some Thoughts About the Implementation of International Obligations', in Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane, and Siegfried Wiessner (eds.), *Looking to the Future: Essays in Honor of W. Michael Reisman* (Leiden: Martinus Nijhoff Publishers, 2011), p. 363.
[150] Cf. Tacna-Arica Arbitration (Chile/Peru), 2 RIAA 921, 929 (1925) (observing that where two states have entered an agreement to negotiate a maritime delimitation, neither state is "bound to make an agreement unsatisfactory to itself provided it did not act in bad faith").
[151] Ibid. p. 929; see also Interim Accord Case, p. 685, para. 132 (endorsing these requirements).
[152] See Interim Accord Case, p. 685, para. 132 (emphasizing these considerations).

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a state's intransigent behavior would reflect unilateralism through covert means, which in turn would infringe sovereign equality.

If negotiations stall, states must pursue mediation, arbitration, adjudication, or some other form of third-party dispute resolution. Support for this principle can be found in Article 33 of the UN Charter, which charges states with resolving their disputes through peaceful means.[153] The General Assembly's Friendly Relations Declaration likewise describes the pursuit of peaceful third-party dispute resolution as an obligation incumbent upon all states.[154] Third-party dispute resolution promotes sovereign equality under the constitutional approach by ensuring that states do not appoint themselves judge and party to the same cause. In cases where states are unable to agree on a negotiated solution or a forum for arbitration, they must maintain a continuous dialogue and refrain from taking steps that would prejudice the outcome of negotiations.

These procedural duties are explained by international law's commitment to sovereign equality: in settings where states are not mutually independent, they can harmonize and reconcile their respective rights and powers only through negotiations, mediation, democratic procedures (e.g., fair voting), or by submitting to third-party dispute resolution. Mandatory cooperation ensures that states have an opportunity to participate and have their preferences taken into account in decisions that impact their legal interests.[155] It also attends to the collective right to self-determination by ensuring that states resolve their disputes in a manner that reflects the collective will of the peoples concerned.[156]

Mandatory cooperation suggests that international legal order is not concerned merely with establishing minimal terms of co-existence among independent states.[157] Instead, international law requires states to embrace international cooperation, pooling their sovereign authority

[153] See UN Charter art. 33.

[154] See Friendly Relations Declaration (declaring that "[e]very State shall settle its international disputes with other States by peaceful means," such as mediation, arbitration, and judicial settlement, and that if these mechanisms fail to yield a solution, "[t]he parties to a dispute have the duty . . . to continue to seek a settlement of the dispute by other peaceful means agreed upon by them").

[155] See Wiener, 'Disregard and Due Regard', p. 463 (explaining that due regard aims "[t]o remedy omitted voice, to see those who are invisible, to listen to those who were unheard" by enabling participation in decision-making).

[156] See ICCPR art. 1; ICESCR art. 1.

[157] Pace Hurrell, *On Global Order*; and Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Palgrave Macmillan Press, 1977).

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to develop common norms and institutions, in settings where their respective sovereign rights and authority are unsettled or otherwise entangled. These features of the constitutional approach to sovereign equality are well-suited to our current era of global interconnectivity and interdependence, when activities occurring in one country routinely reverberate across national borders to affect people, markets, ecosystems, and legal and political systems around the world.[158]

Roadmap

In subsequent chapters, we explore how mandatory cooperation has been incorporated into a wide range of fields of international law. We shall see that mandatory cooperation finds expression in numerous international treaties and norms of customary international law. It also features prominently in dozens of decisions from national and international courts, including judgments of the ICJ and arbitral tribunals convened under the PCA. Our methodology throughout the book is mostly descriptive, inasmuch as it begins with the existing practice and self-understanding of international law. But our method is also interpretive, since we use the organizing principle of sovereign equality to explain the extant legal norms of mandatory cooperation. Collectively, the case studies we develop in this book chronicle how the constitutional approach to sovereign equality is gradually eclipsing (but has not yet fully eclipsed) the older voluntarist approach.

The remainder of this book is divided into three parts. The first two parts use case studies to characterize and assess international law's deployment of mandatory cooperation in contexts where the practice is reasonably well entrenched, while the last part will explore contexts where mandatory cooperation is less well developed.

In Part I – *Conflicting Sovereignties* – we consider cases of overlapping rights, shared sovereign powers, or unsettled jurisdiction to explain why sovereign equality requires states to resolve disputes through international cooperation. In Chapter 2, we begin by examining how

[158] See Eyal Benvenisti, "Sovereign as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107 AJIL 295 (observing that while international lawyers in the past viewed sovereignty as "akin to owning a large estate separated from other properties by rivers or deserts" – in other words, conditions of mutual independence – "today's reality is more analogous to owning a small apartment in one densely packed high-rise," where each owner's rights and interests are inextricably bound up with others' rights and interests).

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international law governing rivers has established a requirement that upstream and downstream sovereigns must consult and negotiate in good faith to determine mutually satisfactory solutions for the shared use of rivers. Chapter 3 shows how the international law of the sea moved away from state unilateralism in favor of the equitable model of sovereignty by requiring states to resolve disputes over international fisheries and maritime boundaries through cooperation in accordance with equitable principles. Chapter 4 considers how duties of international cooperation safeguard sovereign equality by reconciling the territorial sovereignty of coastal states with landlocked states' rights to access the oceans through negotiation or binding arbitration. Chapter 5 demonstrates that states have accepted obligations of mandatory cooperation with respect to a variety of other transboundary harms, including piracy, terrorism, and at least some cyberattacks. Chapter 6 shows that international environmental law embraces an equitable approach whereby states must cooperate to suppress transboundary pollution. In both Chapter 5 and Chapter 6, we argue that states where transboundary harms originate bear legal obligations to cooperate with injured states to suppress threats from nonstate actors by taking effective measures to prevent or suppress those threats.

In Part II – *Collective Stewardship* – we show that cooperation is required when international law commits authority to groups of states for the collective stewardship of the international community as a whole or a matter of common concern. In Chapter 7, we examine climate change as a transnational and existential threat to humanity generally, and to certain smaller and vulnerable states most dramatically. Since it poses an existential threat to low-lying coastal states and raises the frequency and intensity of extreme weather events, we make the case that climate change should be understood to trigger duties of international cooperation. Chapter 8 considers international territorial administration through multilateral governance structures, devoting special attention to Antarctica as a global *res communis* for peaceful exploration and scientific study. In Chapter 9, we explain how mandatory cooperation applies to the international community's collective responsibility to safeguard international peace, security, and human rights. With the establishment of the United Nations, the Grotian paradigm of states deciding when to use force for themselves shifted to a collective stewardship model whereby states must cooperate with one another to avoid armed conflict, punish atrocity crimes, and combat global poverty,

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including through collective consultation, negotiation, and peaceful dispute resolution.

Part III – *Future Directions* – begins with Chapter 10, where we examine whether states bear duties of international cooperation with respect to forced migration, including the mass displacement caused by Myanmar's campaign of ethnic cleansing against its Rohingya Muslim minority. We make the case that the international community has accepted the protection of forced migrants as a common concern of humanity under the community's joint stewardship. Although states have not come close to satisfying this collective responsibility, the system of national pledges established under the 2018 Global Compact for Safe, Orderly and Regular Migration[159] and the Global Compact on Refugees[160] represent substantial (albeit nonbinding) measures in the direction of fulfilling states' nascent duties of mandatory cooperation. Chapter 11 uses antitrust law as a case study to explore the phenomenon of extraterritorial regulation. Over the past several decades, many states have extended their domestic competition laws extraterritorially, subjecting foreign actors outside their borders to the concurrent regulation of multiple states. We argue in Chapter 11 that the principle of sovereign equality requires states to resolve disputes involving fields of concurrent prescriptive jurisdiction through mandatory cooperation. Chapter 12 offers a provocative and jurisprudentially ambitious argument: that sovereign equality requires states to submit to international adjudication or arbitration even in ordinary legal disputes that do not involve overlapping sovereign rights or powers. Drawing on the ICJ's groundbreaking judgment in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua,[161] we argue that even if international law permits states to opt out of the jurisdiction of a particular court, in practice the ICJ interprets that entitlement restrictively, and the principle of sovereign equality prohibits states from abandoning third-party dispute resolution entirely. Finally, Chapter 13 concludes by recapping the book's key themes, considering potential obstacles to mandatory cooperation, and identifying other matters of international concern, such as pandemics, that are good candidates for mandatory cooperation under the equitable conception of sovereign equality.

[159] Global Compact on Safe, Orderly, and Regular Migration (GCM), New York, 19 December 2018, A/RES/73/195.

[160] Global Compact on Refugees, New York, 2 August 2018, A/73/12 (Part II).

[161] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar./US), Merits, 1986 ICJ Rep. 14 (27 June).

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While this chapter began with a story of international cooperation in retreat – the ongoing calamity in Ukraine, where the failure of cooperation is being paid in blood – we shall see that in many other contexts states' obligations of mandatory cooperation are taken seriously and have attained the status of customary international law, even where their initial source is treaty-based (e.g., international watercourses, maritime delimitation, the duty to resolve disputes using peaceful means). Even in an era when multilateralism faces serious setbacks under assault from nationalist movements, fueling pessimism about the future of international cooperation, the fact remains that international law continues to thrive across many fields. International treaties and the judgments of international courts and tribunals continue to affirm that states must cooperate to address a host of common challenges. Mandatory cooperation is the legal framework that enables states to make policy together as equals, as joint stewards of both their people and humanity.

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