

NOTE

WAGING WAR: EXERCISING THE RIGHT TO SELFDEFENSE IN DISPUTED TERRITORIES

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INTRODUCTION

When Russia began its invasion of Ukraine on February 24, 2022, President Vladimir Putin gave a video address to the world.¹ In his address, Putin justified his use of force by claiming it was in accord with Article 51 of the U.N. Charter: the right of self-defense.² The right of self-defense, however, is influenced by the “Purposes and Principles” outlined in the first Chapter of the U.N. Charter (“the Charter”).³ Chiefly, the Charter states that members of the United Nations must refrain from infringing on the territorial integrity or political independence of any state.⁴ For the first time in four decades, the U.N. Security Council, deadlocked by its five permanent members, passed a resolution calling for an “emergency special session” of the General Assembly to recommend collective action on Ukraine.⁵

This incursion is not the first time that Russia’s use of force has threatened international peace. From its occupation of Moldova in 1992 to the 2008 invasion of Georgia, Russian military forces have historically targeted disputed territories under the guise of protecting the separatist movements it has initiated.⁶ But the attacks Russia initiated in Ukraine in February 2022 were different. Rather than solely targeting Ukrainian military

¹ *Transcript: Vladimir Putin’s Televised Address on Ukraine*, BLOOMBERG (Feb. 24, 2022, 7:07 AM), <https://www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24?leadSource=uverify%20wall> [<https://perma.cc/7MKZ-DPAN>].

² *Id.* (explaining that Putin’s decision to carry out a “special military operation” in Ukraine was in accordance with Article 51 (Chapter VII) of the UN Charter as well as the treaties of “friendship and mutual assistance” with the Donetsk People’s Republic and with the Lugansk People’s Republic); *see also* U.N. Charter art. 51 (explaining that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense . . .”).

³ *See generally* U.N. Charter art. 1 (stating a purpose of the United Nations is “to maintain international peace and security”).

⁴ U.N. Charter art. 2, ¶ 4.

⁵ S.C. Res. 2623 (Feb. 27, 2022). In 1982, four decades ago, the Security Council called for an emergency special session of the General Assembly to address Israel’s military aggression towards its neighboring states. S.C. Res. 500 (Jan. 28, 1982); *see also* S.C. Res. 501 (Feb. 25, 1982) (reaffirming its demand for Israel to “immediately . . . cease its military action against Lebanese territorial integrity”); S.C. Res. 2623 (Feb. 27, 2022) (calling for an emergency special session of the General Assembly to address the situation in Ukraine).

⁶ R.J. Delahunty, *The Crimean Crisis*, 9 U. ST. THOMAS J.L. & PUB. POL’Y 125, 146–47 (2014); Tim Lister, Tara John & Paul P. Murphy, *Here’s What We Know About How Russia’s Invasion of Ukraine Unfolded*, CNN (Feb. 24, 2022, 11:42 AM), <https://www.cnn.com/2022/02/24/europe/ukraine-russia-attack-timeline-intl/index.html> [<https://perma.cc/P646-S33V>].

forces in disputed regions, Russia initiated a full-on invasion, attempting to effect regime change and threatening the entire state's territorial integrity. The effects of the ongoing war have caused aftershocks across the globe, which begs the question: what does the future hold for the other breakaway states that maintain a Russian military presence? Although it is settled international law that a state has a right to defend itself, when can that right impinge on the territorial integrity or political independence of another state?

I

ARGUMENT OUTLINE

This Note will focus on whether a state may invoke the right to self-defense in order to protect citizens living in a different territory. In my Note, I will examine the separatist regions of Abkhazia, Transnistria, and Donbas.

First, I will argue that Russia's efforts to foster sovereignty in separatist regions by creating treaties with governing authorities, distributing passports, and encouraging secession do not establish a mandate for that state to protect individuals in the disputed territories. Second, I will argue that, even if Russia's right to protect its citizens could extend to military action in a foreign state, Russia was not facing an "imminent" threat, as required by the *Caroline* test. Third, I will discuss how the legal implications of a separatist region's sovereignty suggest that Russia's previous and current incursions into separatist regions are illegal under customary international law.

I will end by discussing the U.N. member states' options to dissuade inappropriate uses of force. The U.N. member states' options are never pleasant. At a minimum, they may involve economic or other measures not involving the use of force. Ultimately, military incursions may require a use of the military instrument in order to restore international peace and security. In addition to enacting economic sanctions or beginning military action, the U.N. could also adopt changes to its Charter or pursue legal remedies. In this section, I will discuss the complications that arise with passing U.N. Security Council resolutions against individual members of the council, given the unilateral veto power of the five permanent members.⁷ Lastly, I will explore how the international community

⁷ *Russia Vetoes Security Council Resolution Condemning Attempted Annexation of Ukraine Regions*, U.N. NEWS (Sept. 30, 2022), <https://news.un.org/en/story/2022/09/1129102> [<https://perma.cc/D3HA-SKV6>].

can find a path forward in Eastern Europe through amnesty, reparations, regime change, and criminal tribunals.

II

BACKGROUND

A. United Nations Charter

Signed on June 26, 1945, the U.N. Charter establishes the fundamental law governing the use of force within the international community and outlines many of the core principles of international law.⁸ The principles governing inter-state conflict are primarily contained in Article 2(4), Article 42, and Article 51.⁹ Under Article 2(4) of the Charter, states are prohibited from the threat or use of force against another state unless the state has consented to the use of force.¹⁰ When consent is not provided, the U.N. Charter provides two exceptions: (1) actions taken in self-defense under Article 51 and (2) enforcement actions authorized by the Security Council.¹¹ Article 2(4) explicitly limits the self-defense justification to the use of force to actions taken under Article 51, which only permits self-defense in response to an armed attack.¹²

The U.N. Charter has been widely criticized by the international community for its inflexibility; it has only been amended three times, with the last change coming nearly five decades ago.¹³ Even when there have been amendments to the Charter, they have largely been procedural in nature.¹⁴ The reason the

⁸ Academic Impact: UN Charter (Oct. 22, 2020), <https://www.un.org/en/academic-impact/un-charter> [<https://perma.cc/BN33-Y5V6>].

⁹ U.N. Charter art. 2, ¶ 4 (explaining that members of the U.N. should refrain from the threat or use of force against the territorial integrity or political independence of any state); U.N. Charter art. 42 (explaining that the U.N. Security Council can “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”); U.N. Charter art. 51 (explaining that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs . . .”).

¹⁰ U.N. Charter art. 2, ¶ 4.

¹¹ U.N. Charter art. 51.

¹² *Id.*

¹³ ABOUT US: UN CHARTER, <https://www.un.org/en/about-us/un-charter> [<https://perma.cc/85XU-SJKP>] (last visited Nov. 18, 2022). The U.N. Charter was last amended in 1973.

¹⁴ Jessica Liang, *Modifying the UN Charter Through Subsequent Practice: Prospects for the Charter's Revitalisation*, 81 *NORDIC J. INT'L L.* 1, 3 (2012); UN CHARTER: AMENDMENTS TO ARTICLES 23, 27, 61, 109, <https://www.un.org/en/about-us/un-charter/amendments> [<https://perma.cc/VM25-7YTQ>] (last visited Dec. 9, 2022). For example, Article 23 was amended to increase the number of Security Council members from eleven to fifteen in 1965, and Article 109 was amended to require

Charter has seen so few amendments is, in part, how difficult it is to amend. Two-thirds of the members of the United Nations, including all permanent members of the Security Council, must ratify any amendment after it has been adopted by two-thirds of the members of the General Assembly.¹⁵ There are only five permanent members of the Security Council, which include the United States, the Russian Federation, the United Kingdom, China, and France.¹⁶ But given the competing interests of these permanent members, it is difficult for any amendment to receive the necessary support for its incorporation into the Charter. As a result, the Charter has yet to adapt to the nature of modern conflicts in disputed territories.

B. *Caroline* Test

In addition to the U.N. Charter, customary international law is also informed by the *Caroline* test.¹⁷ The *Caroline* test, originating from a naval dispute between Britain and the United States at Niagara Falls, established that the need for preemptive self-defense must be “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁸ This “instant” and “overwhelming” need is commonly referred to as a requirement for an “imminent threat.”¹⁹ Modern conflicts, however, disregard this requirement. States instead engage in “forever wars” long after the initial imminent threat that justified a self-defense action has been resolved.²⁰ For example, the primary justification of the United States for its 20-year involvement in

nine members of the Security Council (instead of seven members) to vote on the date and place of General Conferences for reviewing the U.N. Charter.

¹⁵ U.N. Charter art. 108.

¹⁶ SECURITY COUNCIL: CURRENT MEMBERS, [https://www.un.org/securitycouncil/content/current-members#:~:text=The%20Council%20is%20composed%20of,end%20of%20term%20year\)%3A](https://www.un.org/securitycouncil/content/current-members#:~:text=The%20Council%20is%20composed%20of,end%20of%20term%20year)%3A) [https://perma.cc/EB78-W9EC] (last visited Nov. 18, 2022).

¹⁷ U.N. Charter art. 2, ¶ 4; U.N. Charter art. 42; U.N. Charter art. 51.

¹⁸ Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British diplomat (Aug. 6, 1842), in CAROLINE AND MCLEOD CASES, 32 AM. J. INT’L. L. 82, 89 (R.Y. Jennings, 1938).

¹⁹ Matthew Waxman, *The Caroline Affair in the Evolving International Law of Self-Defense*, LAWFARE (Aug. 28, 2018).

²⁰ See Mary E. O’Connell, *Forever Air Wars and the Lawful Purpose of Self-Defense*, 9 J. ON USE FORCE & INT’L L. 33, 37 (2022) (discussing an example in which President Bill Clinton used Article 51 to justify launching a missile attack on Iraq “in retaliation for an alleged plot to assassinate former President Bush while on a visit to Kuwait” that happened weeks prior).

Afghanistan was self-defense.²¹ The United States claimed its military action was a necessary defense response to the terrorist attacks on September 11, 2001, and then the United States later used its involvement in Afghanistan to extend its military campaign to Iraq.²² The international community's anemic response to questionable claims of imminent threat is indicative of the failure of the *Caroline* test and calls into question how far—and how long—a right to self-defense claim can go. In light of the armed conflicts in Abkhazia (which has been ongoing since 1988), Transnistria (which has been deadlocked since 1992), and Ukraine (which has expanded in scope since the 2014 annexation of Crimea), it is necessary to revisit the applicability, if any, of the *Caroline* test in modern conflicts.

C. The Impact of External Sovereignty on Consent

With respect to understanding whether an interstate conflict violates the U.N. Charter, Article 2(4) requires, at a minimum, an answer to the question of whether a state has consented to another state's use of force in its territory. Here, "state" refers to a political institution, but "statehood," an important prerequisite to being a state, encompasses the legitimacy of that institution.²³ Thus, statehood is essential for a state to be able to consent.²⁴ The four criteria for statehood are outlined in The Montevideo Convention of 1933.²⁵ The primary disputed criterion at issue with separatist regions—specifically, Abkhazia,

²¹ Permanent Rep. of the United States of America to the U.N., Letter dated October 7, 2001, from Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001) (informing the Security Council that the United States "has initiated actions in the exercise of its inherent right of individual and collective self-defence . . . includ[ing] measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan"); Stephen W. Preston, Former General Counsel of the Department of Defense, *The Legal Framework for the United States' Use of Military Force Since 9/11* (Apr. 10, 2015) (transcript available at <https://www.defense.gov/News/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/> [https://perma.cc/UU58-RPJW]).

²² *Id.*

²³ Sheldon Leader, *Statehood, Power, and the New Face of Consent*, 23 *IND. J. OF GLOB. LEGAL STUD.* 127, 127 (2016).

²⁴ *Id.*

²⁵ Montevideo Convention on the Rights and Duties of States art. 1., *opened for signature* Dec. 26, 1933, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934). The four criteria outlined are: (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter relations with the other states. These criteria are considered customary international law that applies to all states. James Summers, *Kosovo*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 235, 254

Transnistria, and the Donbas—is their capacity to engage in interstate relations.²⁶ For separatist regions, the relationship between the separatist region and their patron state render a close examination of their statehood and capacity for interstate relations necessary.²⁷

Although the capacity for interstate relations had been considered part of customary international law's criteria for statehood before 1933, independence claims of breakaway states have increasingly become an issue in modern territorial conflicts.²⁸ Historically, the international community has refused to recognize breakaway states until the previous territorial sovereign had given up its claim to the disputed territory.²⁹ Without international recognition, the sovereignty of the state is extremely limited.³⁰ The breakaway state may be able to exercise authority over its citizens, but it may not have the liberty or ability to act independently against external forces. Notably, a state's capacity to enter relations with other states is not exclusively determined by its inherent characteristics; rather, it is predicated on external recognition that it can act as a state. Thus, to evaluate the ability of the separatist regions of Abkhazia, Transnistria, and Donbas to consent to Russia's use of force in their territory, it is necessary to examine the validity of their independence claim.³¹

III

ANALYSIS

A. The U.N. Charter's Right to Self-Defense is Extremely Limited

Contemporary uses of force have changed from the circumstances surrounding nineteenth-century naval skirmishes or

(describing how the criteria in the Montevideo Convention constitute “[t]he usual formula for determining the existence of a state”).

²⁶ *Id.*

²⁷ VIKTORIA POTAPKINA, *NATION BUILDING IN CONTESTED STATES*, 231–32 (Jelena Dzanic ed. 2020).

²⁸ See Joshua Castellino, *International Law and Self-Determination: Peoples, Indigenous Peoples, and Minorities*, in *SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 27, 44 (1st ed. 2014) (explaining how “claims for self-determination . . . continue to grow in vehemence and, as viewed over a longer span of history, may eventually lead to a reconfiguration of the states, irrespective of the ‘legitimacy’ of such claims”).

²⁹ *Id.* at 50.

³⁰ *Id.* at 51.

³¹ See *id.*

the international principles signed in the wake of World War II.³² The right to self-defense established by the U.N. Charter in the wake of World War II is narrower than the *Caroline* test.³³ For example, Article 51 of the Charter requires an “armed attack” to justify the use of self-defense.³⁴ An “armed attack” is usually understood to be limited to violence against an adversary, particularly violence that involves military force.³⁵ Although the definition of armed attack has expanded in recent decades, the expansion of the definition has been limited to address the growing threat of cyberwarfare.³⁶ Article 51 predominantly addresses conventional uses of military force, such as Russia’s invasion of Ukraine or the occupations in Abkhazia and Transnistria.

In light of this narrow definition, the primary considerations in each of the below case studies are (1) whether the separatist region is a state capable of foreign relations; (2) assuming the region has not achieved statehood, whether Russia’s military action is (a) authorized by the Security Council or (b) in self-defense; and (3) whether the U.N. Charter can adapt to address modern conflicts.

B. Russia’s Military Incursions Comply with International Law Only if Separatist Regions are States Capable of Consent

1. *Georgia: Abkhazia Case Study*

Abkhazia has operated with some measure of independence since the early twentieth century.³⁷ Although the Soviet

³² Waxman, *supra* note 19; Marc Weller, *Ukraine—How the New Normal Came About*, 172 *NEW L.J.* 7969 (2022) (explaining that although Russia’s justifications for the massive invasion of Ukraine have been used before, “the scale of the present operation is unprecedented”); 22 U.S.C. § 8902.

³³ Simon Parsons, *The Law of War*, 172 *N.L.J.* 7966 (2022).

³⁴ *Id.*

³⁵ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3 (defining attacks as “acts of violence . . . in offence or defence.”); Yoram Dinstein, *The Principle of Distinction and Cyber War in International Armed Conflicts*, 17 *J. CONFLICT AND SEC. L.* 261, 264 (2012) (explaining that an incident devoid of violence, no matter how detrimental, is not an armed attack, but an armed attack “does not have to be kinetic”).

³⁶ See Harold H. Koh, *Keynote Address: The Emerging Law of 21st Century*, 66 *EMORY L. J.* 487, 504 (2017) (explaining that “forms of cyber activity can, under certain circumstances, represent a use of force to which the laws of *jus ad bellum* and *jus in bello* apply . . .”).

³⁷ Tracey German, *Abkhazia and South Ossetia: Collision of Georgian and Russian Interests*, *FR. INST. INT’L. RELS.*, June 2006, at 7.

Union initially incorporated Abkhazia as its own Soviet Socialist Republic in 1921, Abkhazia was later subsumed as part of Georgia.³⁸ In February 1931, Abkhazia joined Ajaria and South Ossetia as one of the three autonomous areas operating in the Georgian Soviet Socialist Republic.³⁹ Soon after, the USSR encouraged ethnic Georgians to settle in Abkhazia, such that, by 1989, ethnic Abkhazians were in the minority of the population.⁴⁰ Despite an ethnic Georgian majority, Abkhazia's separatist movement gained more traction, and demands for independence were floated at the 19th Party Conference of the Communist Party.⁴¹ After the dissolution of the Soviet Union, Abkhazia continued functioning as a *de facto* state, managing its own customs service and military forces.⁴² Abkhazia also organized multiple referendums to assert its autonomy.⁴³ In response, the Commonwealth of Independent States, an international organization comprised of former Soviet Union republics,⁴⁴ issued sanctions against Abkhazia and installed a peacekeeping force with a large Russian military contingent.⁴⁵ As these sanctions lifted, however, Abkhazia's relation with Russia flourished.⁴⁶ Russia encouraged Abkhaz citizens to obtain Russian passports, maintained transportation routes from

³⁸ *Contrary to the Will of the People: How the S[oviet] S[ocialist] R[epublic] of Abkhazia Became an Autonomy Within Georgia*, ABKHAZ WORLD, Dec. 9, 2020, <https://abkhazworld.com/aw/history/1869-how-the-s-s-r-abkhazia-became-an-autonomy-within-georgia> [<https://perma.cc/6QUP-PHHY>].

³⁹ *Id.*; KONSTITUTSIA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION] art. 25 (Russ.); Teimuraz Papaskiri, *The Negative Results of the Soviet Occupation of Georgia*, MERIDIAN PUBLISHERS, 423, 424 (2011) (discussing the status of Abkhazia, Ajaria, and South Ossetia). The Soviet Union granted Abkhazia and Ajaria the status of Autonomous Soviet Socialist Republics and South Ossetia the status of an Autonomous Oblast.

⁴⁰ Ethnic Abkhazians accounted for 18% of the population of Abkhazia whereas ethnic Georgians accounted for 46% of population in 1989. See German, *supra* note 37, at 7.

⁴¹ ANA MARIA ALBULESCU, INCOMPLETE SECESSION AFTER UNRESOLVED CONFLICTS 109 (Gëzim Visoka ed., 2022).

⁴² In response to Abkhazia's growing separatist movement, the U.N. established an observation mission to keep an open dialogue between Abkhazia, Georgia, and the Russian military. *Id.* at 110–11.

⁴³ Abkhazia organized a constitutional referendum resulting in the passing of its National Act of Independence in 1999. Seven years later, Abkhazia held a referendum on its independence. *Id.* at 113–14.

⁴⁴ *Map of the Commonwealth of Independent States*, NATIONS ONLINE <https://www.nationsonline.org/oneworld/map/CIS-map.htm> [<https://perma.cc/XBJ3-D43L>].

⁴⁵ See ALBULESCU, *supra* note 41, at 121.

⁴⁶ *Id.* at 125.

Russia to Abkhazia, paid the pensions of Abkhazians, and invested heavily in the Abkhazian economy.⁴⁷ Russia became indispensable to Abkhazia, to the extent that Abkhazia looked to Russia as the “sole guarantor of security and economic welfare of Abkhazia.”⁴⁸

Despite the push for Abkhazian independence, Abkhazia’s separatist movement was widely considered frozen until Russia invaded South Ossetia in 2008, undermining Georgia’s sovereignty over the autonomous areas.⁴⁹ Following the end of the Russo-Georgian War in August 2008, Russia became the first U.N. member state to recognize the Republic of Abkhazia.⁵⁰ Years later, only four other U.N. member states recognize the independence of Abkhazia.⁵¹ Today, most of Abkhazia’s population has adopted Russian passports, which are required to receive pensions.⁵² Still, Abkhazia enjoys a unique amount of independence compared to the other separatist regions, such as Transnistria and Donbas.⁵³ For example, Abkhazia enjoys a presidential system with regular elections.⁵⁴ Civil society in Abkhazia is also relatively robust, and political organizations enjoy the freedom of association.⁵⁵ Abkhazia’s independence, however, comes at a steep

⁴⁷ *Id.* at 125–26.

⁴⁸ *Id.* at 129.

⁴⁹ In this way, Abkhazia’s separatist movement is intrinsically tied to the separatist movement in South Ossetia. Both hosted a robust Russian military contingent, and both experienced armed conflict with Georgia. The conflicts differ, however, in extremely important ways. For one, the majority of the population in South Ossetia is Ossetian. But most importantly, South Ossetia’s conflict with Georgia had a significant territorial basis. South Ossetia did not simply want to be part of the Russian Federation; it wanted to unite with North Ossetia. *See generally*, German, *supra* note 37.

⁵⁰ *Countries That Recognized South Ossetia’s and Abkhazia’s Independence*, TASS (May 29, 2018), <https://tass.com/world/1007058> [<https://perma.cc/TPU4-E7UA>].

⁵¹ *Id.*

⁵² *See* German, *supra* note 37, at 9.

⁵³ Freedom in the World 2022, *Abkhazia*, FREEDOM HOUSE, <https://freedomhouse.org/country/abkhazia/freedom-world/2022> [<https://perma.cc/5REV-2G59>] (scoring Abkhazia as “Partly Free”); Freedom in the World 2022, *Transnistria*, FREEDOM HOUSE, <https://freedomhouse.org/country/transnistria/freedom-world/2022> [<https://perma.cc/J833-37A3>] (scoring Transnistria as “Not Free”); Freedom in the World 2022, *Eastern Donbas*, FREEDOM HOUSE, <https://freedomhouse.org/country/eastern-donbas/freedom-world/2022> [<https://perma.cc/A799-23ZE>] (scoring Eastern Donbas as “Not Free”).

⁵⁴ *Id.*

⁵⁵ *Id.*

cost.⁵⁶ Abkhazia's military infrastructure is primarily funded by the Russian state, and the only U.N. member states that recognize Abkhazia's independence are allies of the Russian Federation.⁵⁷ Thus, Abkhazia can hardly be said to be truly independent. Without the capacity for international relations, Abkhazia is not a state capable of consenting to Russian military action within its borders under the Montevideo Convention.

Next, it is important to consider whether Russia's military presence is justifiable under Article 2(4). The first question is whether the United Nations Security Council authorized Russia's use of force in Abkhazia. Perhaps having recognized a pattern after Russia's previous military involvement, the United Nations had a firm response to Russia's involvement in Abkhazia.⁵⁸ Although the U.N. Security Council expressed deep concern about the Russo-Georgian conflict, the Security Council refused to intervene on behalf of—or condemn—either side.⁵⁹ Instead, many members of the United Nations condemned Russia's use of force in Abkhazia and South Ossetia.⁶⁰

Second, under the *Caroline* test, it is necessary to examine whether there was an "imminent threat" in Abkhazia that Russia needed to defend itself against. Although the Russo-Georgian War concluded more than a decade ago, Russia maintains an active security presence in Abkhazia, (including a sizeable military base), and a leadership role in Abkhazia's State Security Service, as well as supplying most of Abkhazia's state budget.⁶¹ Russia based part of its military intervention

⁵⁶ See Marc Schleifer, *The Impossible Independence of Abkhazia*, CIPE (July 12, 2015), <https://www.cipe.org/blog/2015/12/07/the-impossible-independence-of-abkhazia/> [<https://perma.cc/C8MK-RSH7>].

⁵⁷ *Id.*; see also TASS, *supra* note 50 (listing Russia, Nicaragua, Venezuela, Nauru, and Syria as countries who recognize South Ossetia and Abkhazia's independence).

⁵⁸ See discussion *infra* Section III.B.2.

⁵⁹ See Repertoire of the Practice of the Security Council of 2008-2009, The Situation in Georgia, U.N. Doc. ST/PSCA/1/Add.16.; *UN Security Council refuses to condemn Georgia*, LENTA (Aug. 8, 2008, 2:09PM), <https://lenta.ru/news/2008/08/08/unoss/> [<https://perma.cc/KW9J-W6UP>].

⁶⁰ See CNN Editorial Research, *2008 Georgia Russia Conflict Fast Facts*, CNN (Apr. 6, 2022, 11:13AM), <https://www.cnn.com/2014/03/13/world/europe/2008-georgia-russia-conflict/index.html> [<https://perma.cc/BLD5-AE4L>]; Press Release, United States Mission to the United Nations (Aug. 12, 2022), <https://usun.usmission.gov/joint-statement-by-un-security-council-members-following-an-aob-on-georgia-2/> [<https://perma.cc/L6VV-JRLB>].

⁶¹ European Parliament Workshop, *Russian Military Presence in the Eastern Partnership Countries*, SUBCOMMITTEE ON SECURITY AND DEFENCE (2016), <https://www.europarl.europa.eu/cmsdata/108547/Russia%20military%20in%20>

in 2008 on the imminent threat to its citizens in Abkhazia.⁶² Given Russia's policy to issue passports to the Abkhazian residents, that is a pretextual argument. Even if the Abkhazian residents were considered Russian citizens, the *Caroline* test applies to imminent threats to a state, not individual citizens. It does not justify the use of force wherever a Russian citizen may be solely because the individual is under an imminent threat. Additionally, the long-standing conflict in the region established a baseline level of threat, which Russia chose to increase through military intervention.⁶³ Given that the conflict among Georgia, Abkhazia, and Russia had been ongoing since at least 1994, Russia's choice of timing for its initial military intervention is hardly consistent with the *Caroline* test. Even assuming that the original intervention was lawful, since Georgia has enjoyed relative peace following the Cease-fire Agreement of August 12, 2008, neither Abkhazia nor Russia face a continued imminent threat requiring self-defense.⁶⁴ The ceasefire agreement ended direct hostilities between Russia, Abkhazia, and Georgia,⁶⁵ making the military presence that Russia maintains in Abkhazia unlawful and a continued threat to the territorial integrity of Georgia. The U.N.'s failure to adequately condemn Russia's invasion of Georgia in 2008 established a dangerous precedent for future armed conflicts.⁶⁶

EaP_Workshop.pdf [<https://perma.cc/WL6W-V3BQ>]; FREEDOM HOUSE, *supra* note 53.

⁶² Scott Littlefield, *Citizenship, Identity and Foreign Policy: The Contradictions and Consequences of Russia's Passport Distribution in the Separatist Regions of Georgia*, 61 EUROPE-ASIA STUDIES 1461, 1462 (2009) (describing Russia's policy of passport proliferation).

⁶³ See *Report of Independent International Fact-Finding Mission on the Conflict in Georgia, Report*, Vol. I, at 20 (Sept. 2009) (reporting Russia's provision of military equipment and training to Abkhaz forces and the "influx of volunteers or mercenaries from the territory of the Russian Federation to South Ossetia" in early August 2008).

⁶⁴ Further, Russia admitted it initiated military action in response to armed conflict in South Ossetia—not in Abkhazia. Russia, therefore, had no basis to increase military activity to defend both the South Ossetian and Abkhazian separatist movements. See *Repertoire of the Practice of the Security Council of 2008-2009, The Situation in Georgia*, U.N. Doc. ST/PSCA/1/Add.16.

⁶⁵ See *generally id.* (explaining the aftermath of the ceasefire in the Georgian conflict).

⁶⁶ Peter Dickinson, *The 2008 Russo-Georgian War: Putin's Green Light*, ATLANTIC COUNCIL, Aug. 7, 2021, <https://www.atlanticcouncil.org/blogs/ukrainealert/the-2008-russo-georgian-war-putins-green-light/> [<https://perma.cc/6MCR-MMKZ>].

2. *Moldova: Transnistria Case Study*

The Pridnestrovian Moldavian Republic, known as Transnistria, declared its independence on September 2, 1990.⁶⁷ When the Republic of Moldova refused to recognize the break-away state of Transnistria, both sides were soon embroiled in armed conflict.⁶⁸ Russia made every effort to enable Transnistria's independence from Moldova, from providing military aid to conducting election fraud.⁶⁹ Unlike Abkhazia, Transnistria's population was fairly diverse, but it maintained a strong contingent of ethnic Russians, which comprised over one-fourth of Transnistria's population in 1989.⁷⁰ In a model that has been repeated in recent inter-state conflicts, Transnistria held a referendum on its independence on December 1, 1991.⁷¹ The majority of voters (98%) voted in favor of Transnistria's independence, but the legitimacy of the referendum has often been debated.⁷² Throughout the war with Moldova, Russia's army bolstered Transnistrian military forces until Moldova negotiated a ceasefire that established Transnistria's *de facto* independence.⁷³ However, given that Moldova negotiated the ceasefire with Russia—and not with Transnistria—it appears Transnistria has limited ability to exercise this independence.⁷⁴

⁶⁷ VIKTORIA POTAPKINA, *NATION BUILDING IN CONTESTED STATES*, 145 (Jelena Dzanic ed. 2020).

⁶⁸ *Id.* at 117.

⁶⁹ Letter from Ambassador Julie Finley to the Permanent Council (July 18, 2006), <https://www.osce.org/files/f/documents/e/4/20003.pdf> [<https://perma.cc/4M3T-MUUC>] (asserting that Transnistria's referendum "cannot be taken seriously" and that only Moldova "has the right to choose . . . to allow foreign military forces on its territory").

⁷⁰ *POPULATION CENSUS, NATIONAL BUREAU OF STATISTICS OF THE REPUBLIC OF MOLDOVA 300* (Vol. 1, 2004); *YEARBOOK OF THE STATE STATISTICS SERVICE, MINISTRY OF ECONOMIC DEVELOPMENT OF THE PRIDNESTROVIAN MOLDAVIAN REPUBLIC*, 29 (2003). Moldova is a diverse country, with ethnic Moldovans accounting for 64.5% of the population in 1989 and ethnic Ukrainians and ethnic Russians accounting for 13.8% and 13% of the country's population, respectively. Transnistria had a lower population of ethnic Moldovans (33.1%) and higher populations of ethnic Ukrainians (28.9%) and ethnic Russians (29%).

⁷¹ See POTAPKINA, *supra* note 67, at 118.

⁷² *Id.*; see also Letter from Ambassador Julie Finley to Permanent Security Council, *supra* note 69 (asserting that the referendum "cannot be taken seriously or treated as a legitimate vote . . .").

⁷³ UNITED STATES AGENCY OF INTERNATIONAL DEVELOPMENT, *MOLDOVA: COUNTRY DEVELOPMENT COOPERATION STRATEGY 4* (2020) (describing how the conflict in 1992 led to a "cease-fire policed by Russian forces and a de-facto separation of Transnistria within Moldova").

⁷⁴ Letter from the President of the Republic of Moldova to the Security Council (July 3, 1992), <https://peacemaker.un.org/sites/peacemaker.un.org/files/>

Remnants of Russia's 14th Army remain as peacekeeping forces in Transnistria, which remains heavily dependent on Russia to this day.⁷⁵

Since hostilities ended in 1992, Transnistria has often been viewed as playing a minor role in the geopolitical landscape.⁷⁶ But this is no longer the case. Thus, it is important to examine whether Transnistria is capable of consenting to uses of force in its borders. After a series of bombs shook Transnistria on April 26, 2022, fear has spread in the international community that the explosions could be a pretense for Russia to expand its military presence in the region.⁷⁷ The situation in Transnistria, however, is different from the conflict in Abkhazia. Chiefly, Transnistria's internal and external sovereignty is much more limited than Abkhazia's. Transnistria has the basic hallmarks of a functioning society—maintaining a police force, conducting elections, and operating according to a constitution—but the Transnistrian currency has no international circulation and its postal stamps are not recognized outside its borders.⁷⁸ Civil society is also extremely limited.⁷⁹ Authorities regularly reject permits for organizing, police use violence to coerce confessions, and opponents of the ruling political party are often barred from participating in elections.⁸⁰ As a result, Transnistria continues to rely heavily on Russian subsidies, and its economy is supported by Russian supplies of gas, oil, and other necessities.⁸¹ Russia also supports Transnistrian citizens directly by funding their pensions and offering them Russian citizenship.⁸² In many ways, Russia is Transnistria's sole benefactor, in part because no U.N. member states have recognized

MD%20RU_920000_AgreementPrinciplesPpeacefulSettlementDniestrConflict.pdf [https://perma.cc/64C6-UXKJ].

⁷⁵ NICHOLAS BUDA, INTERNATIONAL RELATIONS: SHORT REFLECTIONS OF A WORLD IN CONSTANT CHANGE 127, 130 (2014).

⁷⁶ Monika Pronczuk, *Explosions Rattle a Breakaway Region in Moldova, Raising Fears of a Broader War*, NY TIMES (Apr. 26, 2022), <https://www.nytimes.com/2022/04/26/world/europe/explosions-transnistria-moldova-war.html> [https://perma.cc/XZ2C-SNNP].

⁷⁷ *Id.*

⁷⁸ *See* BUDA, *supra* note 75, at 32.

⁷⁹ *See generally* Freedom in the World 2022, *Transnistria*, FREEDOM HOUSE, <https://freedomhouse.org/country/transnistria/freedom-world/2022> [https://perma.cc/J833-37A3].

⁸⁰ *Id.*

⁸¹ *See* BUDA, *supra* note 75, at 32.

⁸² *Id.* at 33.

Transnistria's independence.⁸³ Russia's sphere of influence, in combination with Transnistria's limited political freedoms and limited international recognition, makes it clear that Transnistria is not capable of entering relations independently with other states as required by the Montevideo Convention.⁸⁴ Thus, as a breakaway region with limited external recognition, not only was Transnistria unable to consent to Russia's intervention in 1990, but Transnistria remains unable to consent to the use of force on its territory in the present day.⁸⁵

Next, it is important to consider whether Russia's military action was justifiable under Article 2(4). The first question is whether the U.N. Security Council authorized Russia's use of force in Transnistria. After the U.N. Security Council accepted Moldova's application for membership to the U.N., the U.N. remained relatively uninvolved in the Transnistrian conflict.⁸⁶ In June 1992, after the fighting had already broken out between Russian-backed separatists and Moldova, the U.N. tried to encourage a ceasefire, deploying a fact-finding mission to help resolve the conflict.⁸⁷ At the time, the Security Council failed to formally condemn Russia's use of force in Transnistria.⁸⁸ The lack of condemnation, however, does not signal Security Council authorization. In the years following the ceasefire, the international community has requested a withdrawal of Russian troops. Although Moldova and Russia ultimately negotiated a ceasefire one month later, Russia has remained unresponsive to these requests.⁸⁹ Russia's continued refusal to leave Transnistria

⁸³ See POTAPKINA, *supra* note 67, at 118.

⁸⁴ See Summers, *supra* note 25.

⁸⁵ See generally Rainer Hofmann, *Annexation*, MAX PLANCK INST. FOR COMPAR. PUB. L. AND INT'L. L. (Jan. 2020), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1376> [https://perma.cc/2Z28-BBVC] (describing the legal evolution of occupation through force).

⁸⁶ See generally S.C. Res. 739 (Feb. 5, 1992).

⁸⁷ Dynamic Analysis of Dispute Management (DADM) Project, *Moldova/Transnistria (1990-present)*, UNIVERSITY OF CENTRAL ARKANSAS, <https://uca.edu/politicalscience/dadm-project/europerussiacentral-asia-region/moldovatrnsdnier-1990-present/>. [https://perma.cc/KMJ6-SC6F].

⁸⁸ See generally Resolutions Adopted by the Security Council in 1992 (last accessed Dec. 9, 2022), <https://www.un.org/securitycouncil/content/resolutions-adopted-security-council-1992> [https://perma.cc/L6E4-FMQW].

⁸⁹ Letter from the President of the Republic of Moldova to the Security Council (July 3, 1992), https://peacemaker.un.org/sites/peacemaker.un.org/files/MD%20RU_920000_AgreementPrinciplesPeacefulSettlementDniestrConflict.pdf [https://perma.cc/64C6-UXKJ]; Press Release, General Assembly, General Assembly Adopts Texts Urging Troop Withdraw from Republic of Moldova, Strengthening Cooperation in Central Asia, U.N. Press Release GA/12030 (June 22, 2018); Ana Maria Luca and Madalin Necsutu, *Moldova's UN Victory on Transnistria*

has contributed to the view that Russia's military presence is an armed occupation instead of a peacekeeping force.⁹⁰

Since the U.N. failed to authorize Russia's peacekeeping presence in Transnistria, it is necessary to examine whether there was an "imminent threat" that required Russia to use force to defend itself.⁹¹ Unlike in Abkhazia, Russia did not intervene to protect its citizens.⁹² While a self-defense claim over citizens in foreign territory is more plausible, the instant situation in Transnistria fails to rise even to that bar. The only self-defense claim that could be made for the initial intervention was the presence of ethnic Russians in Transnistria. Not only were the separatists not Russian citizens, but the diverse ethnic makeup of the region speaks against any claim Russia may have had in Transnistria. Given that Russia's initial intervention was unlawful, its continued occupation remains so. At present, Russia claims it maintains part of its 14th Army in Transnistria to act as peacekeepers of the 1992 ceasefire agreement and to guard a Soviet-era ammunition depot.⁹³ However, aside from recent bombings in April 2022, Transnistria has seen very little military conflict.⁹⁴ Further, since Russia has had two decades to secure the ammunitions, it is hard to argue that there is an imminent threat that requires its military presence. Based on the relative peace in Transnistria and the time to resolve the ammunitions challenges, both of Russia's

Leaves Russia Unmoved, BALKANINSIGHT, June 29, 2018 <https://balkaninsight.com/2018/06/29/moldova-s-un-victory-on-transnistria-leaves-russia-unmoved-06-28-2018/> [https://perma.cc/C53X-96E6]; UN News, UNITED NATIONS, *At General Debate, Moldova's President highlights need to resolve Transnistrian issue*, Sept. 26, 2012, <https://news.un.org/en/story/2012/09/421292> [https://perma.cc/5XAD-AGGA].

⁹⁰ Madalin Necsutu, *Council of Europe Designates Transnistria 'Russian Occupied Territory'*, BALKANINSIGHT (Mar. 16, 2022), <https://balkaninsight.com/2022/03/16/council-of-europe-designates-transnistria-russian-occupied-territory/> [https://perma.cc/BQ8Z-T98R].

⁹¹ See Waxman, *supra* note 19.

⁹² See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 ¶ 190 (June 27, 1986). In *Nicaragua v. U.S.*, the International Court of Justice held that the U.S. violated customary international law by supporting an armed militia's attempts to overthrow the Nicaraguan government. In *Nicaragua*, the U.S. had no significant cultural or ethnic connections to the forces it was supporting. Here, Russia can raise a claim that it is acting in support of ethnic Russians, which distinguishes *Nicaragua v. U.S.* from the instant situation.

⁹³ See *Freedom in the World 2022*, *supra* note 79.

⁹⁴ See Pronczuk, *supra* note 76 (describing how bombing near Transnistria's border with Ukraine has "ramp[ed] up fears that the war next door could spill over into neighboring countries and swell into a wider conflict")

proffered explanations for their continued military involvement in Transnistria fail the *Caroline* test's imminence requirement and threaten the territorial integrity of Moldova.⁹⁵ Although Russia's continued military interventions are not justifiable under Article 2(4), Russia is likely maintaining its military presence in the region because Transnistria holds a strategic position by bordering Ukraine. Some have speculated the current war in Ukraine is part of a larger plan to assert Russian dominance in former Soviet states.⁹⁶ Regardless, Transnistria represents another example of Russia's illegal use of force in Eastern Europe and of the failure of the United Nations to hold Russia accountable for its uses of force.

3. *Ukraine: Donbas Case Study*

Much like Abkhazia and Transnistria before it, the Donbas has experienced the same Russian intervention as other regions where Russia has promoted separatism. After the fall of the Soviet Union, Ukraine struggled to reconcile its eastern pro-Russian population and its western occidental-oriented population.⁹⁷ In 2014, protests broke out throughout the country in response to the then-president's decision to stop pursuing an association agreement with the European Union.⁹⁸ As Russian-backed separatists in Donbas began to seize control, a clear division developed between the separatist regions and the rest of Ukraine.⁹⁹ Two separatist governments began to emerge in eastern Donbas: the Luhansk People's Republic and the Donetsk People's Republic. These regions hosted a constant Russian military presence since April 2014, and Russian soldiers began vacationing in Donbas to fight for the separatists.¹⁰⁰ Since 2014, Ukraine and Russia have

⁹⁵ See Waxman, *supra* note 19.

⁹⁶ See Pronczuk, *supra* note 76.

⁹⁷ CARTER R. JOHNSON, PARTITION AND PEACE IN CIVIL WARS: DIVIDING LANDS AND PEOPLES TO END ETHNIC CONFLICT at 126 (2022).

⁹⁸ *Id.*

⁹⁹ *Id.*; For example, in February 2014, 33.2% of Donetsk and 24.1% of Luhansk supported unifying with Russia, while only 12% of Ukrainians supported unification. By July 2014, only 34.2% of the population in Donbas identified themselves as citizens of Ukraine. Serhiy Kudelia, *Civil War Settlements and Conflict Resolution in the Donbas*, in *THE WAR IN UKRAINE'S DONBAS: ORIGINS, CONTEXTS, AND THE FUTURE* 205, 208–09 (David R. Marples ed., 2021).

¹⁰⁰ Oksana Mikheieva, *Motivations of Pro-Russian and Pro-Ukrainian Combatants in the Context of the Russian Military Intervention in the Donbas*, in *THE WAR IN UKRAINE'S DONBAS: ORIGINS, CONTEXTS, AND THE FUTURE* 67, 67 (David R. Marples ed., 2021); see Kudelia, *supra* note 99, at 205.

signed numerous agreements in pursuit of a ceasefire, but these agreements have had little effect on the increasing hostilities in the region.¹⁰¹

Although scholars already considered Donbas as a Russian-occupied region in Ukraine,¹⁰² the war shifted when Russia launched a full-scale invasion of Ukraine in February 2022.¹⁰³ Thus, it is necessary to examine whether Russia's invasion had the requisite approval. After Russia vetoed the U.N. Security Council's resolution to end Russia's invasion of Ukraine on February 25, 2022, the eleventh emergency special session of the U.N. General Assembly suspended the rights of membership of Russia in the Human Rights Council on April 7, 2022.¹⁰⁴ Before February 24, 2022, Russia had mostly limited its military involvement to its support of separatists in the Donbas,¹⁰⁵ but Russia's advance towards Ukraine's capital is reminiscent of its prior involvement in Georgia, which ultimately expanded beyond the separatist regions.¹⁰⁶ The conflict in Ukraine, however, differs from the conflict in Abkhazia inasmuch as it is not inherently about ethnicity. Rather, residents of the Donbas are primarily "longing for autonomy."¹⁰⁷ According to the most recent census data, the proportion of ethnic Ukrainians and Russians has remained relatively stable since 1989. In 1989, Ukrainians accounted for 72.7% and Russians accounted for 22.1% of the population of Ukraine. In 2001, Ukrainians and Russians accounted for 77.8% and 17.3%, respectively, of the total

¹⁰¹ See Letter dated February 24, 2005 from Permanent Rep. of Ukraine to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/135, annex (2015) (describing the twelve-step plan in the Minsk ceasefire agreement); Kudelia, *supra* note 99, at 208–09.

¹⁰² See Mikheieva, *supra* note 100, at 68.

¹⁰³ Aditi Sangal et al., *February 24, 2022 Russia-Ukraine news*, CNN (Feb. 25, 2022, 8:06AM) https://www.cnn.com/europe/live-news/ukraine-russia-news-02-24-22-intl/h_12b5345ad5d6402d1e2fe5d9f90692f1 [<https://perma.cc/544J-6595>].

¹⁰⁴ G.A. Res. ES-11.3, *Suspension of the rights of membership of the Russian Federation in the Human Rights Council* (Apr. 7, 2022).

¹⁰⁵ Sangal et al., *supra* note 103.

¹⁰⁶ During the Russo-Georgian war, Russia expanded their military campaign into towns such as Gori, but most of these towns were located near the separatist regions. Sabrina Tavernise, *Russian Soldiers Occupying Stalin's Birth City Are Buoyed by Battle With Georgia*, NY TIMES (Aug. 13, 2008), <https://www.nytimes.com/2008/08/14/world/europe/14gori.html> [<https://perma.cc/B2UU-GQKX>].

¹⁰⁷ See Kudelia, *supra* note 99, at 208–09.

population of Ukraine.¹⁰⁸ The population of ethnic Russians was slightly higher in Donbas in 2001, but ethnic Ukrainians accounted for the majority of the population in Donbas, accounting for 56.9% of the population of Donetsk¹⁰⁹ and 58% of the population of Luhansk.¹¹⁰

Since the Security Council has not passed a resolution to allow Russia's use of force in Ukraine, it is necessary to determine whether the separatist regions in Donbas can be considered autonomous states capable of interstate relations. In efforts to establish autonomy, the separatist regions in Donbas have established their government, constitution, and elections process, but the legitimacy of these elections has been questioned.¹¹¹ Despite their search for autonomy, the Luhansk and Donetsk republics remain tightly controlled by the Russian state. Both regions are entirely dependent on Russia for both financial and military support, and both host a large Russian military contingent.¹¹² Similar to Russia's push to integrate ethnic Georgians in Abkhazia, Russia has worked to integrate residents of the separatist regions by providing Russian passports and by installing Russian citizens in key positions in universities, businesses, and the media. As a result, many of the residents who identified as Ukrainian have fled, and Russian is now the only official language in Donbas.¹¹³ Further, Russia's claim that the republics are autonomous states capable of consenting to its use of force is undermined by its public declarations. Days

¹⁰⁸ *About Number and Composition Population of UKRAINE*, STATE STATISTICS COMMITTEE OF UKRAINE <https://web.archive.org/web/20111217151026/http://2001.ukrcensus.gov.ua/eng/results/general/nationality/> [https://perma.cc/Z5UF-VYBX].

¹⁰⁹ In 2001, ethnic Russians accounted for 38.2% of the population in Donetsk, which declined from 43.6% in 1989. *About number and composition population of DONETSK REGION*, STATE STATISTICS COMMITTEE OF UKRAINE <https://web.archive.org/web/20130518010230/http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Donetsk/> [https://perma.cc/3YUK-VLH2].

¹¹⁰ In 2001, ethnic Russians accounted for 39% of the population in Luhansk, which declined from 44.8% in 1989. *About number and composition population of LUHANSK REGION*, STATE STATISTICS COMMITTEE OF UKRAINE, <https://web.archive.org/web/20130518015251/http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Luhansk/> [https://perma.cc/LM9D-Y6BD].

¹¹¹ *Ukraine's Luhansk, Donetsk Republics Ratify Union of People's Republics Constitution*, SPUTNIK NEWS (June 26, 2014, 2:19 PM), <https://sputniknews.com/20140626/Ukraines-Luhansk-Donetsk-Republics-Ratify-Union-of-Peoples-190719495.html> [https://perma.cc/JT4B-PPFQ]; Freedom in the World 2022, *Eastern Donbas*, FREEDOM HOUSE, <https://freedomhouse.org/country/eastern-donbas/freedom-world/2022> [https://perma.cc/A799-23ZE].

¹¹² See FREEDOM HOUSE, *supra* note 53; Sangal et al., *supra* note 103.

¹¹³ See FREEDOM HOUSE, *supra* note 53.

before the invasion Sergei Naryshkin, head of Russia's foreign intelligence service, declared his intent to "support the proposal" for Donetsk and Luhansk to become "part of the Russian Federation."¹¹⁴ Though the Luhansk and Donetsk republics entered into treaties with Russia for protection,¹¹⁵ both regions fail to meet the Montevideo Convention's criteria for statehood because of Russia's strong military presence and illegitimacy of their election processes.¹¹⁶ Thus, neither republic is capable of consenting to Russia's military interventions.

Although Russia expanded its invasion of Ukraine on February 24, 2022, Russia had maintained a military presence in separatist regions in Ukraine long before 2022 began.¹¹⁷ Tensions in the region have remained high, and the active military conflict between pro-Ukrainian and pro-Russian contingents in Donbas has resulted in some shells landing in the Russian Federation.¹¹⁸ The effect of the hostilities on Russia and Russian citizens is significant, particularly since Russia has provided Donbas residents with a path to Russian citizenship.¹¹⁹ Such a systematic attempt to create *casus belli* by artificially creating a population of Russian citizens should not be taken lightly. Naturally, the question of whether Russia's military invasion of Ukraine was in self-defense against an imminent threat is more difficult to parse than the situations in Abkhazia and Transnistria. However, given that Ukraine had not made any military advances on Russian soil,¹²⁰ it is implausible that Ukraine's military actions in Donbas constituted an "imminent threat" to Russia as required by the *Caroline* test.¹²¹ Further, since the fighting had been mostly isolated to Donbas prior to 2022,¹²² Russia's assault against Kyiv was not proportional to any potential threat.

¹¹⁴ Official Internet Resources of the President of Russia, *Security Council Meeting*, KREMLIN (Feb. 21, 2022, 6:30PM), <http://en.kremlin.ru/events/president/news/67825> [<https://perma.cc/65C3-KWDM>].

¹¹⁵ *Russia's treaty with Donbass republics envisages military aid and bases — senior diplomat*, TASS (Feb. 22, 2022), <https://tass.com/politics/1408077> [<https://perma.cc/PG6F-CML6>].

¹¹⁶ See Summers, *supra* note 25.

¹¹⁷ See Mikheieva, *supra* note 100, at 67; Kudelia, *supra* note 99, at 205.

¹¹⁸ See Official Internet Resources of the President of Russia, *supra* note 114.

¹¹⁹ *Id.*

¹²⁰ *Conflict in Ukraine's Donbas: A Visual Explainer*, INTERNATIONAL CRISIS GROUP, <https://www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer> [<https://perma.cc/YW97-KHTJ>].

¹²¹ See Waxman, *supra* note 19.

¹²² *Id.*

C. The U.N. Can Resolve Conflicts in Separatist Regions Without Armed Attacks

Many have criticized the United Nations, claiming that Russia's involvement in Ukraine could have been avoided if only the international community had "reacted adequately" to Russia's previous military interventions in other separatist regions.¹²³ The United Nations, however, has learned from its lackluster responses to the crises in Transnistria and Abkhazia, and it has taken a harder stance on Russia's most recent invasion of Ukraine by passing multiple resolutions to deter future uses of force.¹²⁴ For example, the U.N. General Assembly requested the immediate reversal of Russia's advances in Ukraine and has refused to recognize the separatist regions' referenda to join the Russian Federation.¹²⁵ The most significant actions were taken by the United States, joined by its NATO allies and other members of the United Nations and the European Union, which imposed harsh economic sanctions in response to Russian aggression.¹²⁶ These actions, despite their symbolism and economic repercussions, have not stopped Russia's military advances, and their effect on deterring future conflicts remains to be determined.

Despite the international attention the war in Ukraine received in 2022, peace talks have repeatedly failed.¹²⁷ The war

¹²³ Chris Harris, *Europe's Forgotten War: The Georgia-Russia Conflict Explained a Decade on*, EURONEWS (July 8, 2018), <https://www.euronews.com/2018/08/07/europe-s-forgotten-war-the-georgia-russia-conflict-explained-a-decade-on> [<https://perma.cc/RQM5-QD4Q>].

¹²⁴ G.A. Res. ES-11/1, *Aggression against Ukraine* (Mar. 2, 2022); G.A. Res. ES-11/2 *Humanitarian Consequences of the Aggression against Ukraine* (Mar. 24, 2022); G.A. Res. ES-11.3, *Suspension of the Rights of Membership of the Russian Federation in the Human Rights Council* (Apr. 7, 2022).

¹²⁵ See generally *Ukraine: UN General Assembly Demands Russia Reverse Course on 'Attempted Illegal Annexation'*, UN NEWS (Oct. 12, 2022), <https://news.un.org/en/story/2022/10/1129492> [<https://perma.cc/XRT7-7NSF>]; *Ukraine 'Referendums': Full Results for Annexation Polls as Kremlin-Backed Authorities Claim Victory*, EURONEWS (Sept. 28, 2022), <https://www.euronews.com/2022/09/27/occupied-areas-of-ukraine-vote-to-join-russia-in-referendums-branded-a-sham-by-the-west> [<https://perma.cc/6HCM-LLF7>].

¹²⁶ Minami Funakoshi, Hugh Lawson, and Kannaki Deka, *Tracking sanctions against Russia*, REUTERS (Mar. 9, 2022), <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/> [<https://perma.cc/NH94-UBDC>]; 22 U.S.C. § 8907.

¹²⁷ Sabine Fischer, *Peace Talks Between Russia and Ukraine: Mission Impossible*, 1 GERMAN INST. FOR INT'L. AND SEC. AFFS. 2 (Nov. 26, 2022) (describing how "public support for a compromise with Russia evaporated" and was instead replaced with questions of "whether Russia was committing genocide" against ethnic Ukrainians).

of attrition raging across Ukraine continues while Transnistria and Abkhazia both remain frozen in conflict. While a clear path for Russia to withdraw its military units from Abkhazia, Transnistria, or Donbas, has yet to appear, the international community can chart a new path. U.N. member states must take a two-prong approach to heal the wounds of ongoing conflicts and to deter future violations of Article 2(4).

1. *U.N. Member States Must Renew Transitional Justice Efforts in Eastern Europe*

The effects of the war can be felt across the globe—from increasing grain prices in the European Union to the fertilizer crisis in Malawi.¹²⁸ As the war rages on, it becomes increasingly clear that continued conflict in the region is a detriment to the international economy. To heal the wounds of armed conflicts, the United Nations member states must show states that aggressors will lose more than they will gain when they take territory through force. Thus, the U.N. must encourage countries like Russia and Ukraine to consider the four pillars of transitional justice: truth-seeking, prosecution, reparations, and institutional reforms.¹²⁹ Transitional justice is the path for society to ensure accountability and achieve reconciliation when resolving large-scale conflicts.¹³⁰ This form of justice is comprised of both judicial and non-judicial remedies, so transitional justice in Donbas, Abkhazia, and Transnistria could include reparations, regime change, or amnesty.

As part of the resolution of the war in Ukraine and other disputed territories, U.N. member states could require Russia to pay reparations to the affected states for the losses associated with Russia's military incursions. For Moldova and Georgia, this could take the form of requiring Russia to pay each country for the economic losses it has suffered. For example, Russia could pay Moldova for profits it has lost from Transnistria's

¹²⁸ *Infographic – Ukrainian Grain Exports Explained*, COUNCIL OF THE EUR. UNION (Dec. 19, 2022), <https://www.consilium.europa.eu/en/infographics/ukrainian-grain-exports-explained/> [<https://perma.cc/GSC7-WSAF>]; Xinshen Diao et al., *Malawi: Impacts of the Ukraine and Global Crises on Poverty and Food Security*, INT'L FOOD POL'Y RSCH., July 7, 2022, at 4.

¹²⁹ Rep. of the S.C., at 4, U.N. Doc. S/2004/616 (2004). The goal of transitional justice is to remedy the harm from past conflicts and increase rule of law. In addition to reparations, regime change, and amnesty, transitional justice efforts can include criminal tribunals, strengthening of civil society, and preservation of archives.

¹³⁰ *Id.*

steel and textile industry or pay Ukraine the gross capital lost by the inability to export grain.¹³¹ For Georgia, this could take the form of Russia compensating Georgia for losses to its infrastructure.¹³² Russia, however, has a strong argument against paying such reparations. In the case of Moldova and Georgia, there has been active Russian military influence since at least 1992 and 2008, respectively. Although Georgia and Moldova still assert claims over Abkhazia and Transnistria, each state has had decades to rebuild its infrastructure and increase domestic production. Further, the losses of Moldova, Georgia, and Ukraine may be too steep of a price for Russia to pay. Many experts directly correlate the rise of Nazism in Germany to reparations they were forced to pay to the Allied nations: approximately \$31.5 billion when accounting for inflation.¹³³ This number pales in comparison to the estimates for what it will take to rebuild lost infrastructure in Eastern Europe. According to the head of the European Investment Bank, rebuilding infrastructure in Ukraine alone will cost more than \$1.1 trillion.¹³⁴ Thus, compensating Moldova, Georgia, and Ukraine for their losses may not be feasible for Russia, particularly in light of the severe economic sanctions it has suffered in 2022.

Another option for U.N. member states would be to encourage political reform. After Russia's blatant disregard for Article 2(4), it will be difficult for leaders in the international community to engage in diplomacy with the current leadership.¹³⁵ In particular, the leaders of Moldova, Georgia, and Ukraine may

¹³¹ Kamil Calus, *An Aided Economy: The Characteristics of the Transnistrian Economic Model*, 108 CTR. FOR E. STUD. 1, 2 (2013).

¹³² Peter Havlik and Vasily Astrov, *Economic Consequences of the Georgian-Russian Conflict*, VIENNA INST. MONTHLY REP., Sept. 2008, at 1.

¹³³ RUTH HENIG, *VERSAILLES AND AFTER 1919-1933*, 63 (Eric J. Evans and P.D. King eds., 2d ed. 1995) (describing how "historians now recognize that . . . reparations became the 'chief battleground of the post-war era'"); Office of the Historian, *Milestones in the History of U.S. Foreign Relations: The Dawes Plan, the Young Plan, German Reparations, and the Inter-allied War Debts*, UNITED STATES DEPARTMENT OF STATE, <https://history.state.gov/milestones/1921-1936/dawes> [<https://perma.cc/24A7-VJHE>].

¹³⁴ Steve Arons, *Ukraine Reconstruction May Cost \$1.1 Trillion*, EIB Head Says, BLOOMBERG (June 21, 2022), <https://www.bloomberg.com/news/articles/2022-06-21/ukraine-reconstruction-may-cost-1-1-trillion-eib-head-says> [<https://perma.cc/SH74-PL3F>].

¹³⁵ Holly Ellyatt, *Trust Between the West and Russia Has Been Destroyed*, NATO Chief Says, CNBC (Dec. 12, 2022), <https://www.cnbc.com/2022/12/12/trust-between-the-west-and-russia-has-been-destroyed-nato-chief-says.html> [<https://perma.cc/L3EN-MF32>].

never fully trust President Putin again.¹³⁶ Although it is unlikely that President Putin or his affiliates will resign, U.N. member states can encourage Eastern European leaders to include election monitoring requirements as part of any peace treaty. In the most recent State Duma elections, election-monitoring groups reported numerous violations of vote buying and ballot stuffing.¹³⁷ These allegations are similar to the procedural irregularities reported during the 2018 presidential elections.¹³⁸ Given Russia's alleged interference in foreign elections,¹³⁹ U.N. member states should encourage election monitoring in Moldova, Georgia, and Ukraine as well. The European Parliament, for example, has observed elections in many countries across the globe, including Moldova, Georgia, and Ukraine.¹⁴⁰ Thus, election monitoring has a sufficient precedent that should be relatively easy for the international community to implement as part of a transitional justice regime.

Russia may be reluctant to broker peace, however, without assurances that its politicians will be immune from prosecution. An important part of a transitional justice regime is prosecuting violations of international law, but it may be difficult to achieve a resolution to ongoing conflicts without defined

¹³⁶ Office of the President of Ukraine, *A Terrorist State Won't Be Forgiven*, YOUTUBE (Dec. 31, 2022), <https://www.youtube.com/watch?v=846mvNvBrJw> [<https://perma.cc/R4GN-V8CH>]. (explaining that Ukraine “will not forgive” Russia); Maia Sandu, FACEBOOK (Nov. 23, 2022), <https://www.facebook.com/maia.sandu/posts/pfbid02jr9p81FLkKERwGDWvBVYd9WxTZdbeBxk4ahguWkHi5qBXPL4m-7Vu5Zxmce41d5rF1> [<https://perma.cc/DGQ8-K3Z7>] (explaining that Moldova “cannot trust a regime that leaves them in the dark”); Amy Mackinnon, *President Zourabichvili: Georgia Should Not Be 'Forgotten'*, FOREIGN POLICY (Apr. 27, 2022), <https://foreignpolicy.com/2022/04/27/zourabichvili-georgia-ukraine-russia/> [<https://perma.cc/R5VG-3QAQ>]. (describing that Georgia is showing solidarity with Ukraine because they “understand what it means where this is a direct threat to your sovereignty”).

¹³⁷ See Freedom in the World 2022, *Russia*, FREEDOM HOUSE, <https://freedom-house.org/country/russia/freedom-world/2022> [<https://perma.cc/X3FY-LEPZ>].

¹³⁸ See generally Andrew Osborn, Jack Stubbs, and Denis Pinchuk, *OSCE Says Russian Presidential Election Lacked Real Choice*, REUTERS (Mar. 19, 2018), <https://www.reuters.com/article/us-russia-election-osce-idUSKBN1GV1JN> [<https://perma.cc/2HN2-SVJ2>].

¹³⁹ Maggie Tennis, *Russia Ramps Up Global Elections Interference: Lessons for the United States*, CSIS (July 20, 2020), <https://www.csis.org/blogs/technology-policy-blog/russia-ramps-global-elections-interference-lessons-united-states> [<https://perma.cc/MUZ5-27VX>].

¹⁴⁰ *Global Democracy Support: Election Observation*, EUROPEAN PARLIAMENT (last visited Jan. 3., 2023), <https://www.europarl.europa.eu/globaldemocracysupport/en/elections/election-observation> [<https://perma.cc/67ZY-LEYA>].

amnesty criteria.¹⁴¹ Further, Russia's leadership may be hesitant to engage in further discussions if it perceives the consequences of resolution as greater than the consequences of continuing the conflict.¹⁴² In Moldova, Georgia, and Ukraine, the accountability provided by criminal prosecutions must be weighed against the public interest in a final resolution to conflicts that have been ongoing for decades.¹⁴³ To encourage both sides to continue peace talks, U.N. member states could offer amnesty to individuals based on their age, political motivations, and scale of their violations.¹⁴⁴ Since many Russian soldiers were drafted into this war,¹⁴⁵ amnesty would offer a compromise for Russia's citizens that still allows the international community to hold every soldier and politician involved accountable for violations of humanitarian law.

Still, it is likely that other territorial concessions will have to be made on the part of Moldova, Georgia, and Ukraine to ensure lasting peace in the region. The international community will need to broker an agreement that ensures Russia does not end up too much worse off than when it launched its attack on February 24, 2022, while also holding Russia accountable in a way that appropriately disincentivizes states from using military force to satisfy territorial ambitions.¹⁴⁶

¹⁴¹ See Ben Saul, *Forgiving Terrorism: Trading Justice for Peace, or Imperiling the Peace?*, in FRESH PERSPECTIVES ON THE 'WAR ON TERROR' 189, 206 (Miriam Gani and Penelope Mathew eds., 2008); see generally Rep. of the S.C., at 4, U.N. Doc. S/2004/616 (Aug. 23, 2004).

¹⁴² See generally Alla Dmytrivna Kovalova, *Truth and Reconciliation Commission in Post-War Ukraine*, 1 J. OF CONFLICT AND INTEGRATION 124, 128 (2017) (discussing the role of amnesty as a compromise).

¹⁴³ See Saul, *supra* note 141, at 195.

¹⁴⁴ See Kovalova, *supra* note 142 (discussing how the amnesty criteria used in resolving the South African apartheid regime could be applied in Ukraine).

¹⁴⁵ Ivan Nechepurenko, *Russia's Defense Minister Says the Recent Draft Is Finished, and No More Are Planned*, N.Y. TIMES (Oct. 28, 2022), <https://www.nytimes.com/2022/10/28/world/europe/russia-draft-war.html> [<https://perma.cc/LX9X-Y5H4>].

¹⁴⁶ Clive Crook, *An Off-Ramp for Putin Is Repugnant But Necessary*, BLOOMBERG (Sept. 22, 2022), <https://www.bloomberg.com/opinion/articles/2022-09-22/an-off-ramp-for-putin-repugnant-but-necessary> [<https://perma.cc/U9A5-TM9E>]; Tom McTague, *Putin Needs an Off-Ramp*, THE ATLANTIC (Mar. 14, 2022) <https://www.theatlantic.com/international/archive/2022/03/west-save-putin-russia-ukraine/627051/> [<https://perma.cc/3WKA-RRBL>]; Paul K. Huth, *Deterrence and International Conflict*, 2 ANN. REV. POL. SCI. 25, 38 (1999) (explaining how "diplomatic policies that include flexibility and a willingness to compromise . . . combined with a refusal to concede on vital security issues, increase the likelihood of deterrence success.").

2. U.N. Member States Can Deter Violations of Article 2(4)

While brokering a resolution to the ongoing conflicts, the international community must also consider how to deter future violations of the prohibition against the use of force. One possibility to help deter such violations is an amendment to the U.N. Charter. Currently, the United Nations Charter fails to serve as a living document. Aggressors often rely on Article 51's permissive self-defense exception to serve as a catch-all justification to defend any military action by their state. To allow for stronger action against potential aggressors, the Charter could be amended to require the majority of the members of the Security Council to ratify any amendments instead of the current requirement that all permanent members of the Security Council must ratify an amendment.¹⁴⁷ The problem with this solution, of course, is how difficult it is to amend the Charter.¹⁴⁸ Amending the charter requires an affirmative vote from all five members of the U.N. Security Council, and the permanent members often disagree. For example, in 2009, Russia vetoed a resolution that would allow U.N. observers to remain in Georgia, forcing them to leave after over a decade of their observation mission.¹⁴⁹ In the case of Ukraine, Russia's veto of United Nations Security Council resolutions has forced the council to resort to calling Special Emergency Sessions and taking action to condemn Russia through General Assembly.¹⁵⁰

Another possibility is for international organizations to take stronger economic stances¹⁵¹ against aggressors. Such action would require both preventative and responsive measures. While certain nations may be wary of deploying physical troops in armed combat, all illegal uses of force should trigger significant financial sanctions and temporary exclusions from the global economy. This systematic exclusion would deter future uses of force, as well as reduce the aggressor state's resources

¹⁴⁷ U.N. Charter art. 108.

¹⁴⁸ *Id.*

¹⁴⁹ See CNN Editorial Research, *supra* note 60.

¹⁵⁰ G.A. Res. ES-11/1, *Aggression against Ukraine* (Mar. 2, 2022); G.A. Res. ES-11/2, *Humanitarian Consequences of the Aggression against Ukraine* (Mar. 24, 2022); G.A. Res. ES-11.3, *Suspension of the rights of membership of the Russian Federation in the Human Rights Council* (Apr. 7, 2022).

¹⁵¹ *10 facts you should know about Russian military aggression against Ukraine*, MINISTRY OF FOREIGN AFFAIRS OF UKRAINE (Dec. 19, 2019), <https://mfa.gov.ua/en/10-facts-you-should-know-about-russian-military-aggression-against-ukraine> [<https://perma.cc/PH62-HDC9>] (asserting that Russia's intervention can only be stopped by putting more pressure on the Kremlin).

and ability to wage war. Further, to prevent full-scale war, the international community must consider the role financial security plays in potential conflicts. Russia has displayed a consistent pattern of promoting industrialization through subsidies and providing residents of separatist regions with pensions and passports. In general, promotion of economic development in disputed territories has historically decreased the chances of future conflict.¹⁵² A targeted approach, where territories that are economically and militarily vulnerable to external control are proactively identified, would allow the international community to provide resources that will reduce the likelihood of future conflicts. For example, if the International Monetary Fund relaxed its lending requirements, it is possible that these separatist regions would not see Russia as the sole guarantor of their welfare.¹⁵³

Lastly, U.N. member states can ensure harsh legal consequences against aggressors. The U.N. can deploy additional fact-finding missions, gather information from organizations (such as the Human Rights Watch), and use this evidence to bring claims against aggressors of every level. Similar to the approach taken for conflicts in the former Yugoslavia¹⁵⁴ and Rwanda,¹⁵⁵ claims of human rights violations resulting from illegal uses of force should be pursued in International Criminal Tribunals. Such action would discourage countries who believe that the consequences for violating Article 2(4) will be minimal, so long as they simply attempt to justify their actions under existing legal frameworks. Although these claims will be difficult to pursue against states like Russia, China, and the United States, which fail to recognize the jurisdiction of the International Criminal Court, 123 countries do recognize its

¹⁵² Han Dorussen and Hugh Ward, *Disaggregated trade flows and international conflict*, in *THE HANDBOOK ON POLITICAL ECONOMY OF WAR* 515, 515 (Christopher J. Coyne and Rachel L. Mathers eds., 2011); see also *IMF Lending Factsheet*, INTERNATIONAL MONETARY FUND (Dec. 2022), <https://www.imf.org/en/About/Factsheets/IMF-Lending> (describing external and domestic factors that contribute to crises) [<https://perma.cc/86SA-6TCS>].

¹⁵³ *IMF Lending Factsheet*, INTERNATIONAL MONETARY FUND (Dec. 2022), <https://www.imf.org/en/About/Factsheets/IMF-Lending> [<https://perma.cc/86SA-6TCS>]; ANA MARIA ALBULESCU, *INCOMPLETE SECESSION AFTER UNRESOLVED CONFLICTS* 129 (Gëzim Visoka ed., 2022).

¹⁵⁴ See generally *About the ICTY*, UNITED NATIONS INTERNATIONAL RESIDENTIAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://www.icty.org/en/about> [<https://perma.cc/E6TU-W9GY>].

¹⁵⁵ See generally *The ICTR in Brief*, UNITED NATIONS INTERNATIONAL RESIDENTIAL MECHANISM FOR CRIMINAL TRIBUNALS (2015), <https://unictr.irmct.org/en/tribunal> [<https://perma.cc/SEN4-JKQU>].

jurisdiction.¹⁵⁶ Countries that adhered to the Rome Statute¹⁵⁷ can use diplomacy to require all parties to ceasefire agreements to ratify the statute, and these countries can leverage the impact of the ongoing armed conflicts to encourage the remaining countries to ratify the statute as well. Since this remedy has truth-seeking and prosecutorial components, it has the benefit of direct deterrence while also being part of a transitional justice regime.

CONCLUSION

Over time, Russia has refined its strategy for territorial incursions from Transnistria to Abkhazia to Donbas. The result of its use of force remains the same: a threat to the territorial integrity of the countries in which the separatist regions belong. Ultimately, the international community needs to come to terms with the fact that certain borders were intentionally drawn to maximize strife and that no degree of international cooperation will fully mitigate the structural imbalances leading to war.¹⁵⁸ To heal these territorial divides, the international community must work on a comprehensive prevention, response, and transitional justice strategy to address conflicts like those in Moldova, Georgia, and Ukraine. This will require rebuilding trust, establishing and maintaining economic co-dependencies, and developing deterrent measures such that costs of warmongering will outweigh any benefits.

¹⁵⁶ Claire Klobucista, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELS. (Mar. 28, 2022, 2:00PM), <https://www.cfr.org/background/role-international-criminal-court> [https://perma.cc/JC6F-4LJV].

¹⁵⁷ *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90, entered into force July 1, 2002.

¹⁵⁸ See Stephen Blank, *Soviet Reconquest of Central Asia*, in CENTRAL ASIA: ITS STRATEGIC IMPORTANCE AND FUTURE PROSPECTS 39, 54–55 (Malik Hafeez ed., 1994); see generally Kataryna Wolczuk and Rilka Dragneva, *Russia's longstanding problem with Ukraine's borders*, CHATHAM HOUSE (Aug. 24, 2022), <https://www.chatham-house.org/2022/08/russias-longstanding-problem-ukraines-borders> [https://perma.cc/R964-JRS9].