Thinking about the Role of International Law in Relation to Longstanding Violations of the International Order

Professor Sir Malcolm Evans

Nicosia, Cyprus Bar Association

7th February 2025

Writing in the 19th century, Clausewitz famously observed that 'war is a mere continuation of policy by other means'. Winston Churchill equally famously said that 'jaw-jaw is better than war-war'. And today we might add that 'law-law' seems better than both. We live in an age of 'law-fare'. Today, the types of political or policy differences which Clausewitz might have thought could best be addressed through 'escalation' and through conflict are generally thought best addressed through processes or 'de-escalation'; where diplomacy trumps violence and the rule of law trumps both.

Of course, there is a huge difference between when Clausewitz was writing and today. Then, recourse to force was seen as the ultimate way of upholding international order – if war was the continuation of policy by other means, it was also considered to be a legitimate policy option. This is no longer the case. Ever since the UN Charter in 1945 (if not before) it has been clear that the use of force is no longer an acceptable way of resolving disputes between states: the UN Charter also makes it clear that disputes are to be settled by peaceful means, and that peaceful means include both the tools of diplomacy *and* of law. Today, it is *law* which is the continuation of diplomacy by other means. And in a sense, it always has been a means of doing so.

I – and many here today – am an international lawyer. And the most fundamental debate about international law continues to rumble on as unresolved as it has done for the best part of the last 600 years or so: this is the question 'what is international law *for?*'

For some, international law has always been a means of imposing some sort of restraint upon the actions of the powerful, and in particular upon those who exercise sovereign power. For others, international law has always been about how those *with* sovereign power manage their relations with each other. For neither, however, has international law been seen as being the primary means or chief method for achieving redress for wrongs committed. It has (and remains) more about what you can and cannot – or should and shouldn't – do. It is not really about righting wrongs– or getting remedies for wrongs. It may help with this from time to time, but international law rarely does so itself. when it does so, it is more of a happy accident than a matter of design.

However, irrespective of what we might think about the practical usefulness of international law as a means of righting wrongs and gaining remedies – and irrespective of what we might thing international law is even for, what it actually *says* is and always has been both important and contested. More so than national law, we ought to think of international law as being something of a 'policy space' that is to be filled. What matters most is not so much what 'it' (international law) as a body of law actually brings about, but what it says of the type of place we want the world to be.

Nothing comes from nowhere, and international law does not come from outer space. It comes from what 'we' consider it to be, or what 'we' want it to be. The international lawyer's debate about 'lex lata' and 'lex ferenda' is a reflection of this: the very fact that we can argue over whether a particular rule is one or the other shows that there is and always has been an 'aspirational' elements to the subject: we are as much concerned with what we want international to be as with what it actually is.

But who are the 'we'? That is the other, great, contested and unresolved question that has perplexed international lawyers down the ages, and still does so today. It is very fashionable to rush to look at the Charter of the United Nations with its cry of 'We, the peoples' – and assume that the international order is increasingly anthro-centric (we like to say we now live in the anthroprocene). It's all about people, and if it isn't, then it should be……. But here is the snag: it isn't. If anything, it is less so now than it ever has been. Despite all the talk about human rights, intergenerational rights, rights of peoples, and so on and so forth – personally, I am less and less convinced that this is true. And as someone who has a fair claim to be a fairly prominent international human rights lawyer, it troubles me that I am fairly untroubled by this. Let me explain.

As every diplomat knows–and as just about anyone who has ever attended any meeting on just about anything knows - one of the most important issues is 'who sets and controls the agenda'. And so it is with international law too: who decides what is to be discussed, debated and on what international law may or may not comment or pass judgment is completely critical to what it says and what it is for.

The more conservative and traditional of the approaches to international law is to think of it as being the 'law between states'. For some, this seems old fashioned, and inappropriate in a more people and rights focussed world. But it seems to be that international law has, in fact, become even more old-fashioned and 'traditional' than ever in some crucial respects. Possibly the most important thing which has happened to the legal and political ordering of the world in the last hundred years or so has occurred, if not by chance, then probably unintentionally - and this is the remarkable solidification of the international order around the *permanency* of the *territorial integrity* of states. Whilst in the 19th century international law might have been largely about the interests of states – it was also largely about the rights and interests of powerful states, and states that remained powerful, or powerful enough, to be members of the international system of states. It is decidedly uninterested in those that were not.

Continued ‘membership’ of the club of nations was a privilege that had to be deserved, not a right to be had.

This has now all changed. Across the course of the 20th century the drive for political recognition and self-determination crystallized around the notion of sovereign *statehood* (rather than *sovereignty*) as never before. As a result, the entire notion of ‘the international order’ has today become synonymous with the question of statehood, and alongside this with respect for the territorial and political integrity of states.

The foundational documents of the modern international legal order are replete with assertions of this. When the Preamble to the UN Charter refers to ‘We, the peoples’ it actually refers to, ‘Us, the States’. The entire history of the era of the United Nations has been the history of the rise of the centrality of ‘states’, vividly reflected in the UN Charter going on to stress the principals of non-interference in internal affairs.

Yet for some, the entire point of international law always was to ‘interfere’ in the affairs of states when it was appropriate to do so. This heightened focus on the State has therefore been counterbalanced by a redefinition of what ‘counts’ as the ‘internal affair’ of a state. Surprisingly little has actually changed, but that how we go about addressing such concerns has changed. There is, in effect, a trade off: for example, what we now call human rights concerns cannot be ignored on the basis that these are not the concerns of others. Contrary to what is often said, such concerns for the treatment of others was always of interest to international law: but in the past, such concerns might have been addressed in others ways – through population movement, or changes in territorial boundaries for example: today we respect the territorial sovereignty of the state, but expect questions to be asked and answered about the way in which it is exercised.

This is both inevitable and important: if contemporary international law places the highest premium on the territorial integrity of its constituent parts – the territorial integrity of States - then there *must* be ways of lifting the veil on what goes on within them. The remarkable growth of international human rights law in the latter half of the 20th century is indeed the prime example of this development – though there are many others. In a nutshell, as international law increasingly doubles-down on the centrality and significance of sovereign statehood and the territorial integrity of states as the foundational building blocks of its international legal order, then it has sought to mitigate some of the consequences of this in other ways. But the point I want to stress is that very extent of those ‘mitigations’ – those ‘intrusions’ into the sovereignty of the state which are sanctioned by the current international legal order - have the effect of reinforcing the centrality of those core elements.

As a result, challenges to the territorial integrity of states are today seen as about the single most important threat to the international order. This is hard-wired into the international system through the ‘triggers’ that exist for the legitimate use of unilateral use force: ‘if an armed attack occurs’ has long been constrained by the idea that we are talking about ‘cross boarder’ activities of a certain scale and severity. New

technological developments and dependencies are now rapidly challenging this, but this remains the starting point for any discussion of the matter. Threatening the territorial integrity of a recognised state is the single-worst thing that is known to international law. We see this all the time – Ukraine of course, but now add Panama, Greenland….?

Obviously, there are plenty of disputes between states concerning the exercise of territorial jurisdiction – the world is awash with them – but it is also increasingly clear that the resolution of such disputes has to be the result of an international legal process if it is to have legitimacy and to be 'recognised' by the system of law: what international law gives, only international law can take.

There is now firmly entrenched in international law the doctrine of 'non-recognition' of situations which have been brought about by illegal means: a clear, foundational principal of the international legal order itself. When it comes to the exercise of territorial sovereignty, what *was* illegal, *remains* illegal - unless or until it is rectified or remedied by the recognised forms or processes of law.

This may sound obvious: but it has not always been this way. I am old enough to remember long discussions in lectures and tutorials about *'de facto'* and *'de iure'* states – something which is not so much discussed these days, I think. The reason is simple: a 'de facto' state was a 'de iure' state in the making: the question was whether (or when) it would 'make it'. They very language had a 'pejorative tone': well, it might be a state in law, but it isn't really….

The concept is not dead – but today the question is the other way around, and is more about the *legitimacy* than the *efficacy* of the entity. You can be as de facto a state as you like, but this will not change a thing unless there is legitimacy. And legitimacy is derived from conformity with the fundamental principles of the international order. Its not about 'recognising claimed realities': reality requires legitimacy. Indeed – as the UK has found with the Chagos Islands – legitimacy can even create reality. And not vice versa.

And this brings me to what is, probably, my main point. International law used to be quite good at what might be called 'self-healing' – and I must stress that this is is NOT a complement! [Forster: 'Room with a view']. In general language, if something was wrong, if there was a major violation of international law, then the international legal order 'got over it' quite quickly. It quickly moved on from a situation of illegality to accept the new reality, and that new reality swiftly became the new 'normal'. International law was meant to reflect the world as it was, and if the world had turned, then if international law was to do its job, then it had to turn with it. Some might call this pragmatism, others might call it turning a blind eye; yet others (with whom I would identify myself) might call it the abandonment of international *law*. Violations of international law may be ignored or forgotten, but just do not go away.

This, of course, is well known here. Fifty years ago, Turkish forces invaded Cyprus. The illegality of this was widely condemned. Approaching ten years later, the declaration of the establishment of the 'TRNC' was also condemned by the United Nations in SC Resolution 541, which said it considered 'the declaration ... as legally invalid' and called for its withdrawal'. This was then followed up in UNSC Res 550 which called on States 'to respect the sovereignty, independence, territorial integrity' of the Republic of Cyprus and which 'Reiterates the call upon all States not to recognise the purported State of the "Turkish Republic of Northern Cyprus" set up by secessionist acts and calls upon them not to facilitate or in any way assist the aforesaid secessionist entity'.

This was subsequently reinforced by the landmark decision of the European Court of Human Rights in the *Loizidou* case as long ago as 1996, which refused to recognise the legitimacy of acts of appropriation undertaken pursuant to the TNRC constitution and imputed responsibility for those acts to Turkey, in order to ensure the continued application of Convention system within the territory of the Republic of Cyprus. The 2001 Inter-State case between Cyprus and Turkey essentially took the same approach. This position, then, has not changed, nor is it likely to – a remarkable testimony to the commitment of the international community to confront illegality over time.

Last year the ECHR again refused to recognise the legality of acts of those unlawfully exercising authority over territory. In the Grand Chamber judgment concerning the case between Ukraine and Russia relating to the Crimea, the Court refused to recognise the legitimacy of *any* action undertake pursuant to Russian Law unlawfully extended to the illegally occupied area. This suggests that even the modest effect sometimes given to acts of *de facto* authorities in the interests of individuals can be called into question. It certainly removed the need to consider the exhaustion of 'local remedies'. Whilst the implication of this remain unclear, there has certainly been no *weakening* of resolve to continue to reject the consequences of breaches of the international order brought about by the unlawful use of force between states when, as between states, those conflicts remain unresolved. So indeed: violations of international law just do not 'go away'. A breach is a breach.

However, 'recognition' of a breach, and non-recognition of its effects is one thing: but as a lawyer, I am hard-wired to believe that violations require not only recognition, but responses; breaches require remedies. Here, international law continues to disappoint. Effective remedies tend to be the point at which international law runs out of road, and the sad truth is that the more serious the breach, the lesser the likelihood there is of an effective legal *remedy* – even if there may be an 'effective' response through non-recognition.

States do not commit serious violations of international law lightly. They never have. It is difficult to commit a serious violation accidently, and the most serious violations of the international order are almost always intentional and, worse, calculated. Thus, by

definition, they represent a serious threat to the integrity of the international order. So, what can international law 'do' about this?

International law is not an 'actor': 'it' can 'do' nothing. International law is a tool in the hands of others, setting the normative and institutional frameworks through which others might respond. And it remains true that if there is no response from others, then it may well be that such illegality becomes normalised. Indeed – as every student of international law knows, the development of new rules of customary law often implies the breach, or potential breach, of existing ones. As a result, responding to illegality matters. And illegality does not wither over time – unless the perception of the illegality in question changes over time too: once upon a time, freeing someone else's slaves was illegal – we would not question that today. To that extent, nothing is forever.

But it is also true that, even if they are available, the mechanisms of international law can turn slowly – cases brought before international tribunals take many years, and may result only in the poorly called remedy of 'just satisfaction' – a declaratory statement acknowledging the wrong which, to this victim is rarely considered either satisfactory or just (no matter which the state itself might think).

But despite these limitations, all this matters. The increasing density of international law in its various manifestations – human rights law, international trade, environmental and much more besides – has created an ever more intricate web through which the legal ramifications of international illegality can quite literally be prosecuted, and by an ever-increasing range of potential actors, not limited to the state itself.

The implications of longstanding illegality as becoming ever clearer; as the UK has found in relation to the *Chagos Islands* in recent years. And very importantly, political condemnations of the actions of others are more and more linked to violations of norms of international law: the law counts – and states now frequently find it necessary to couch their justifications for their actions in the language of law rather than the language or power – and these justifications must have an air of plausibility, at the very least. The need for this seems to increase, rather than diminish, over time.

For all the frustration at the longevity of international responses to illegality, the very fact of our considering violations *to be* so 'longstanding' is, in some paradoxical sense, a major step forward. Things don't just 'go away' – and this in turn reflects the longevity of the current ordering of the international community. The current global system of international public order is based on state sovereignty, territorial integrity, and the outlawry of the use of force. For all its shakiness – it has lasted a surprisingly long time. This makes it less and less likely that past wrongs will simply be forgotten or forgiven. Indeed, we live in a world in which some of the wrongs of hundreds of years ago and more are increasingly being recalled and responded to. We are, then, unlikely to forget those which challenge the foundations of the epoch in which we currently live – such as the illegal seizure of the territory of others. To forget is, in effect, to forgive – and this runs the risk of unravelling the basic assumptions of the global order.

None of this is necessarily much comfort, of course, to those seeking to right such longstanding wrongs. And there remains a particular challenge in confronting the problems of the past: many of the most potent approaches which have been developed – particularly those based on individual responsibility and international criminal law, for example - cannot be retrospective and so have little direct relevance to addressing the most longstanding violations. Nevertheless, they feed into our perceptions of legitimacy and of legality, particularly when the underlying situations relate back to the illegal use of force. The cumulative effect of the findings of international human rights bodies, and now of Courts able to assert jurisdiction over individuals, is hugely important in lending substance to the recognition of such illegality – and the international community is getting better at this: with improved sanctions regimes, freezing orders, confiscation processes, and so on. These may now provide the way forward.

We are, then, no longer so willing as in the past to move on from things without a resolution achieved through the application of law. It may also be that the international community is finally beginning to develop more effective, or at least additional, legal tools through which to combat in a practical way serious and longstanding violations of the international order too.

What, then, international has done in recent years is to help forge a clear sense of the continuing wrongness of violations of the international legal order. This should empower those who are seeking to address such wrongs; knowing that the world is *not* going to turn the page on them as it might have done in the past. What international law has done is to establish a clear normative framework through which to identify violations of international order and to hold them up against an international *legal* framework of wrongfulness.

And there is power in this – as there is power in the concept of law, and of international law. When I was a student, International Law was still routinely written off as something of little significance and, at best, a tool in the toolbox of international relations. No one would say that today. It is a force to be reckoned with. It has ensured that serious violations of the international order are unlikely to be marginalised over time, as might have been the case in the past, and it has helped create a web of obligations through which the implications of such illegalities can be challenged. Has it done enough? Does it provide a clear path to a remedy? Does it right wrongs? Possibly not to the extent we might like, but it is now beginning to do that too. And so, is international law contributing to the resolution of longstanding conflicts in the contemporary world? Yes, it is. It is not letting them ‘go away’ – and it is increasingly providing of the means through which they can be addressed. But it is still a long way from being able to impose a solution.