What Remains of Law Against War

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The law against war appears to be dead. Russia's attempt to conquer Ukraine in 2022 is the most serious breach of the prohibition on the use of force since it was codified in the United Nations Charter in 1945. Violations in the Middle East, Africa, and elsewhere are plain. Under the theory of legal positivism, such widespread and serious breaches can lead to the disappearance of once viable law. The prohibition on force, however, is no mere positive law rule. It is a peremptory norm of natural law, which does not shrink or disappear. This article analyzes how the enduring law against war came to be so disrespected and how that disrespect can be reversed. Two causes of decline stand out. With the end of the Cold War, the United States and democratic allies began promoting an alternative system of international law known as the "Western International Rule Based Order" or "RBIO." The RBIO is a two-tiered system that purports to allow members privileges, including the right to use force at will with only the thinnest veneer of legal support. The Global South sees the RBIO as a blatant double-standard. In addition, RBIO legal justifications are based on manipulating positive law. They ignore the fact that peremptory norms are natural law. These features of the RBIO have served to progressively weaken the law's "pull to compliance" for all states. Applying social science research on "norm death" points to a remedy. It involves influential states modeling obedience to authentic law, law that includes the principle of sovereign equality and the natural law norm against war. These are tumultuous times made more uncertain by the emergence of AI. The enduring natural law against war provides an indispensable anchor of stability and normativity.

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INTRODUCTION

On February 24, 2022, Russian air, land, and sea forces began a full-scale invasion of Ukraine.[1] The objective was to end Ukraine's independent existence.[2] Despite

1. *See War in Ukraine*, CTR. FOR PREVENTIVE ACTION, COUNCIL ON FOREIGN RELS.: GLOB. CONFLICT TRACKER (Oct. 16, 2024), https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine [https://perma.cc/EG2E-AU57].

2. *See* Natalia Antonova, *Putin's War Was Never About NATO*, FOREIGN POL'Y (July 5, 2022, 1:49 PM), https://foreignpolicy.com/2022/07/05/putin-russia-ukraine-war-nato/ [https://perma.cc/2GG4-427G] ("Russian President Vladimir Putin confirmed that in Ukraine, he is fighting a war of imperialist

predictions that Russia would succeed within days, Ukrainian forces held off the advance at the outskirts of the capital, Kyiv, and managed to hold most of the country as months of fighting turned into years.[3] In addition to military defense, Ukraine's government took action in response to the invasion on multiple fronts, including an appeal to the United Nations (U.N.) Security Council (the Council) as the invasion began.[4] The United States, one of five permanent members of the Council (the P5), co-authored a draft resolution on Ukraine's behalf demanding that Russia immediately withdraw its troops.[5] As expected, Russia, another permanent member, used the veto power reserved to the P5 to block the resolution.[6] The crisis then moved to the U.N. General Assembly (the General Assembly). On March 2, 2022, 141 of 193 U.N. member states voted to deplore "the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter" and to demand unconditional withdrawal without delay back to Russia's "internationally recognized borders."[7] The text and vote clearly favored Ukraine, but China, India, and fifty other

conquest . . . ."). Since invading Crimea, Putin has wanted to restore "the Russian Empire, a dream he'd harbored since witnessing the collapse of the Soviet Union." Fred Kaplan, *Putin's Miscalculation*, N.Y. REV. BOOKS, Feb. 9, 2023, https://www.nybooks.com/articles/2023/02/09/putins-wars-from-chechnya-to-ukraine-galeotti/.

3. *See* Kaplan, *supra* note 2. For more details on the conflict, see CTR. FOR PREVENTIVE ACTION, *supra* note 1.

4. U.N. SCOR, 77th Sess., 8974th mtg. at 12–13, U.N. Doc. S/PV.8974 (Feb. 23, 2022).

5. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022), https://press.un.org/en/2022/sc14808.doc.htm [https://perma.cc/FW5U-6AUH].

6. *Id.*

7. G.A. Res. ES-11/1, ¶ 2, 4 (Mar. 2, 2022). The precise votes on the resolution were 141 in favor, 5 against, and 35 abstentions, with 12 states not present. *See* Michael Ramsden, *Uniting for Peace: The Emergency Special Session on Ukraine*, HARV. INT'L L.J. ONLINE (Apr. 1, 2022), https://journals.law.harvard.edu/ilj/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/ [https://perma.cc/T9U8-97EW].

The resolution cites Article 2(4) of the U.N. Charter (the Charter), which mandates that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, ¶ 4. The resolution refers to Russia's invasion as "aggression." G.A. Res. ES-11/1, *supra*, ¶ 2. In 1974, the General Assembly defined aggression as a violation of Article 2(4) of "sufficient gravity." *See* G.A. Res. 3314 (XXIX), annex, Definition of Aggression art. 1, art. 2 (Dec. 14, 1974). The focus of this Article is on grave violations of Article 2(4), whether termed "aggression," "war," "armed conflict," "invasion," "intervention," or "use of force." As Jan Klabbers explains, the precise terms and "precise classifications are not the main priority when it comes to issues of war and peace." Jan Klabbers, *Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What's the Difference?*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 488, 490 (Marc Weller et al. eds., 2015). It is the conduct that matters in relation to Article 2(4).

The Article 2(4) prohibition is the core principle in a set of principles regulating resort to war known as the *jus ad bellum*. The set includes the three limitations on Article 2(4)—Charter Article 51 on the right of self-defense; Charter Articles 39 to 42 on Security Council authorization of the use of force; and from beyond the Charter, the right of a government to invite military assistance. In addition to these limitations, all lawful resort to force must conform with the general principles of attribution, necessity, and proportionality, as well as international human rights law (IHRL) and international humanitarian law (IHL). IHL provides the principles for the lawful conduct of war and is the major part of law known as the *jus in bello*. For more on Article 2(4) and the wider *jus ad bellum*, see *infra* notes 30–31, 74–93, and 172–254 and accompanying text.

states—more than a quarter of the United Nation's membership—withheld their support.[8]

Twenty months later, on October 7, 2023, as the war in Ukraine ground on, the armed wing of the Hamas organization, together with other Palestinian armed groups, carried out a brutal attack on Israeli communities.[9] As many as 1,200 people died initially, and around 240 Israeli and foreign nationals were taken hostage.[10] Israel reacted swiftly, first carrying out punitive air strikes in Gaza from where the terrorist attacks had originated, then commencing a major ground invasion. Israel's stated war aim was to "crush and destroy Hamas."[11] The United States provided unequivocal support to Israel, citing its right of self-defense.[12] Three months later, Hamas issued a statement saying the operation had been "a necessary step and a normal response" to redress Israel's wrongs in the Palestinian territories it occupies.[13] On December 7, 2023, U.N. Secretary-General António Guterres invoked a rarely used procedure to request that the Council issue a resolution mandating an immediate humanitarian ceasefire by all parties in Gaza.[14] The draft resolution was worded to avoid a veto by omitting any finding that the Charter or other legal duties had been violated. The draft simply demanded that "all parties comply with their obligations under international law."[15] The draft resolution's focus was on the release of the hostages and delivery of humanitarian relief. Nevertheless, the United States vetoed the resolution, casting the sole negative vote.[16] The General Assembly stepped in once again,

8. *See* Farnaz Fassihi, *The U.N. General Assembly Passes a Resolution Strongly Condemning Russia's Invasion*., N.Y. TIMES (Mar. 2, 2022), https://www.nytimes.com/2022/03/02/world/europe/russia-un-invasion-condemn.html.

9. *See* Abdelali Ragad, Richard Irvine-Brown, Benedict Garman & Sean Seddon, *How Hamas Built a Force to Attack Israel on 7 October*, BBC (Nov. 27, 2023), https://www.bbc.com/news/world-middle-east-67480680 [https://perma.cc/3TJK-B6V9].

10. *Id.*

11. Robert Satloff, Dennis Ross & David Makovsky, *Israel's War Aims and the Principles of a Post-Hamas Administration in Gaza*, WASH. INST. FOR NEAR EAST POL'Y (Oct. 17, 2023), https://www.washingtoninstitute.org/policy-analysis/israels-war-aims-and-principles-post-hamas-administration-gaza [https://perma.cc/EZ64-MWLX] (quoting Israeli Prime Minister Benjamin Netanyahu).

12. *See* Myah Ward & Craig Howie, *'Rock Solid and Unwavering': Biden Pledges Support for Israel After Hamas Attacks*, POLITICO (Oct. 7, 2023, 8:10 AM), https://www.politico.com/news/2023/10/07/hamas-terrorism-attacks-on-israeli-civilians-00120480 [https://perma.cc/NFM5-UM7H].

13. *Hamas Says October 7 Attack Was a 'Necessary Step', Admits to 'Some Faults*,' AL JAZEERA (Jan. 21, 2024), https://www.aljazeera.com/news/2024/1/21/hamas-says-october-7-attack-was-a-necessary-step-admits-to-some-faults [https://perma.cc/RHD2-MKZ8].

14. *See UN Secretary-General Invokes Article 99 on Gaza*, AL JAZEERA (Dec. 7, 2023), https://www.aljazeera.com/news/2023/12/7/un-secretary-general-invokes-article-99-on-gaza [https://perma.cc/8R2G-2ZE6].

15. S.C. Draft Res. S/2023/970 ¶ 2 (Dec. 8, 2023).

16. Edith M. Lederer, *US Vetoes UN Resolution Backed by Many Nations Demanding Immediate Humanitarian Cease-Fire in Gaza*, AP (Dec. 9, 2023, 8:49 AM), https://apnews.com/article/israel-palestinians-un-resolution-ceasefire-humanitarian-6d3bfd31d6c25168e828274d96b85cf8 [https://perma.cc/6HXU-G5LF].

with 153 members voting in favor of a ceasefire.[17] Ten voted against, including the United States.[18] Four close U.S. allies, the United Kingdom (U.K.), Germany, Italy, and The Netherlands, were among the states that abstained.[19]

Developments at the United Nations related to Ukraine and Gaza reflect—particularly for many in the "Global South"—just the latest examples of a U.S. double standard respecting the international law against war.[20] For Yanar Mohammed, an Iraqi human rights lawyer, there is no legal difference between Russia's invasion of Ukraine and persistent U.S. uses of force against her own country spanning over thirty years.[21] The United States successfully and lawfully came to the defense of Kuwait from Iraqi aggression in 1991.[22] Since then, however, the United States has attacked Iraq in almost every subsequent year using a variety of inadequate legal justifications. Among the weakest was the attempt to justify a full-scale invasion that aimed at regime change in 2003 by relying on the thirteen-year-old Security Council resolutions adopted to defend Kuwait.[23] For South African scholar Sanusha Naidu and former Chilean diplomat Jorge Heine, Russia's invasion of Ukraine is not a global concern.[24] For them, it is another war among many, most of which are undertaken by the United States.[25] Matias

17. *UN General Assembly Votes by Large Majority for Immediate Humanitarian Ceasefire During Emergency Session*, UNITED NATIONS: UN NEWS (Dec. 12, 2023), https://news.un.org/en/story/2023/12/1144717 [https://perma.cc/ENB8-56DQ].

18. *Id.*

19. *Id.*

20. *See* Patrick Wintour, *Why US Double Standards on Israel and Russia Play into a Dangerous Game*, GUARDIAN (Dec. 26, 2023, 12:00 AM), https://www.theguardian.com/us-news/2023/dec/26/why-us-double-standards-on-israel-and-russia-play-into-a-dangerous-game [https://perma.cc/7ABE-4F7C]. "Hypocrisy" and "whataboutism" are additional terms used to critique the United States for applying differing legal tests to the same conduct. *See* Oliver Stuenkel, *Why the Global South Is Accusing America of Hypocrisy*, FOREIGN POL'Y (Nov. 2, 2023, 11:29 AM), https://foreignpolicy.com/2023/11/02/israel-palestine-hamas-gaza-war-russia-ukraine-occupation-west-hypocrisy/; Patryk I. Labuda, *On Eastern Europe, 'Whataboutism' and 'West(s)plaining': Some Thoughts on International Lawyers' Responses to Ukraine*, EJIL: TALK! (Apr. 12, 2022), https://www.ejiltalk.org/on-eastern-europe-whataboutism-and-westsplaining-some-thoughts-on-international-lawyers-responses-to-ukraine/ [https://perma.cc/YGZ7-44DA]. For a succinct analysis of the "double-standard" critique, see Mary Ellen O'Connell, *Understating the Double-Standard on the Use of Force*, 2022/1-2 BELG. REV. INT'L L. 55, 63 (2024).

The term Global South "refers to the world's poorer, often post-colonial countries." Morning Edition, *BRICS Group of Major Emerging Economies Will Hold a Summit in Johannesburg*, NPR, at 00:57 (Aug. 21, 2023, 5:04 AM), https://www.npr.org/2023/08/21/1194972792/brics-group-of-major-emerging-economies-will-hold-a-summit-in-johannesburg [https://perma.cc/YGD8-GZAL]. The term "global majority" is emerging as a more accurate term to replace "Global South." *See* Herman Tiu Laurel, *Global Majority Remakes Mankind's Future*, CHINA DAILY GLOB. (Apr. 8, 2024, 12:00 AM), https://epaper.chinadaily.com.cn/a/202404/08/WS66133cdda310df4030f50aba.html [https://perma.cc/M5C4-VJ33].

21. *See* Yanar Mohammed, Remarks at the Proceedings of the 116th Annual Meeting of the American Society of International Law (Apr. 7, 2022), *in* ASIL PROC., Mar.–Apr. 2023, at 90, 90–91.

22. *See infra* notes 268–85.

23. For the United States' justification of post-Cold War uses of force, see *infra* notes 123–24, 323, and accompanying text.

24. *See* Morning Edition, *supra* note 20, at 01:21, 01:45.

25. *See id.*

Spektor, a Brazilian political scientist, explained that high levels of resentment in the Global South over the West's tone of general "moral superiority" are largely due to the fact the United States and its close allies are seen as the major violators of law against war.[26] Western states do not "liv[e] up to their soaring moral rhetoric on sovereignty and territorial sanctity," according to Ebenezer Obadare, a Senior Fellow for Africa Studies at the Council on Foreign Relations.[27] These views reflect that the West's various attempts at legal justification for their own uses of military force are seen as no better than Russia's with respect to Ukraine.

Criticism of a double standard grew considerably with the war in Gaza. China's government hinted that the United States' votes against the Secretary-General's Gaza ceasefire resolutions reinforced America's double standard on international law in general and the use of force in particular.[28] The United States has repeated, prior to U.N. votes, that Israel has an inherent right of self-defense to wage war in Gaza.[29] This legal position, however, contradicts the United States' own long-held interpretation until 2001 that resort to military force in response to terrorism is unlawful.[30] The U.S. stance on Israel's war in Gaza (Gaza War) also ignores the U.N. International Court of Justice's (I.C.J.) specific finding that the right to resort to force under Article 51 of the U.N. Charter does not apply to Israel in territory it occupies.[31] South Africa, a leading Global South nation, cited this I.C.J. decision in a case it instituted against Israel in late December 2023, charging Israel with breach of the Convention on the Prevention

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26. *Id.* at 2:10.

27. Michael T. Klare, *Biden's "Rule-Based International Order" Is Broken*, NATION. (Nov. 7, 2023), https://www.thenation.com/article/world/bidens-rule-based-international-order-is-broken/.

28. *See* Christina Lu, *How China Is Leveraging the Israel-Hamas War*, FOREIGN POL'Y (Jan. 31, 2024, 2:04 PM), https://foreignpolicy.com/2024/01/31/china-israel-hamas-global-south-us-foreign-policy/.

29. *See, e.g.*, Shashank Bengali, *A Look at the Three Previous U.N. Cease-Fire Resolutions the U.S. Vetoed*, N.Y. TIMES (Mar. 22, 2024), https://www.nytimes.com/2024/03/22/world/middleeast/us-cease-fire-resolution-vetoes.html; Michelle Nichols, *US Pushes UN to Back Israel Self-Defense, Demand Iran Stop Arms to Hamas*, REUTERS (Oct. 21, 2023, 8:40 PM), https://www.reuters.com/world/us-pushes-un-back-israel-self-defense-demand-iran-stop-arms-hamas-2023-10-22/ [https://perma.cc/PV54-5QXY].

30. *See* MARY ELLEN O'CONNELL, THE ART OF LAW IN THE INTERNATIONAL COMMUNITY 197–204 (2019); *infra* note 201 and accompanying text.

31. *See* Legal Consequences of Construction of a Wall in Occupied Palestinian Territory (*Wall Case*), Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9). Article 51 of the U.N. Charter provides in full:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately
>
> reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

and Punishment of the Crime of Genocide (Genocide Convention).[32] South Africa emphasized during its request for provisional measures that under the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*,[33] Israel's 2023 resort to force in Gaza is not justified under Article 51 and is thus in violation of Article 2(4).[34] The unjustified resort to major force, together with the resulting high number of Palestinians killed and the extent of the destruction by Israel in Gaza, are the key components of its argument.[35] U.S. officials condemned South Africa's case as "meritless" while much of the world took it quite seriously, with many countries joining South Africa's side.[36] A few months later, U.S. officials invited more criticism from the Global South when they condemned the International Criminal Court (ICC) prosecutor's request for arrest warrants for certain Israeli and Palestinian leaders. President Biden called the warrants for the Israeli leaders "outrageous" while, at the same

32. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Verbatim Record, at 80 ¶ 28 (Jan. 11, 2024) [hereinafter Verbatim Record of the Application of the Convention], https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf [https://perma.cc/XZR7-HAUT]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Application Instituting Proceedings, ¶ 1 (Dec. 29, 2023) [hereinafter Application of the Convention], https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf [https://perma.cc/LPL3-MDBY].

33. *Wall Case*, 2004 I.C.J. Rep. 136.

34. *See* Verbatim Record of the Application of the Convention, *supra* note 32, at 80 ¶¶ 28–31. South Africa noted that there are other potentially lawful bases beside self-defense for exercising force in Gaza and mentioned retaining control of the occupation zone and policing as examples. *See id.* ¶ 31. It is doubtful whether Israel has the right to use force to maintain its occupation, however, given the I.C.J. advisory opinion of July 19, 2024. Legal Consequences Arising from Policies and Practices of Israel in Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 2024 I.C.J. Rep. 1, ¶¶ 259–64 (July 19). Whether lawful or not, so long as Israel remains in occupation it has not only the right but also the duty to carry out law enforcement operations. These will occasionally require the use of lethal force, but such force is governed by human rights standards, not Article 51 self-defense. Regardless, the United States and Israel have only invoked a right of self-defense, which is regulated under Article 51, and no other basis for using military force. Article 51 provides no right under the circumstances.

35. *See* Verbatim Record of the Application of the Convention, *supra* note 32, at 22 ¶¶ 4–5, 80–81 ¶¶ 23–32.

36. *US Condemns South Africa's 'Meritless' Genocide Case Against Israel*, VOA AFRICA (Jan. 4, 2024, 8:00 AM), https://www.voaafrica.com/a/us-condemns-south-africa-s-meritless-genocide-case-against-israel-/7425559.html [https://perma.cc/BM4T-LTFW]. The I.C.J., however, found great merit, in line with much global legal opinion. *See* Tim Cocks, *South Africa's Genocide Case Is a Diplomatic Win, After 'Damning' Verdict*, REUTERS (Jan. 26, 2024, 12:08 PM), https://www.reuters.com/world/south-africas-genocide-case-is-diplomatic-win-whatever-verdict-2024-01-26/ [https://perma.cc/2YQW-KRY5]; Atlantic Council Experts, *Experts React: What the International Court of Justice Said (and Didn't Say) in the Genocide Case Against Israel*, ATL. COUNCIL (Jan. 26, 2024), https://www.atlanticcouncil.org/blogs/new-atlanticist/experts-react/experts-react-what-the-international-court-of-justice-said-and-didnt-say-in-the-genocide-case-against-israel/#nusairat-icj [https://perma.cc/D5VF-59SW] (citing Tuqa Nusairat, who argues that "[t]he ruling shows how isolated the US is in its support of Israel"). "South Africa is leading the Global South in rejecting the notion that international law has selective applicability." *Id.*

time, his Administration was strongly supporting ICC arrest warrants for Russian leaders.[37]

The charge that the United States practices a double standard respecting the law on the use of force is not new. It has, however, gained greater prominence in the comparative context of Ukraine and Gaza. The two conflicts have important characteristics in common, making the United States' disparate legal assessment appear subjective or selective. The conflicts are proximate in time—beginning less than two years apart. They also involve the same principles of international law—U.N. Charter Article 2(4) prohibiting the use of force and Article 51 on self-defense. Both conflicts are notable for high levels of casualties, displacement, and destruction.[38] For critics of the United States, comparing Ukraine and Gaza demonstrates that the United States interprets international law based on the actor, not the conduct. Yet, a close assessment of the relevant legal principles and U.S. policies and practices leads to a more nuanced conclusion.

American leaders have attempted since the end of the Cold War to apply not so much a double standard as a single standard, in which the United States and a small group of liberal, democratic allies have privileges over other states. It is a single standard with two tiers and is commonly referred to as the "Western International Rule-Based Order" or "RBIO."[39] When the RBIO first emerged—as the Soviet Union declined—the concept raised less concern than it does today. In the early days, those promoting the RBIO seemed to be speaking of modest reinterpretations of existing law for changing world conditions, not a different legal order altogether. Proponents emphasized human rights and democracy, common topics of international law discussions.[40] Certain aspects are, or appear, largely the same, and much of the terminology is similar. Until Russia's full-scale invasion and the invocations of the RBIO to critique it, international lawyers rarely remarked on the concept. Over time, however, it became clear that the RBIO is not consistent with international law.[41] Aspects of international law are included

37. Chantal Da Silva, *Biden at Odds with Allies as U.S. and Israel Attack ICC Over Arrest Warrants*, NBC (May 21, 2024, 10:42 AM), https://www.nbcnews.com/news/world/biden-us-israel-attack-icc-arrest-warrants-netanyahu-hamas-rcna153211 [https://perma.cc/5GTN-ZT6P].

38. *See* Wintour, *supra* note 20.

39. There are several variations of the term "Western International Rule-Based Order" and the acronym "RBIO." A common variation uses "rules" instead of "rule" or drops the "Western International" for "rules-based order" or "RBO." For the origins of the term and examples of other variations, see *infra* notes 108–71 and accompanying text.

40. Protection of human rights is a core purpose of the United Nations. *See* U.N. Charter art. 55. Promoting democracy through peaceful means has also been a long-standing topic in international law. For an overview, see generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) and Tom Ginsburg, *Introduction to the Symposium on Thomas Franck, "Emerging Right to Democratic Governance" at 25*, 112 AM. J. INT'L L. UNBOUND 64 (2018).

41. On the other hand, I.C.J. Judge Hilary Charlesworth's comments on the RBIO as used in Australia indicate she considers it to be international law. *See* Ben Scott, Madeleine Nyst & Sam Roggeveen, *Australia's Security and the Rules-Based Order: Tracking a Decade of Policy Evolution*, LOWY INST., https://interactives.lowyinstitute.org/features/rules-based-order/ [https://perma.cc/AX7S-AAXD] (last visited Oct. 25, 2024) (explaining that Australia advocates for "an international rules-based order" in a quote by Hilary Charlesworth).

or omitted as the United States sees fit.[42] One of the RBIO's basic precepts, for example, holds that the United States and liberal democratic allies are superior to others. In international law, however, all sovereign states are equal before the law regardless of form of government, economic system, or alliances.[43] This general principle of equality is comparable to the American legal principle that all citizens are equal under the law regardless of social status, wealth, or virtue.[44] Purporting to demote some sovereign states to a second tier is a challenge to the entire system of international law.

Another feature of the RBIO that departs from international law concerns the legal prohibition on the use of force. Since the end of the Cold War, the United States has behaved as though it can alter the prohibition whenever its national interest or foreign policy demands. This conduct permitted under the RBIO also reflects realist thinking. Realists are dismissive of international law restrictions on the use of force.[45] John Mearsheimer, a leading American realist, explains without mentioning international law that "realists consider war a legitimate tool of statecraft that can be employed to either maintain the balance of power or shift it in an advantageous way."[46] He attempts to distinguish liberal supporters of the RBIO from realists,[47] but in both cases, resort to force is accepted in the pursuit of an agenda.[48] Mearsheimer writes, liberals are "committed to a remarkably

42. Author and columnist Spencer Ackerman confirms that the United States sometimes presents the RBIO as synonymous with international law: "[W]hen U.S. prerogatives coincide with international law, the United States describes the two synonymously[,] . . . [b]ut when U.S. prerogatives diverge from international law, America apparently has no problem violating it — all while declaring its violations to ultimately benefit global stability." Spencer Ackerman, Opinion, *Where Is America's 'Rules-Based Order' Now?*, N.Y. TIMES (Apr. 10, 2024), https://www.nytimes.com/2024/04/10/opinion/us-un-ceasefire-gaza.html.

43. *See* U.N. Charter art. 2, ¶ 1; G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970); ANTONIO CASSESE, INTERNATIONAL LAW 48 (2d ed. 2005).

44. For example, the Fourteenth Amendment of the United States Constitution provides that no U.S. state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

45. *See, e.g.*, Brian C. Schmidt, *Realist International Theory and the Military*, *in* HANDBOOK OF MILITARY SCIENCES 1, 10 (Anders McD. Sookermany ed., 2020).

46. JOHN J. MEARSHEIMER, THE GREAT DELUSION: LIBERAL DREAMS AND INTERNATIONAL REALITIES 220 (2018) [hereinafter MEARSHEIMER, THE GREAT DELUSION]; *see also* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 138 (2001). Mearsheimer never mentions the international legal prohibition on resort to force or its codification in U.N. Charter Article 2(4) in either book.

47. *See*, *e.g.*, MEARSHEIMER, THE GREAT DELUSION, *supra* note 46, at 222–24. This is a difference of degree, not kind. He fails to see that the mutual willingness to go to war to pursue an agenda unites them. International law, however, prohibits resort to force for this purpose. *See id.* at 220; *see also infra* note 108 and accompanying text.

48. During the George W. Bush Administration, "neoconservatism" emerged as another ideology, espousing the "use [of] U.S. military supremacy to support U.S. security interests and democracy simultaneously." Francis Fukuyama, *The Neoconservative Moment*, NAT'L INT. (June 1, 2004), https://nationalinterest.org/article/the-neoconservative-moment-811 [https://perma.cc/GV25-N4T6]. It therefore overlapped with both realism and liberal hegemonism. However, it had apparently faded by the beginning of the second Bush term. *See generally* FRANCIS FUKUYAMA, AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY (2006).

ambitious foreign policy agenda and [are] not shy about using military force to advance it."[49] Proponents of the RBIO, unlike realists, do tend to cite law on the use of force. Whether they do so cynically for the instrumental benefit of giving lip service to the law or in the good faith belief that the RBIO version of the law is valid is difficult to discern. In either case, the RBIO has had a serious negative impact on global respect for authentic international law. With regard to the use of force, the RBIO has given some states the false impression that they are free to use force regardless of the law of the U.N. Charter and related principles promoting peace.[50]

Russia and China lobbied for years against these attempts to use RBIO arguments in place of international law but have apparently given up.[51] In a speech on the eve of Russia's full-scale invasion of Ukraine, Putin denounced the arrogance of the West in violating the prohibition on force in Serbia, Iraq, Libya, and Syria.[52] He contrasted those violations with an assertion of Russia's own sacrifices and contributions to peaceful order in the post-Cold War period.[53] He implied that the era of one-sided contribution was over and Russia would act to resume prominence on the world stage.[54] The invasion of Ukraine that followed aligns with Putin's implied conclusion that using unlawful force as the United States has so often done will achieve his goal of renewed prominence.[55] Relatedly, Russia

49. MEARSHEIMER, THE GREAT DELUSION, *supra* note 46, at 153.

50. For details of the negative impact, see *infra* notes 257–259, 306–349 and accompanying text. Samuel Moyn has also identified the U.S. retreat from the U.N. Charter prohibition on force and other principles of the law against war. *See* SAMUEL MOYN, HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR 7 (2021).

51. Prior to 2022, Russia, for example, had not sought to modify international law, a reflection that it is not part of the group of countries that believe they can "easily" gain support for new rules. *See* Roy Allison, *Russian Revisionism, Legal Discourse and the 'Rules-Based' International Order*, 72 EUR.-ASIA STUD. 976, 976 (2020); *see also* Stefan Talmon, *Rules-Based Order v. International Law?*, GER. PRAC. INT'L L. (Jan. 20, 2019), https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/ [https://perma.cc/JN99-CCKA] (identifying Russian Federation criticisms of Germany's "attempts . . . to replace the universal norms of international law with a 'rules-based order'"); Weekend Edition Sunday, *Russia Is Finding New Supporters After Being Isolated by the West*, NPR, at 02:19 (June 21, 2024, 8:47 AM), https://www.npr.org/2024/06/21/nx-s1-5015056/russia-is-finding-new-supporters-after-being-isolated-by-the-west [https://perma.cc/3FTM-9QV9].

52. *See* Vladimir Putin, President of the Russian Federation, Address by the President of the Russian Federation 1–3 (Feb. 24, 2022) [hereinafter Address by President Putin (Feb. 24, 2022)] (transcript available at http://en.kremlin.ru/events/president/news/67843 [https://perma.cc/H3NQ-VR4V]).

53. *See id.* at 4, 7.

54. *See id.* at 4, 6.

55. Putin wants an end to

> what he sees as disrespect for his country's place in the global order. . . . In Ukraine, [he] is attempting to strike his own decisive blow against the US and Europe to reshape that global order to Russia's advantage. Putin's gamble — backed by military force and grudges — is that he can bend the world to his will.

Bloomberg News, *Putin Seeks Revenge on a World Order He Once Wanted to Join*, BLOOMBERG (Feb. 13, 2024), https://www.bloomberg.com/news/features/2024-02-13/russian-president-vladimir-putin-seeks-revenge-on-us-western-world-order; *see* Paul Krugman, Opinion, *Russia Is a Potemkin Superpower*, N.Y. TIMES (Feb. 28, 2022), https://www.nytimes.com/2022/02/28/opinion/putin-military-sanctions-weakness.html; Antonova, *supra* note 2; Kaplan, *supra* note 2.

and China are now discussing the formulation of their own alternative system of rules.[56]

The full-scale invasion of Ukraine,[57] the terror attack of October 7,[58] and the resort to war in Gaza[59] are among the most serious violations of international law since World War II. They reflect the lost "pull to compliance" of law devoted to peace that the United States once championed.[60] A prominent Global South international law scholar concluded that "rules on the resort to force . . . have been emptied of any meaning in the context of the Israel-Hamas conflict."[61] Another scholar declared that international law died in 2023.[62] Nevertheless, it will be argued here that the prohibition on the use of force is a peremptory norm which, while clearly weakened, will not disappear entirely.[63] Indeed, peremptory norms

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56. China and Russia are openly discussing a new order in the context of the BRICS group of states. *See* Nils Adler, *Can BRICS Create a New World Order?*, AL JAZEERA (Aug. 22, 2023), https://www.aljazeera.com/features/2023/8/22/can-brics-create-a-new-world-order [https://perma.cc/9S6H-B42U]; *see also* Stephen M. Walt, *China Wants a 'Rules-Based International Order,' Too*, FOREIGN POL'Y (Mar. 31, 2021, 11:48 AM), https://foreignpolicy.com/2021/03/31/china-wants-a-rules-based-international-order-too/.

57. For President Emeritus of the Council on Foreign Relations, Richard Haass,

> what's so frightening about this crisis[] is that Russia . . . crossed an international border . . . . I don't think it's any exaggeration to say that we've either arrived at a point or are getting perilously close to a point where the threat to world order, to world peace is greater than it has ever been.

All Things Considered, *Russia Puts the Strength of NATO Alliance to the Test*, NPR, at 05:55 (Mar. 26, 2022, 5:13 PM), https://www.npr.org/2022/03/26/1089033538/russia-puts-the-strength-of-nato-alliance-to-the-test [https://perma.cc/N5B3-SXXE].

58. The attack involved the greatest loss of Jewish lives in one day since the Holocaust. *See* Satloff et al., *supra* note 11.

59. In the *Wall Case*, the I.C.J. advised that Article 51 provides no basis for the lawful resort to significant armed force in territory that Israel occupies. *Wall Case*, 2004 I.C.J. Rep. ¶ 139. No other justification exists. For a more detailed discussion of Israel's resort to armed conflict in Gaza, see *supra* notes 9–19 and *infra* notes 72–77 and accompanying text.

60. The phrase "pull to compliance" is associated with Thomas Franck and his analysis of why states obey international law despite it being a system without the regular institutions of lawmaking, application, and enforcement of nation states. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 705 (1988). He found that certain features of rules, including their degree of clarity, help account for compliance. The greater the perceived validity of a rule, the greater its "pull on states in the direction of uncoerced rule compliance." *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990). His views and others on improving compliance with international law are discussed *infra* Part III.

61. Email from James Thuo Gathii, Wing-Tat Lee Chair of Int'l L. & Professor of L., Loyola Univ. Chi. Sch. of L., to Mary Ellen O'Connell, Robert & Marion Short Professor of L. & Professor of Int'l Peace Stud.—Kroc Inst., Univ. of Notre Dame (Nov. 9, 2023, 6:44 PM) (on file with author).

62. *See* Ata R. Hindi, *International Law is Dead*, THIRD WORLD APPROACHES TO INT'L L. REV.: EXTRA (Nov. 20, 2023), https://twailr.com/international-law-is-dead/ [https://perma.cc/TS7T-8ZDB].

63. "Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law." Int'l L. Comm'n, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 2 (2022). According to Judge Elaraby, in a separate opinion in the *Wall Case*, "[t]he prohibition of the use of force . . . is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted." *Wall Case*, 2004 I.C.J. Rep. at 254 (separate opinion by Elaraby, J.).

endure so long as law itself endures, even if they do so in a diminished state. The United States is in a position to reverse the decline it initiated by abandoning the RBIO and renewing commitment to the law's single standard against war in its leaders' words and actions.[64]

Consideration of the RBIO and its impact on law against war continues in Part I with the origins and meaning of the concept. The RBIO's authors introduced the concept to gain greater rights for the United States than is permitted by international law.[65] They were willing to sacrifice ancient norms and contemporary institutions to reach this goal. The concept has not led to greater order or the flourishing of democracy and human rights as predicted. Instead, as will be shown in Part II, international law's barrier to violence through clear, acknowledged prohibitory norms has been weakened. At the same time, international law violations have reached a new level of seriousness. The United States' own violations and role in undermining the law has come at a cost to its standing in the world.[66] Part III explains why U.S. promotion of the RBIO has served only to weaken the law but not to replace it. One state or a few states—regardless of how powerful—cannot, as a matter of legal theory, determine the rules for the rest of the world. This is particularly true of fundamental natural law norms and precepts, including the principles of equality and the non-use of force. Promoting the RBIO's version of global rules in place of the U.N. Charter and other authentic international law has sown confusion and competition, not a new world order. Propitiously, international law and international relations scholarship on improving compliance with norms and reversing norm decline indicates how the negative effects of the RBIO can be overcome. The approach has two components: first, to acknowledge the content of authentic law and model it through compliance by influential states,[67] and second, to recognize that the RBIO is no more than the relatively recent idea of a small group of academics and officials. The reelection of Donald Trump in 2024 should lead to reevaluation of the RBIO by its members. Its reversal is more than possible and is important for the future vitality and effectiveness of law against war.

I. COMPETING SYSTEMS OF RULES-BASED ORDER

On March 26, 2022, just a few weeks after the U.N. General Assembly voted overwhelmingly in favor of a resolution calling on Russia to withdraw from Ukraine,[68] U.S. President Joe Biden gave a speech in Warsaw, Poland. He praised Ukraine's resolve and charged Russia with threatening the security of all states by bringing into question the sanctity of borders, calling the invasion "nothing

64. This reversal need not necessarily require acknowledgment of past wrongdoing. Express statements in support of the law and action in compliance going forward may suffice. *See infra* notes 433–35.

65. *See infra* notes 108–67 and accompanying text.

66. *See infra* notes 423–38 and accompanying text.

67. *See infra* notes 359–413 and accompanying text.

68. *See* G.A. Res. ES-11/1, *supra* note 7, ¶ 4.

less than a direct challenge to the rule-based international order established since the end of World War Two."[69] His words drew praise but also raised crucial issues relative to the international law prohibiting the use of force. He begged the question of why Russia's use of force against Ukraine posed any greater challenge to global legal order than the United States' own persistent overseas military operations.[70] He also referred to the "rule-based international order," not international law or the prohibition on the use of force in Article 2(4) cited in the General Assembly's Ukraine resolution.[71]

In the case of the Israel–Hamas conflict, invocation of the RBIO has been subtler. U.S. officials speaking in support of Israel have failed to cite the U.N. Charter or decisions of the I.C.J. on resort to force.[72] President Biden has argued repeatedly that Israel has a right to defend itself.[73] He does not say it is the right of self-defense under Article 51 of the Charter.[74] The negotiating history of the Charter makes it clear that the drafters, in delineating the rights and duties of

69. Joseph R. Biden Jr., President of the U.S., Remarks by President Biden on the United Efforts of the Free World to Support the People of Ukraine (Mar. 26, 2022) [hereinafter Remarks by President Biden on the United Efforts] (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/26/remarks-by-president-biden-on-the-united-efforts-of-the-free-world-to-support-the-people-of-ukraine/ [https://perma.cc/ZQ87-YUG7]).

70. *See* Victor Kattan, *Big Brother v. Little Brother: A Critical Analysis of Russian President Vladimir Putin's Legal Justifications for Russia's Preventive War in Ukraine*, JURISTNEWS (Mar. 18, 2022, 1:05 PM), https://www.jurist.org/commentary/2022/03/victor-kattan-russia-ukraine-legal-justifications/ [https://perma.cc/87BX-Q48D]. According to Richard Falk, the United States has used military force more often than any other state since the adoption of the U.N. Charter. *See* Richard Falk, Opinion, *'Rule-Based-International-Order' : A New Metaphor for US Geopolitical Primacy*, EURASIA REV. (June 1, 2021), https://www.eurasiareview.com/01062021-rule-based-international-order-a-new-metaphor-for-us-geopolitical-primacy-oped/ [https://perma.cc/3ZKB-6WZW].

71. Remarks by President Biden on the United Efforts, *supra* note 69.

72. Invocations of international law by U.S. officials in the opening months of the Gaza War tended to be specifically on IHL in connection with Israel's conduct of the war. *See, e.g.*, *Readout of President Biden's Call with Prime Minister Netanyahu of Israel*, WHITE HOUSE (Oct. 29, 2023) [hereinafter *Readout of President Biden's Call*], https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/29/readout-of-president-bidens-call-with-prime-minister-netanyahu-of-israel-7/ [https://perma.cc/ZD52-N25D]. On the meaning of the term "IHL," see *supra* note 7. The U.S. focus on IHL, while ignoring the U.N. Charter, is a new example of Moyn's argument that the United States obscures its rejection of the law of peace. *See* MOYN, *supra* note 50, at 287–89 (describing the United States' circumvention and contortion of international law).

73. *See, e.g.*, *Readout of President Biden's Call*, *supra* note 72 ("Israel has every right and responsibility to defend its citizens . . . ."); *see also* Jeff Mason, *Biden Says Israel Has Right to Defend Itself, Must Protect Civilians*, REUTERS (Oct. 25, 2023, 2:30 PM), https://www.reuters.com/world/biden-criticizes-extremist-settlers-west-bank-2023-10-25/ [https://perma.cc/5AA3-A44B]. Biden's comments cite the plight of people in Gaza, yet no mention is made of the U.N. Charter. *See* Alex Gangitano, *Biden Reaffirms Israel Defending Itself Within International and Humanitarian Law*, HILL (Nov. 1, 2023, 5:17 PM), https://thehill.com/homenews/administration/4288336-biden-reaffirms-israel-must-defend-self-international-humanitarian-law/ [https://perma.cc/T4R5-VRMQ].

74. *See* U.N. Charter art. 51. In at least one U.N. debate in the aftermath of October 7, U.S. Representative to the United Nations, Ambassador Linda Thomas-Greenfield, did expressly cite Article 51 in arguing Israel had a right of self-defense in Gaza. U.N. SCOR, 78th Sess., 9442d mtg. at 5, U.N. Doc. S/PV.9442 (Oct. 18, 2023). For more on the application of Article 51 to Israel's use of force in Gaza, see *infra* note 76. The point here is that whether Israel had a right to resort to force in Gaza or not it would only be under Article 51 of the U.N. Charter, not the RBIO.

U.N. member states under Article 51, were focused on attacks by a state, rather than non-state actors.[75] The I.C.J.'s judgements in *Military and Paramilitary Activities in and Against Nicaragua* and *Case Concerning Oil Platforms* add that the attack must be on a serious scale that necessitates an armed response on the attacking state's territory.[76] The *Wall Case* decision finds that Article 51 does not apply to justify Israel's resort to force in occupied Palestinian territories.[77] The Biden Administration's references to Israel's right of self-defense in Gaza therefore do not align with authoritative interpretations of the international legal right of self-defense. To the extent the United States is relying on the RBIO and not the Charter, the case is all the weaker. Section I.A of this Article looks more closely at the RBIO concept, starting with its origins and possible meaning, as well as how it differs from international law. Section I.B goes on to show that the United States has tried to rely on the RBIO to justify its own and Israel's uses of force, only to meet growing resistance from the Global South and beyond. Part II will then consider negative consequences of the RBIO, from its impact on the law against war to America's stature as a proponent of the rule of law.

A. THE UN CHARTER AND RELATED LAW AGAINST WAR

Many U.N. Charter drafters, like Louis Sohn, lived through two world wars.[78] Sohn fled Poland on the last passenger ship before the German invasion in

75. *See* Adil Ahmad Haque, *"Clearly of Latin American Origin": Armed Attack by Non-State Actors and the UN Charter*, JUST SEC. (Nov. 5, 2019), https://www.justsecurity.org/66956/clearly-of-latin-american-origin-armed-attack-by-non-state-actors-and-the-un-charter/ [https://perma.cc/EG5X-QE2J]; *see also* RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945, at 689–90 & 689 n.4 (1958) (citing 3 UNITED NATIONS INFO. ORGS., DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945 (1945)).

76. For a discussion of the type of armed attack that gives rise to the right of self-defense under Article 51, see Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (*Nicaragua Case*), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 201, 210, 247–49, 257 (June 27) and Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 51 (Nov. 6).

77. *See Wall Case*, 2004 I.C.J. Rep. at ¶ 139. South Africa, in its case before the I.C.J., took the position that because Israel has remained in occupation of Gaza, the *Wall Case* continues to apply regarding Article 51. Verbatim Record of the Application of the Convention, *supra* note 32, at 80 ¶¶ 28–30. Long-standing expert opinion supports South Africa's position that at the start of the Gaza War, Israel remained in occupation—despite the fact that in 2005, Israel removed unlawful settlements in Gaza and allowed Hamas to perform governmental functions—because Israel did not give up its external border and other controls. For further analysis on why Article 51 does not justify Israel's resort to force in Gaza, see Ralph Wilde, *Israel's War in Gaza Is Not a Valid Act of Self-Defence in International Law*, OPINIOJURIS (Sept. 11, 2023), http://opiniojuris.org/2023/11/09/israels-war-in-gaza-is-not-a-valid-act-of-self-defence-in-international-law/ [https://perma.cc/PZ58-DESW] and Sarthak Gupta, *Israel's Right to Self-Defense Under International Law*, JURISTNEWS (Dec. 22, 2023, 2:16 PM), https://www.jurist.org/commentary/2023/12/7-10-the-question-of-israels-right-to-self-defense-under-international-law/ [https://perma.cc/RVR8-5EAT]. For an overview of the arguments on both sides, see Celeste Kmiotek, *Israel Claims It Is No Longer Occupying the Gaza Strip. What Does International Law Say?*, ATL. COUNCIL (Oct. 31, 2023), https://www.atlanticcouncil.org/blogs/menasource/gaza-israel-occupied-international-law/ [https://perma.cc/H6L9-ZVJ4] and Marko Milanovic, *Does Israel Have the Right to Defend Itself?*, EJIL: TALK! (Nov. 14, 2023), https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/ [https://perma.cc/HBE2-5BB5] ("Israel's war against Hamas in Gaza is not, legally, an open-and-shut, clear-cut situation.").

78. *See* Thomas Buergenthal, *Louis B. Sohn (1914–2006)*, 100 AM. J. INT'L L. 623, 623 (2006).

1939.[79] He immersed himself in international law at Harvard Law School and rose from a war refugee to become the Bemis Professor of International Law at Harvard.[80] During the final Charter negotiations, Sohn helped ensure that Article 2(4) was as comprehensive as possible, reflecting the ancient legal and moral ban on resort to war. In place of armed force, after 1945, states would resolve disputes using the peaceful means set out in Article 33. Sohn drafted Article 51 on self-defense to restrict unilateral resort to armed force to situations of clear, objective emergency that required a response before the U.N. Security Council had time to act.[81]

The U.N. Charter is devoted to "sav[ing] succeeding generations from the scourge of war."[82] The Article 2(4) prohibition on the use of force is the cornerstone of this effort and of the post-World War II international legal system in general.[83] Article 2(4) requires that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[84] The negotiating history makes clear that Article 2(4) is "an absolute all-inclusive prohibition; the phrase 'or in any other manner' was designed to insure that there should be no loopholes."[85] The remainder of the Charter text includes only two express limits on the prohibition's reach.[86] First, the U.N. Security Council may authorize armed force if necessary to restore international peace and security.[87] Second, Article 51 permits states to use force in individual or collective self-defense "if an armed attack occurs" until the Council acts.[88] It allows for the use of force on the territory of another state if the defending state is the victim of an armed attack by the target state.[89] As the I.C.J. has explained, the

79. *Id.*

80. *See id.* at 623–24.

81. *See id.* at 624. Sohn was a member of the U.S. delegation to the final negotiations of the Charter in San Francisco in 1945 and was instrumental in drafting Article 51. *Id.*; *see also* Louis B. Sohn, *The Issue of Self-Defense and the UN Charter*, 89 ASIL PROC. 52, 52–53 (1995).

82. U.N. Charter pmbl.

83. Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 148 (Dec. 19); *see also* Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 544 (1971) (stating that Article 2(4) is "the principal norm of international law in our time").

84. U.N. Charter art. 2, ¶ 4.

85. The United Nations Conference on International Organization, *Summary Report of Eleventh Meeting of Committee I/1*, U.N. Doc. 784/I/1/27 (June 5, 1945), *in* 6 UNITED NATIONS INFO. ORGS., DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945, at 331, 334–35 ¶ 7 (1945).

86. The English language scholarship on the international law on the use of force commonly features the term "exceptions" rather than "limits," but because there can be no exceptions to an absolute, *jus cogens* prohibition such as that on the use of force, the better term is limits. The prohibition has limits on its scope that involve self-defense, U.N. Security Council authorization, and a government's right to invite another state to intervene in low-level internal conflict.

87. U.N. Charter arts. 39–42.

88. *Id.* art. 51.

89. On the requirement of the attack in Article 51 being by a state versus a non-state actor, see Haque, *supra* note 75. For more authority on this point and on the meaning of Article 51 in general, see

general principles of international law that are found outside the Charter further restrict the right of self-defense.[90] The use of force must be necessary to accomplish the objective of defense in the moment of emergency, while remaining proportionate to the injury suffered.[91] In all other cases, states must bring their concerns to the Council or use peaceful means to resolve disputes.[92]

Paradoxically, during the Cold War, the U.N. Charter regime on the use of force was somewhat insulated by the U.S.–Soviet rivalry. European colonial powers tried to find legal arguments around Article 2(4) to use armed force to maintain their empires. The Soviets and Americans sometimes joined in rejecting these attempts in their efforts to appeal to newly independent states.[93] While both superpowers engaged in persistent military operations throughout the Cold War, they tended to do so under claims of legality that depended on manipulating facts but not the law.[94] They were competing for hearts and minds, and commitment to the law enhanced their credibility by promoting an image of trustworthiness and

supra note 7 and accompanying text and *infra* notes 199–246 and accompanying text, and see generally O'CONNELL, *supra* note 30, at ch. 4.

90. *See Nicaragua Case*, 1986 I.C.J. Rep. ¶ 176.

91. *See id.*

92. U.N. Charter art. 2, ¶ 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."). Article 33 repeats the duty and lists examples of what counts as peaceful means: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." *Id.* art. 33, ¶ 1.

93. A specific example was the Anglo–French attempt to hold on to control of the Suez Canal after it was seized by President Gamal Abdel Nasser, one of the leaders of the revolution that ended British colonial rule in Egypt. British and French officials plotted with Israel for Israel to attack Egypt. Then, the U.K. and France sent troops to intervene in the conflict and took the opportunity to recapture the canal. *See The Suez Crisis, 1956*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1953-1960/suez [https://perma.cc/9ZH9-6YC9] (last visited Oct. 27, 2024).

94. According to Henkin, the Soviet Union never "purported to reject the law of the Charter or even to reconstrue it; rather [the Soviet Union gave] its own version of relevant facts." Louis Henkin, *The Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 69 (1989).

In 1956, the Soviets justified sending approximately 60,000 troops to Hungary to install a friendly regime on the basis of an invitation obtained by plotting with János Kádár to represent himself as the true government, moving aside the choice of the reformers, Imre Nagy. *See Hungary, 1956*, U.S. DEP'T OF STATE: ARCHIVE (Jan. 20, 2009), https://2001-2009.state.gov/r/pa/ho/time/lw/107186.htm [https://perma.cc/3WZY-654B]; CHARLES GATI, FAILED ILLUSIONS: MOSCOW, WASHINGTON, BUDAPEST, AND THE 1956 HUNGARIAN REVOLT 16–17, 231–33 (2006); Eliav Lieblich, *The Soviet Intervention in Hungary—1956*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 48, 49–51 (Tom Ruys et al. eds., 2018) (explaining Nagy's fall and replacement by Soviet-backed Kádár). The Soviets followed a similar approach in obtaining invitations to intervene in Czechoslovakia in 1968 and Afghanistan in 1979. *See* PHILIP WINDSOR & ADAM ROBERTS, CZECHOSLOVAKIA 1968: REFORM, REPRESSION AND RESISTANCE 102–11 (1969); Georg Nolte & Janina Barkholdt, *The Soviet Intervention in Afghanistan—1979–80*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra*, at 297, 297–98, 301.

Similar to the Soviets in Afghanistan, the United States is associated with the assassination of the South Vietnam leader Ngo Dinh Diem, who became a concern for the United States with his suppression of critics. *See* James M. Lindsay, *Remembering the Vietnam "Coup Cable,"* COUNCIL ON FOREIGN RELS.: WATER'S EDGE (Aug. 24, 2016, 5:21 PM), https://www.cfr.org/blog/remembering-vietnam-

stability—sending the message that treaties would be honored and conduct would be predictable because it followed the law.[95] Renouncing or attempting to reinterpret the Charter could send the wrong message. Both the Soviet Union and the United States attempted to keep blatantly unlawful practices secret, rather than admit to certain conduct and challenge the law that rendered the conduct wrongful. The United States' effort to keep its role in law violations secret has been confirmed and referred to as "plausible deniability."[96] Two assassinations—one of a South Vietnamese leader involving the United States and another of a leader of Afghanistan involving the Soviet Union, and the alleged issuance of invitations to intervene—are just two of many examples of creating facts to fit the law.[97] The Cold War stance of keeping such law violations secret, as compared to the contemporary approach of attempting to change the law, may seem like a difference without a distinction. However, for the viability of the law itself, the difference is significant. Under customary international law and treaty law, it is not the law violation but the *treatment* of the violation that determines whether the principle or treaty provision remains binding or is superseded through contrary practice.[98]

coup-cable [https://perma.cc/ZD69-4GF8]. In 1963, U.S. Central Intelligence Agency (CIA) officials stood by as Diem was killed and a more acceptable U.S. partner installed. *See New Light in a Dark Corner: Evidence on the Diem Coup in South Vietnam, November 1963*, GEO. WASH. UNIV.: NAT'L SEC. ARCHIVE (Nov. 1, 2020), https://nsarchive.gwu.edu/briefing-book/vietnam/2020-11-01/new-light-dark-corner-evidence-diem-coup-november-1963 [https://perma.cc/6RNV-MHTV]; Quincy Wright, *Legal Aspects of the Viet-Nam Situation*, 60 AM. J. INT'L L. 750, 753, 758 (1966). U.S. interventions in the Dominican Republic, Grenada, and Panama were all based to some extent on the right of intervention by invitation, but in all three cases, the invitations were of questionable legal validity. *See* Christian Walter, *The US Intervention in the Dominican Republic—1965*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra*, at 123, 123, 125; Nabil Hajjami, *The Intervention of the United States and other Eastern Caribbean States in Grenada—1983*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra*, at 385, 393–94; Nicholas Tsagourias, *The US Intervention in Panama —1989*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra*, at 426, 436–37.

95. These are the reasons Henkin gave at the height of the Cold War for why states do and should obey international law. *See* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 48 (1st ed. 1968). *See generally* MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (2008) (explaining enforcement theory and practice); Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (discussing states' compliance with international law, and reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)).

96. *See* REBECCA SANDERS, PLAUSIBLE LEGALITY: LEGAL CULTURE AND POLITICAL IMPERATIVE IN THE GLOBAL WAR ON TERROR 167 (2018).

97. *See* GEO. WASH. UNIV.: NAT'L SEC. ARCHIVE, *supra* note 94. Wright discusses the U.S. legal arguments attempting to justify its intervention in Vietnam. However, he does not mention the United States' involvement in the assassination of Diem. *See* Wright, *supra* note 94, at 750–51, 754, 758. Similarly, Nolte and Barkholdt discuss the suspected role of the Soviet Union in the killing of Afghanistan's leader, Hafizullah Amin, but there is no admission by the Soviets of such a role. Nolte & Barkhold, *supra* note 94, at 297. The Soviet legal justifications turned on invitation and self-defense. *Id.* at 298, 300–01.

98. *See Nicaragua Case*, 1986 I.C.J. Rep. ¶ 186.

[T]he Court deems it sufficient that the conduct of States should, in general, be consistent with [a] rule[], and that instances of State conduct inconsistent with a given rule should generally have been treated as

While this process does not affect the validity of peremptory norms, it does affect the pull to compliance with such norms as discussed in Part III.[99]

The situation changed dramatically when the Soviet Union disintegrated. The United States' concern about a peer–competitor's valid critique of U.S. legal positions disappeared. While the United States gained great admiration for its promotion of democracy,[100] U.S. presidents—first Ronald Reagan, and then the first four post-Cold War presidents—continued to violate the Charter and began attempts to change its terms in the interest of their foreign policy agendas. They issued various reinterpretations of Article 51 while maintaining that the United States remained dedicated to global law.[101]

Two Columbia University law professors predicted in the 1980s that the United States and the world might experience a legal crisis with the end of the Cold War. Louis Henkin and Oscar Schachter, co-editors-in-chief of the *American Journal of International Law*, perceived how the changed political context might tempt U.S. leaders to see the Charter's principles and other rules restricting the use of force differently.[102] Henkin and Schachter defended the law in debates with Reagan Administration officials[103] and in the pages of leading U.S. law journals. One of the debates became the book *Right v. Might*, in which Henkin argued: "It is not in the interest of the United States to reconstrue the law of the Charter so as to dilute and confuse its normative prohibitions . . . which go to the heart of international order . . . ."[104] Schachter wrote an aptly titled article, *In Defense of International Rules on the Use of Force*, for the *University of Chicago Law Review*.[105] Despite the erudition reflected in their views, within a few short years a relatively small group of academics and government officials had managed to push forward the RBIO.

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breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. *Id.*

Henkin wrote something similar in his response to Franck on the continuing validity of Article 2(4) despite frequent violations. States, he noted, did not seek to adapt the law on the use of force to accommodate new uses but rather attempted to present conduct as in compliance with existing law. *See* Henkin, *supra* note 83, at 545–46.

99. For a discussion of peremptory norms (also known as *jus cogens*) and the use of force, see *supra* note 63.

100. *See, e.g.*, *Cold War Diplomacy, 1945–1991*, NAT'L MUSEUM OF AM. DIPL., https://diplomacy.state.gov/discover-diplomacy/period/cold-war-diplomacy/ [https://perma.cc/7CLM-Z2WS] (last visited Oct. 27, 2024).

101. For a close study of how the descent to ever more permissive attitudes toward the prohibition developed over time in the U.S. government, see generally SANDERS, *supra* note 96.

102. *See, e.g.*, Louis Henkin, *Law and War After the Cold War*, 15 MD. J. INT'L L. 147, 152, 154–55, 157 (1991).

103. *See* David J. Scheffer, *Introduction: The Great Debate of the 1980s*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE, *supra* note 94, at 1, 1–3.

104. Henkin, *supra* note 94, at 60.

105. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

B. THE ORIGINS AND MEANING OF THE RBIO

Notwithstanding its impact, much about the RBIO remains obscure. President Biden's Secretary of State, Antony Blinken, linked the concept to the post-World War II international law agreements and institutions for world order, in particular the U.N. Charter.[106] In fact, the concept originated at the end of the Cold War, as will be shown in the following Section.[107] To date, the most useful document for understanding the RBIO was drafted by two Princeton University professors in 2006.[108] Further insights can be gleaned by deduction from invocations of the phrase, a number of which are reviewed below.

1. A Post-Cold War Invention

As the Soviet Union declined, the Reagan Administration began to assert rights and privileges based on its status as the sole remaining superpower and not on the principles of equality and peace. Chief among the asserted new rights was the freedom to use military force to install democratic, or at least pro-U.S., regimes.[109] No such right exists in the U.N. Charter without Security Council authorization.[110] Reagan acted on a claimed right to use force for regime change at least twice: first, when he ordered U.S. troops to oust the government of Grenada, which he believed was under Cuba's influence; and second, when he used force directly and indirectly to attack leftist governments in Central America.[111] By the time of Russia's full-scale invasion of Ukraine in 2022, the RBIO had developed to provide the terminology and serve as a basis for Biden's condemnation of Russia.[112]

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106. *See* Antony J. Blinken, U.S. Sec'y of State, The Administration's Approach to the People's Republic of China, Speech at The George Washington University (May 26, 2022) (transcript available at https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/ [https://perma.cc/4JV4-EJ9W]).

107. *See infra* Section I.B.1.

108. *See* G. JOHN IKENBERRY & ANNE-MARIE SLAUGHTER, PRINCETON PROJECT ON NAT'L SEC., FORGING A WORLD OF LIBERTY UNDER LAW: U.S. NATIONAL SECURITY IN THE 21ST CENTURY 29–30 (2006), https://dml.armywarcollege.edu/wp-content/uploads/2023/01/Princeton-Project-Report-National-Security-in-21st-Century.pdf [https://perma.cc/8ZJV-L3TU]. The ideas in the report have much in common with realist ideology. Both concepts promote the use of military force abroad in pursuit of U.S. supremacy. *See id.*; *cf.* MEARSHEIMER, *supra* note 46, at 152 (asserting that fighting wars to maintain liberal hegemony and "democratiz[e] the globe" leads to international instability). Mearsheimer appears to erroneously believe that liberals, like Ikenberry and Slaughter, are advocating for conduct consistent with international law when they call for military intervention for regime change in the interest of democracy or human rights. *See* MEARSHEIMER, *supra* note 46, at 4–6.

109. For details of the "Reagan Doctrine," see Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE, *supra* note 94, at 19, 20–25.

110. *See supra* notes 82–93 and accompanying text.

111. *See generally* Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131 (1984) (discussing the United States' invasion of Grenada); WILLIAM MICHAEL SCHMIDLI, FREEDOM ON THE OFFENSIVE: HUMAN RIGHTS, DEMOCRACY PROMOTION, AND US INTERVENTIONISM IN THE LATE COLD WAR (2022) (discussing the actions of the Reagan Administration in Central America).

112. *See* Remarks by President Biden on the United Efforts, *supra* note 69.

The RBIO ideas of U.S. superiority and free right to use force continued under President George H.W. Bush and, more decisively, under President Clinton. George H.W. Bush undertook a far more extensive pro-democratic and pro-U.S. slant to use of force than Reagan did when he ordered troops into Panama.[113] In 1989, Bush sent troops to Panama to oust a military dictator who had refused to hand over power to an elected president.[114] As many as several thousand people died in the fighting.[115] Promoting democracy was among several arguments put forward to justify the operation, none of which met the international legal standards for the lawful use of force.[116] Then, in 1990 and 1991, Bush adhered closely to the Charter in leading the successful international effort to liberate Kuwait, as will be discussed in more detail below. There was near unanimity among the members of the U.N. Security Council, including the Soviet Union, to authorize force to drive Iraq back behind its own borders.[117]

Bill Clinton, however, returned to the Reagan approach. He became president after the Soviet Union had disintegrated and a newly democratic Russia had taken its place on the Council. This might have been a moment to consolidate the central role of the Charter in world affairs once again. In the successful aftermath of the liberation of Kuwait, a declaration of world order under international law could have been made. Instead, Clinton ordered major military operations on multiple occasions that had little or no justification under the Charter. He used force against Serbia during the 1999 Kosovo Crisis under an expanded concept of pro-democratic invasion known as "humanitarian intervention" but issued no official explanation of why it was lawful.[118] Clinton also asserted the right of self-defense to bomb Afghanistan and Sudan because those states had hosted Al Qaeda members.[119] Again, the United States referenced self-defense but provided no specific explanation of how such bombing met the condition under Article 51 of "an armed attack occur[ring]" or the requirements of necessity and proportionality.[120]

When the Al Qaeda terrorist organization attacked the United States for the second time on 9/11, President George W. Bush greatly expanded the Clinton practice of using force against states because of the presence of certain non-state

113. *See supra* notes 108–11 and accompanying text.

114. *See* John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J. INT'L L. 276, 279–81 (1990).

115. *Id.* at 295–96 (estimating that "between two hundred and several thousand persons were killed").

116. *See id.* at 297–310 (analyzing the validity of various legal claims relied upon by the United States to justify invading Panama).

117. For details of the Iraq invasion, see *infra* notes 268–85 and accompanying text.

118. *See* Daniel Franchini & Antonios Tzanakopoulos, *The Kosovo Crisis—1999*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra* note 94, at 594, 599–601.

119. *See* Enzo Cannizzaro & Aurora Rasi, *The US Strikes in Sudan and Afghanistan—1998*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra* note 94, at 541, 543; Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 537 (1999). Henkin's position remains the law: "[A]rmed attack should not be lightly construed to cover incidents—even terrible terrorist incidents—limited in scope and usually committed in ways that make it difficult to determine who is responsible." Henkin, *supra* note 94, at 69.

120. U.N. Charter art. 51; *see* Lobel, *supra* note 119, at 537, 543–44.

actor organizations.[121] Bush referred to his policy as a "war on terror" but said little about why such a "war" was lawful.[122] The legality of using force finally emerged as a major issue when President Bush, together with his British and Australian counterparts, decided to invade Iraq in 2003 without U.N. Security Council authorization.[123] The invasion was widely viewed as unlawful even by Western states such as France and Germany.[124] So, in 2004, Anne-Marie Slaughter and co-author Lee Feinstein argued that the United States should have the right to bypass the Security Council and get authorization from the North Atlantic Treaty Organization (NATO) or another group of democracies when it wanted to use force.[125] Slaughter is a former Harvard Law professor and President of the American Society of International Law.[126] She presumably understood the conflict between her proposals and the fundamental substantive and structural principles of the international legal system. Yet, in 2006, she and her Princeton University colleague, John Ikenberry, went further, publishing their Final Report of the Princeton Project on National Security.[127] They proposed the establishment of a group of states distinctive from others like the U.N. or G7 organization of advanced economies.[128] The aim of the new group would be to ensure the "predominance of liberal democracies" in the world to "prevent a return to great power security competition . . . . [T]his predominance would allow [the United States] to work with [its] allies to underwrite the security components

121. *See* John Rielly, *The Bush Administration's Foreign Policy Legacy*, 12 POLITIQUE AMÉRICAINE 73, 74 (2008).

122. The Administration produced no detailed legal analysis on the legality of the "war on terror," even as it did for the use of harsh interrogation techniques and as the Obama Administration would produce for targeted killings. *See* DEP'T OF JUST., LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 1 (2011). *See generally* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

123. Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, GUARDIAN (Sept. 15, 2004, 9:28 PM), https://www.theguardian.com/world/2004/sep/16/iraq.iraq [https://perma.cc/8UPD-X4EW].

124. *See France and Germany Unite Against Iraq War*, GUARDIAN (Jan. 22, 2003, 12:45 PM), https://www.theguardian.com/world/2003/jan/22/germany.france [https://perma.cc/93KF-JTW2].

125. *See* Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFFS. 136, 148–49 (2004). A similar idea for bypassing the Security Council was floated in December 2001 in a report commissioned by the government of Canada. Canada wanted the report so it could point to a post hoc justification for NATO's bombing of Serbia in the Kosovo crisis and so it could have a "right of humanitarian intervention" available as a basis for bombing other states in the future. *See* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at VII, 16 (2001) [hereinafter ICISS Report], https://www.globalr2p.org/wp-content/uploads/2019/10/2001-ICISS-Report.pdf [https://perma.cc/W44A-ZXL7].

126. *Anne-Marie Slaughter*, PRINCETON UNIV., https://slaughter.scholar.princeton.edu/ [https://perma.cc/26VZ-623A] (last visited Oct. 27, 2024).

127. IKENBERRY & SLAUGHTER, *supra* note 108.

128. *Id*. at 25.

of a cooperative rules-based order."[129] In 2009, Slaughter took a high-ranking position at the State Department in the Obama Administration.[130] Subsequently, President Obama spoke of wholly embracing U.S. promotion of democracy abroad and invited other democracies to follow him in the effort.[131] From 2016 onward, usage of terms like "rules-based order" spiked.[132] NATO has likewise taken on even greater prominence in U.S. foreign policy during recent years.[133]

U.S. President Donald Trump pursued a quixotic foreign policy that both hampered and promoted the RBIO. He seems not to have used the phrase "rules-based order" personally and was a critic of NATO.[134] He had a positive personal relationship with Russian President Vladimir Putin. Trump also charted his own foreign policy approaches without apparent regard for long-standing U.S. positions.[135] Yet, his Secretaries of State, Rex Tillerson and Mike Pompeo, did refer to the RBIO, especially in connection with China.[136] In preparation for a visit to India, for instance, Tillerson said that "China, while rising alongside India, has done so less responsibly, at times undermining the international, rules-based order."[137] Pompeo also argued, in a high-profile speech, that China's policies would "erode our freedoms and subvert the rules-based order," leading to the need for a "new alliance of democracies" to defend the RBIO.[138] On another

129. *Id.* at 29–30. In addition to the meaning of RBIO being unclear in this report and other commentary, the terms associated with RBIO goals are also contested, including "liberal," "democracy," "capitalist," and other economic terms. *See, e.g.*, SAMUEL MOYN, LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES 2 (2023) (discussing "liberalism" and how its meaning changed during the Cold War).

130. *See* PRINCETON UNIV., *supra* note 126.

131. *See* Barack Obama, President of the U.S., Address to the 71st Session of the United Nations General Assembly (Sept. 20, 2016) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/address-president-obama-71st-session-united-nations-general-assembly [https://perma.cc/L8NQ-8EXD]).

132. *See, e.g.*, Scott et al., *supra* note 41.

133. *See* Jonathan Guyer, *How America's NATO Expansion Obsession Plays into the Ukraine Crisis*, VOX (Jan. 27, 2022, 8:35 AM), https://www.vox.com/22900113/nato-ukraine-russia-crisis-clinton-expansion [https://perma.cc/3L2B-DSRF]; Robin S. Quinville, Philip T. Reeker & Jason C. Moyer, *Reinventing Security and Cooperation in Europe*, WILSON Q. ONLINE (Winter 2024), https://www.wilsonquarterly.com/quarterly/the-new-multilateralism/reinventing-security-and-cooperation-in-europe [https://perma.cc/2PHC-LGVJ].

134. *See* Scott et al., *supra* note 41; Carol D. Leonnig & Philip Rucker, *'You're a Bunch of Dopes and Babies': Inside Trump's Stunning Tirade Against Generals*, WASH. POST (Jan. 17, 2020, 6:00 AM), https://www.washingtonpost.com/politics/youre-a-bunch-of-dopes-and-babies-inside-trumps-stunning-tirade-against-generals/2020/01/16/d6dbb8a6-387e-11ea-bb7b-265f4554af6d_story.html.

135. *See* Michael Anton, *The Trump Doctrine: An Insider Explains the President's Foreign Policy*, FOREIGN POL'Y (Apr. 20, 2019), https://foreignpolicy.com/2019/04/20/the-trump-doctrine-big-think-america-first-nationalism/; *see also* Leonnig & Rucker, *supra* note 134.

136. *E.g.*, Nicole Gaouette, *Tillerson Raps China as 'Predatory' Rule Breaker*, CNN (Oct. 19, 2017, 2:34 AM), https://www.cnn.com/2017/10/18/politics/tillerson-china-rebuke-speech/index.html [https://perma.cc/SZ5J-VQX3]; Michael R. Pompeo, U.S. Sec'y of State, Remarks on "Communist China and the Free World's Future" (July 23, 2020) [hereinafter Pompeo Remarks on China] (transcript available at https://cl.usembassy.gov/secretary-michael-r-pompeo-remarks-communist-china-and-the-free-worlds-future/ [https://perma.cc/6UGF-GS8J]).

137. Gardiner Harris, *Tillerson Hails Ties with India, but Criticizes China and Pakistan*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/us/politics/tillerson-india-china-pakistan.html.

138. Pompeo Remarks on China, *supra* note 136.

occasion, Pompeo declared that "[i]n the finest traditions of our great democracy, we are rallying the noble nations to build a new liberal order that prevents war and achieves greater prosperity."[139]

The RBIO concept was then embraced by the Biden Administration, with officials using it in reference to the Russian invasion of Ukraine and other high-profile contexts.[140] In March 2021, Secretary of State Blinken met in Alaska with Yang Jiechi, China's Director of the Office of the Central Commission for Foreign Affairs, for a series of discussions about U.S.–China relations.[141] Blinken referred to the RBIO as a "system," saying it "helps countries resolve differences peacefully, coordinate multilateral efforts effectively, and participate in global commerce with the assurance that everyone is following the same rules."[142] Jiechi responded by saying that "[w]hat China and the international community follow or uphold is the United Nations-centered international system and the international order underpinned by international law, not what is advocated by a small number of countries of the so-called 'rules-based' international order."[143]

The RBIO is prominent in NATO's 2022 Strategic Concept, which begins with a reference to the alliance being "a bulwark of the rules-based international order."[144] The document's preface criticizes Russia's aggression and violations of international humanitarian law but makes no mention of the U.N. Charter or general international law.[145] Non-NATO U.S. allies are also embracing the RBIO. In November 2018, the South Korean Ministry of Foreign Affairs co-

139. Robin Emmott, *Trump Shaping New 'Liberal' Order to Block Russia, China, Iran, Says Pompeo*, REUTERS (Dec. 5, 2018, 3:57 AM), https://www.reuters.com/article/uk-usa-eu-idUKKBN1O310P [https://perma.cc/Y7PE-LM29].

140. *E.g.*, Norah O'Donnell, *Secretary of State Antony Blinken on the Threat Posed by China*, CBS NEWS: 60 MINUTES (May 2, 2021, 6:57 PM), https://www.cbsnews.com/news/antony-blinken-60-minutes-2021-05-02/ [https://perma.cc/J7CW-Q9Q8]; Remarks by President Biden on the United Efforts, *supra* note 69.

141. *See* Ben Leonard, *Blinken, Sullivan to Meet with Top Chinese Diplomats Next Week*, POLITICO (Mar. 10, 2021, 2:38 PM), https://www.politico.com/news/2021/03/10/blinken-sullivan-chinese-diplomats-475098 [https://perma.cc/9XB9-GCDQ].

142. Press Release, Antony J. Blinken, U.S. Sec'y of State, Secretary Antony J. Blinken, National Security Advisor Jake Sullivan, Director Yang and State Councilor Wang at the Top of Their Meeting (Mar. 18, 2021), https://www.state.gov/secretary-antony-j-blinken-national-security-advisor-jake-sullivan-chinese-director-of-the-office-of-the-central-commission-for-foreign-affairs-yang-jiechi-and-chinese-state-councilor-wang-yi-at-th/ [https://perma.cc/ED4V-EF3V].

143. *Id.*

144. N. ATL. TREATY ORG., NATO 2022 STRATEGIC CONCEPT 1 (2022), https://www.nato.int/nato_static_fl2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf [https://perma.cc/VX76-E7WP] (adopting this framework at the 2022 NATO Summit in Madrid, which was attended by heads of state and government of NATO allies).

145. *See id.* In *Authoritarian International Law?*, Ginsburg focuses on the damage Russia, China, and other states with authoritarian governments might one day do to the "normative content of international law itself, diluting democratic norms and developing some of their own." Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 224–25 (2020). To gauge the extent of possible future damage by authoritarian states, however, the damage already done to international law by RBIO states needs to be considered. That is a major purpose of this Article. The damage includes undermining the prohibition on force and the principle of equality. *See infra* notes 257–59, 306–49 and accompanying text. Ginsburg does reference the prescient observation of Detlev Vagts on this issue. *See* Ginsburg, *supra*, at 230 ("The United States at the end of the Cold War . . . deployed what Detlev Vagts

sponsored a conference with the U.K. Foreign and Commonwealth Office on the "Rules Based International System."[146] Australia has been using the phrase officially in foreign policy documents since 2008.[147]

2. A Nebulous Concept

Despite these formal and official uses, it is not entirely clear what is meant by "rule-based international order" beyond a few basic facts. First, the RBIO is not international law.[148] Shirley Scott writes that the "'RBO' is a broader term [than international law]: the rules need not even be legal rules. Western proponents of the term are likely attempting to capture soft law, institutional arrangements, and norms beyond those that have reached the status of custom and that may not appear in treaty law."[149] According to Malcolm Jorgensen, the RBIO "generally refers to the order of legal and non-legal rules of global governance but has increasingly developed a secondary meaning as a comparative conception of international law informed by particularistic Western and liberal notions of global order."[150] The United Nations Association of Australia has similarly explained: "The rules-based international order can generally be described as a shared commitment by all [member] countries to conduct their activities in accordance with agreed rules that evolve over time, such as international law, regional security arrangements, trade agreements, immigration protocols, and cultural arrangements."[151] John Dugard finds:

> [T]he rules-based international order may be seen as the United States' alternative to international law, an order that encapsulates international law as interpreted by the United States to accord with its national interests, 'a chimera, meaning whatever the US and its followers want it to mean at any given time'.[152]

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called 'hegemonic international law,' by which it sought to pick and choose which obligations it followed." (citing Detlev Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001))).

146. Brit. Embassy Seoul, *Rules Based International System Conference*, GOV.UK (Jan. 25, 2018), https://www.gov.uk/government/news/rules-based-international-system-conference [https://perma.cc/A8W5-W59Q].

147. *See* Scott et al., *supra* note 41.

148. *See* John Dugard, *The Choice Before Us: International Law or a 'Rules-Based International Order'?*, 36 LEIDEN J. INT'L L. 223, 226 (2023); Ben Scott, *The Trouble with Washington's 'Rules-Based Order' Gambit*, DIPLOMAT (Aug. 3, 2021), https://thediplomat.com/2021/08/the-trouble-with-washingtons-rules-based-order-gambit/. Tom Ginsburg expressed concern in mid-2022 that the United States might mean something different from international law when invoking the RBIO. *See* Tom Ginsburg, *Article 2(4) and Authoritarian International Law*, 116 AJIL UNBOUND 130, 132 (2022).

149. Shirley V. Scott, *The Decline of International Law as a Normative Ideal*, 49 VICTORIA U. WELLINGTON L. REV. 627, 641 (2018).

150. Malcolm Jorgensen, *The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with but Not Binding Under International Law*, 22 MELB. J. INT'L L. 221, 221 (2021).

151. U.N. ASS'N OF AUSTL., THE UNITED NATIONS AND THE RULES-BASED INTERNATIONAL ORDER 7 (2017).

152. Dugard, *supra* note 148, at 226 (quoting Grenville Cross, Opinion, *Rules-Based Order: Hypocrisy Masquerading as Principle*, DOTDOTNEWS (May 4, 2022, 6:32 PM), https://english.dotdotnews.com/a/202205/04/AP627214cae4b0adad9d38658f.html [https://perma.cc/59KF-4MWF]).

Thus, it appears to be "[p]remised on 'the United States' own willingness to ignore, evade or rewrite the rules whenever they seem inconvenient.'"[153] Russia and China have issued several declarations pointing to the differences between the RBIO and international law and advocating for international law.[154] In June 2016, they issued a joint statement, titled *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, in which they rejected RBIO rhetoric and reiterated "their full commitment to the principles of international law as they are reflected in the United Nations Charter."[155]

There are several more facts that can be confirmed about the RBIO, in addition to its distinction from international law. The RIBO divides the world into two categories of states: the special category of Western democracies, and the rest.[156] The United States exercises "global stewardship" over the whole of the RBIO.[157] When U.S. officials repeat that Russia's invasions of Ukraine have violated the "rules-based international order" without referencing international law, the omission is seen as a "considered and deliberate" choice to reflect the RBIO's two-tier system.[158] Russia, China, and the Global South are expected to defer to the special RBIO privileges claimed by the United States and its close allies while they must comply with standard international law or the "rules" made for them by RBIO states. It recalls the days when imperial states tried to impose their "standard of civilization"

According to Rein Müllerson, the RBIO is "based on rules of Washington and not related to international law." *Id*. at 226 n.19 (citing A. N. Vylegzhanin, B. I. Nefedov, E. R. Voronin, O. S. Magomedova & P. K. Zotova, *The Term "Rules-Based International Order" in International Legal Discourses*, 2 MOSCOW J. INT'L L. 35, 36 (2021)).

153. *Id*. at 226 (quoting Walt, *supra* note 56).

154. *See* Joint Declaration of the President of the People's Republic of China and the President of the Russian Federation on Strengthening Global Strategic Stability, in letter dated July 8, 2016 from the Representatives of China and the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. A/70/981, S/2016/601 (July 11, 2016) (issuing a joint declaration in July 2016); *Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions*, MINISTRY OF FOREIGN AFFS. OF RUSSIAN FED'N (Mar. 23, 2021, 7:06 AM), https://mid.ru/en/foreign_policy/position_word_order/1418041 (issuing a joint statement in March 2021).

155. Kenneth Anderson, *Text of Russia-China Joint Declaration on Promotion and Principles of International Law*, LAWFARE (July 7, 2016, 7:18 AM), https://www.lawfareblog.com/text-russia-china-joint-declaration-promotion-and-principles-international-law [https://perma.cc/EK8A-D4V5] (quoting a declaration made on June 25, 2016).

156. Political scientist Stacie Goddard proposes a slightly different variation of these two tiers. *See* Stacie Goddard, *Tiered Membership*, LOWY INST., https://interactives.lowyinstitute.org/features/usa-rules-based-order/responses/tiered-membership/ [https://perma.cc/8CJ3-P576] (last visited Oct. 27, 2024) (arguing that the Biden Administration should advance different tiers of the RBIO—one based on larger shared interests, such as climate change and nuclear proliferation, to involve Russia and China, and a second in which "the rules-based order can be a 'club good', available only to those that share liberal principles and values").

157. Caitlin Byrne, *Securing the 'Rules-Based Order' in the Indo-Pacific: The Significance of Strategic Narrative*, 16 SEC. CHALLENGES (SPECIAL ISSUE) 10, 10 (2020).

158. Dugard, *supra* note 148, at 223. Dugard argues that the United States deliberately invokes the RBIO to judge Russia and China. *Id*. at 228.

on the non-Western world. [159] The nineteenth-century "house rules" of the club of "civilized states" gave privileges to members with respect to the use of military force and in the lawmaking process not available to other communities.[160] International law scholars Laura Dickinson and David Sloss support incorporating this framework into the RBIO. They support privileging democracies over other states because they find democratic governments do a better job of protecting human rights.[161] They may not realize the RBIO's negative impact on international law as a whole, including human rights law, through its two-tier system. For one thing, the RBIO is motivating other states not to become democracies but to create their own RBIOs that clash with international law.[162] This and other negative impacts of the RBIO are discussed in Part III.[163] Suffice it here to say that international law is a system of equality; the RBIO is a system of inequality.

Little is known about the substance of the "rules" of the RBIO beyond the fact they are not the same as international law.[164] In 2022, Russia commented on the

159. The RBIO concept and persistent military intervention by RBIO members in Africa are seen as a continuing form of imperialism or colonialism, leading some in Africa to side with Russia over the West in Ukraine. *See, e.g.*, *Colonialism and Propaganda in Niger's Coup*, ON THE MEDIA (Aug. 4, 2023), https://www.wnycstudios.org/podcasts/otm/segments/colonialism-and-propaganda-nigers-coup [https://perma.cc/Z9AC-UWKR] (discussing Niger revolutionaries' support of Russian President Vladimir Putin and "deep-seated resentments towards their former colonizer, France").

160. *See* Harald Kleinschmidt, *Naturrecht und Völkerrecht? Beobachtungen zu Wandlungen der Rechtsquellentheorie seit Ende des 19. Jahrhunderts*, 135 HISTORISCHES JAHRBUCH 364, 374–75 (2015) (Ger.); *see also* Mary Ellen O'Connell, *The Role of Natural Law in the Rise and Decline of European International Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN EUROPE (Anne van Aaken et al. eds., forthcoming Nov. 2024) (manuscript at 311, 316) (on file with author).

161. Dickinson and Sloss refer to the RBIO as the "liberal plurilateral order"; they believe the RBIO will effectively counter the rise of authoritarianism within states and within the international legal system. David L. Sloss & Laura A. Dickinson, *The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order*, 116 AM. J. INT'L L. 798, 798–99 (2022) (citing Ginsburg, *supra* note 145). Sloss also edited a volume building on this view and expressed hope "that key features of the rules-based international order will endure." David L. Sloss, *Introduction: Preserving a Rules-Based International Order*, *in* IS THE INTERNATIONAL LEGAL ORDER UNRAVELING? 1, 5 (David L. Sloss ed., 2022).

162. *See* sources cited *supra* note 56 and accompanying text.

163. Among the negative impacts—beyond damage to the law of peace and to lawmaking on the basis of equality—is (dis)orderly regulation of the world's oceans, international trade, human rights, and arms control. Ocean governance has been hampered because the United States has never joined the U.N. Convention on the Law of the Sea (UNCLOS), claiming its privileges without submitting to mandatory dispute resolution and other duties of UNCLOS. *See* Dugard, *supra* note 148, at 226. Regarding trade, starting with Barack Obama, the United States has refused to name judges to the World Trade Organization Dispute Settlement Body because the Body has ruled against the United States on multiple occasions. The United States' refusal has crippled a once-thriving method of peaceful dispute resolution. *See* Steve Charnovitz, *The Obama Administration's Attack on Appellate Body Independence Shows the Need for Reforms*, INT'L ECON. L. & POL'Y BLOG (Sept. 22, 2016, 6:23 PM), https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html; Bryce Baschuk, *Paralysis at World Trade Arbiter Sees Protectionism Take Hold*, BLOOMBERG (Aug. 30, 2023, 7:00 AM), https://www.bloomberg.com/news/newsletters/2023-08-30/supply-chains-latest-paralysis-at-wto-appellate-body-hurts-global-trade [https://perma.cc/Y7F6-B9MA]. The United States has never joined an international human rights or criminal court, or many leading arms-control treaties. Dugard, *supra* note 148, at 226.

164. *See* Dugard, *supra* note 148, at 230 ("The rules comprising the 'rules-based international order' have still to be spelled out.").

work of the U.N. International Law Commission's draft conclusions on *jus cogens*—the peremptory, enduring norms of international law that include the prohibition on use of force—saying, "the Russian Federation is not in a position to accept the possibility that the formation of the will or position of a group of States could result in the emergence of international legal obligations for States that are not members of that group."[165] Ikenberry and Slaughter apparently had exactly this in mind.[166] Any RBIO tenets or rules, including principles of international law, are open to alteration by the United States. The value or legitimacy of RBIO rules "depends on the extent to which they serve the interests and values of States which sustain them."[167] This understanding is reflected in the U.S. position that it has the right to loosen restrictions on the use of force to fit U.S. policy. In fact, no state has the right to loosen the restrictions of a peremptory norm.[168]

Membership, like the content of rules, is another vague aspect of the RBIO. The United States is obviously a member. The United Kingdom and Australia likely belong, but it is doubtful that all members of NATO are included. Hungary and Turkey, for example, are unlikely to be members, given their questionable democratic credentials. Given the United States' unquestioned leading position, the determination of membership is likely something that the United States decides *sua sponte*.[169]

C. APPLICATION OF THE RBIO AND RESISTANCE

The RBIO has helped the United States and close allies officially maintain the illusion of being committed to international law while taking actions regardless of the law. This Section looks at how this has occurred with respect to the use of force. With the end of the Cold War, many international lawyers began supplying arguments to justify force relying on less and less evidence of the actual law.[170] The lawyers that engaged in this effort earned the collective label "expansionists," while those supporting the Charter's original meaning and other classic law

165. Int'l L. Comm'n, Comments and Observations Received from Governments on Peremptory Norms of General International Law (*Jus Cogens*), U.N. Doc. A/CN.4/748, at 41 (2022) (quoting the Russian Federation's commentary).

166. IKENBERRY & SLAUGHTER, *supra* note 108, at 25 (explaining how the U.N. Security Council's procedure for authorizing the use of force does not serve U.S. interests and needs to be reformed).

167. Dugard, *supra* note 148, at 230 (quoting MALCOLM CHALMERS, ROYAL UNITED SERVS. INST. FOR DEF. & SEC. STUD., WHICH RULES? WHY THERE IS NO SINGLE 'RULES-BASED INTERNATIONAL SYSTEM,' at vii (2019)).

168. For a discussion of the durable nature of *jus cogens* norms, see *infra* notes 359–410 and accompanying text.

169. Membership based on U.S. preference is implied in the United States' leading position in the RBIO. International law scholar Ntina Tzouvala found another indication that the U.S. decides membership in a footnote in a U.S. Federal Reserve paper, wherein the author wrote, "I use the phrase 'non-Western' to denote countries that are not geopolitically aligned with the U.S." Colin Weiss, *Geopolitics and the U.S. Dollar's Future as a Reserve Currency*, BD. GOVERNORS FED. RSRV. SYS.: INT'L FIN. DISCUSSION PAPERS, No. 1359, Oct. 2022, at 17 n.26.

170. In addition to the examples in this Section, see also O'CONNELL, *supra* note 30, at 152–205.

became the "restrictionists."[171] Expansionist reasoning generally includes at least an implicit view that the greater rights at issue are to be enjoyed by liberal, democratic states alone. This view is seen in the following discussion of three main arguments made by expansionist scholars designed to meet RBIO member interests in resort to force.

1. Humanitarian Intervention/Responsibility to Protect (R2P)

The Charter does not permit the use of military force for any purpose except self-defense unless authorized by the Security Council. As the human rights movement grew after World War II, certain scholars began to argue that it should be lawful to use force against governments that violated the rights of their populations.[172] The argument never went far because it so plainly conflicted with the Charter.[173] When the Cold War ended, however, proponents of "humanitarian intervention" believed they could persuade Western states committed to human rights to take a different view.[174] The aftermath of the successful liberation of Kuwait in early 1991 presented an opportunity. Minority communities in Iraq rebelled only to suffer high casualties inflicted by Iraq's armed forces.[175] France's foreign minister demanded that states stage a military intervention to protect them.[176] No ground force was used, but for the next twelve years the United States, the United Kingdom, and, for a while, France patrolled the skies above Iraq despite Russian arguments against the legality of doing so.[177]

The next Western arguments for humanitarian intervention came in connection with the breakup of Yugoslavia. The arguments reached a point that, by 1999, NATO decided to resort to force on behalf of those seeking to separate the province of Kosovo from the Yugoslav Republic of Serbia and Montenegro.[178] One

171. Julius Stone used terms such as "realist-traditionalist" and "idealist-restrictionist." Julius Stone, *Force and the Charter in the Seventies*, 2 SYRACUSE J. INT'L L. & COM. 1, 8–9, 11 (1974); *see also* Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUR. J. INT'L L. 1129, 1140, 1142 (2009).

Naturally the question arises of why international lawyers would participate in such an effort. One answer involves the concern that unless policymakers receive the answers they want, they will simply ignore the law. *See* Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770, 773 (2012).

172. *See The Rise and Fall of the Responsibility to Protect*, COUNCIL ON FOREIGN RELS. (Apr. 20, 2023), https://education.cfr.org/learn/timeline/rise-and-fall-responsibility-protect [https://perma.cc/S876-4ZSA].

173. An early proponent of the use of force for humanitarian purposes, regardless of it violating the Charter, is the American law professor Richard Lillich. *See* Richard B. Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 229, 244–51 (John Norton Moore ed., 1974). *See generally* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973).

174. *See The Rise and Fall of the Responsibility to Protect*, *supra* note 172.

175. Tarcisio Gazzini, *Intervention in Iraq's Kurdish Region and the Creation of the No-Fly Zones in Northern and Southern Iraq—1991–2003*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra* note 94, at 469, 469.

176. The Charter contains no linkage between a right to use armed force and human rights. Rather, it promotes peace as a component of flourishing human rights. *See* U.N. Charter art. 55.

177. *See* Gazzini, *supra* note 175, at 472, 475.

178. *See* Franchini & Tzanakopoulos, *supra* note 118, at 594–97.

NATO member, Belgium, argued that the bombing was a lawful exercise of humanitarian intervention.[179] The United States and most other NATO members made vague reference to justifications based on the exceptional situation and the need to prevent a humanitarian disaster or catastrophe.[180]

Several NATO members sought a post hoc justification by attempting to create a new exception to the Charter to fit the Kosovo case. They wanted a right to resort to military force on the territory of another state without consent when they determined that a human rights crisis required it.[181] Canada sponsored an effort to advise on how to create this new exception, leading to a report published in December 2001 that introduced the term "responsibility to protect" ("R2P"), another name for humanitarian intervention.[182] The Canadian report, issued by the International Commission on Intervention and State Sovereignty (ICISS), substitutes organizations, such as NATO, for the Security Council in authorizing force.

The use of force against Serbia, an ally of Russia's, has been a principal example of RBIO lawlessness for Russia. A Russian analyst reported on Moscow's perspective in a paper posted to NATO's website:

> Russian critics and experts wrote article after article arguing that the entire system of international relations was based on the UN and its authority. By launching military action in Kosovo without UN sanction, NATO was undermining the very foundation of the world order. . . . NATO's action qualified as aggression. The principle that NATO could unilaterally decide to use force for whatever reason against any country where human rights were ostensibly being violated was particularly unacceptable for Russia. Why not bomb Northern Ireland, then, or Russia itself?[183]

NATO's results in Kosovo were equivocal at best, and no new "humanitarian interventions" were tried again until 2011. Indeed, by the time Canada's report appeared, attention had turned away from Kosovo to 9/11 and counterterrorism. Still, owing to the efforts of political scientists, the core idea of humanitarian intervention as a legal right or moral basis for overriding the law still lingers. In addition, in 2004, U.N. Secretary-General Kofi Annan created the High-Level

179. *Id*. at 599. Additionally, the U.K. Secretary of State for Defense explicitly stated to the House of Commons that the bombing was "justified as an exceptional measure." *Id*. at 600.

180. *Id*. at 599–602. At least 80% of the deaths in the crisis, however, occurred not before NATO's intervention but during the bombing and in the immediate aftermath. Jaume Castan Pinos, *Kosovo: Disputes Continue 20 Years After NATO Bombing Campaign*, CONVERSATION (Mar. 22, 2019, 10:00 AM), https://theconversation.com/kosovo-disputes-continue-20-years-after-nato-bombing-campaign-113669 [https://perma.cc/R3FF-9RW9]. *See generally* Louis Henkin, Editorial Comment, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824 (1999).

181. *See* CHRISTINE GRAY, INTERNATIONAL LAW ON THE USE OF FORCE 53 (4th ed. 2018).

182. ICISS Report, *supra* note 125, at VII–VIII.

183. Vladimir Brovkin, *Discourse on NATO in Russia During the Kosovo War*, 7 DEMOKRATIZATSIYA 544, 548 (1999), https://www.nato.int/acad/fellow/97-99/brovkin.pdf (footnote omitted).

Panel on United Nations Reform in the wake of the Iraq War.[184] The Secretary-General's subsequent report endorses R2P,[185] but U.N. members made it clear in a document adopted by consensus that using force for humanitarian purposes requires prior Security Council authorization.[186] In 2011, the Security Council did authorize the use of force by NATO and other states in Libya for the express purpose of protecting civilians.[187] France and the United Kingdom asserted that regime change was necessary to protect civilians, while Russia and China argued that the Council had clearly not authorized regime change.[188] Nevertheless, NATO's bombing led to the overthrow of the Libyan government and a civil war.[189]

Between the Libya intervention and Russia's full-scale invasion of Ukraine, a claim for humanitarian intervention has been made only once by an RBIO member. In 2018, British Prime Minister Theresa May invoked humanitarian intervention as the legal basis for air strikes on Syria in the aftermath of a chemical weapons attack in the midst of the Syrian civil war.[190] The strikes were carried out together with France and the United States,[191] but only the United Kingdom issued any sort of legal justification. The United Kingdom claimed the attack was lawful because there was a need at the time of the attack to relieve "extreme humanitarian suffering."[192] Chemical weapons were not being used, however, at the

184. *See* UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE ¶¶15–16 (2004), https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/hlp_more_secure_world.pdf [https://perma.cc/6C23-5N5T].

185. *See* U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 132, 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

186. *See* G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 139 (Sept. 16, 2005).

187. S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

188. *See* Ashley Deeks, *The NATO Intervention in Libya—2011*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra* note 94, at 749, 753–57; *see also* Hugh Roberts, *Who Said Gaddafi Had to Go?*, LONDON REV. OF BOOKS (Nov. 17, 2011), https://www.lrb.co.uk/the-paper/v33/n22/hugh-roberts/who-said-gaddafi-had-to-go [https://perma.cc/QRJ8-8Z4J].

189. Emma Farge, *Russia Criticises UN over NATO Role in Libya*, REUTERS (Mar. 9, 2012, 2:09 PM), https://www.reuters.com/article/russia-nato-libya/russia-criticises-un-over-nato-role-in-libya-idUSL5E8E9B1N/ [https://perma.cc/4MWT-42Q3].

190. *See Syria Air Strikes: Theresa May Says Action 'Moral and Legal*,' BBC (Apr. 16, 2018), https://www.bbc.com/news/uk-politics-43775728 [https://perma.cc/2F69-BCWB].

191. *See id.*; *Syria Air Strikes: US and Allies Attack 'Chemical Weapons Sites*,' BBC (Apr. 14, 2018), https://www.bbc.com/news/world-middle-east-43762251 [https://perma.cc/QV5Z-ZCM9].

192. Prime Minister's Off., *Policy Paper: Syria Action – UK Government Legal Position*, GOV.UK (Apr. 14, 2018), www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position [https://perma.cc/N4ZK-KJ44]. On the United States' prior attack on Syria in 2017, see *Syria Air Strikes: US and Allies Attack 'Chemical Weapons Sites*,' *supra* note 191 and Jason Le Miere, *Trump's Attack on Syria Killed Four Children, State News Agency Claims*, NEWSWEEK (Apr. 12, 2017, 11:16 AM), http://www.newsweek.com/syria-attack-children-civilian-killed-580555 [https://perma.cc/ZY47-PZ8Q].

time of the attack.[193] Rather than relieving human suffering in the moment, the attacks were intended somehow to deter future use. Future deterrence was never part of the advocacy for a right to use force for humanitarian purposes.[194] It persuaded few. Russia continued to argue that only the Security Council can authorize force for humanitarian purposes.[195]

Humanitarian intervention is the type of legal claim that cannot meet the standard of law. It is open to subjective adaptation to suit the policy of the party invoking it.[196] Lon Fuller has identified eight criteria that must be present for a potential rule to qualify as a valid legal rule: the rule must be general, promulgated, prospective, clear, noncontradictory, possible, and reflecting constancy and congruity.[197] Subjects of the law must be able to identify what the law prohibits, permits, or requires. Under the humanitarian intervention justification, however, an intervening state determines subjectively what constitutes a crisis worthy of using force. No target state can know in advance what humanitarian intervention prohibits, permits, or requires. The weight of scholarly opinion therefore sides with the need for Security Council authorization.[198] The Security Council provides a deliberative process that mitigates subjectivity.

2. Self-Defense

In addition to ignoring the requirement for Security Council authorization in humanitarian intervention cases, the United States and its allies have extensively reinterpreted Article 51 in an attempt to modify its restrictions. The plain terms of Article 51 and its negotiating history make clear that an actual armed attack must be occurring and there must be a need to use force in self-defense to "halt and repel" the attack.[199] Using force against a terrorist attack that has ended does not fit the paradigm of the continuing need to defend attacks that are underway. Using force days or weeks after a terrorist attack is a reprisal undertaken presumably to attempt to deter or preempt future attacks, not to respond to current ones.[200] This is why international lawyers argue that Article 51 does not permit

193. *See* Prime Minister's Off., *supra* note 192, ¶ 1.

194. *See generally* ICISS Report, *supra* note 125.

195. *See, e.g.*, Address by President Putin (Feb. 24, 2022), *supra* note 52; *see also* Jade McGlynn, *Why Putin Keeps Talking About Kosovo*, FOREIGN POL'Y (Mar. 3, 2022, 11:39 AM), https://foreignpolicy.com/2022/03/03/putin-ukraine-russia-nato-kosovo [https://perma.cc/22H7-WSH3].

196. *Cf., e.g.*, ICISS Report, *supra* note 125, ¶¶ 1.39–1.41 (highlighting the Canadian version of humanitarian intervention); Prime Minister's Off., *supra* note 192, ¶ 3 (providing the U.K. Government's version).

197. *See* LON L. FULLER, THE MORALITY OF LAW 39, 53, 212 (rev. ed. 1969).

198. Christine Gray concluded in 2018 that "the R2P doctrine does not include a right of unilateral intervention in the absence of Security Council authority." GRAY, *supra* note 181, at 60.

199. KEIICHIRO OKIMOTO, THE DISTINCTION AND RELATIONSHIP BETWEEN *JUS AD BELLUM* AND *JUS IN BELLO* 60 (2011); *see* OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 480 (2d ed. 2021); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 156 (2004); *see also* CASSESE, *supra* note 43, at 346.

200. *See* G.A. Res. 2625 (XXV), *supra* note 43, at 122 ("States have a duty to refrain from acts of reprisal involving the use of force.").

the use of force in response to sporadic terrorist violence.[201] Nevertheless, in 1986, the United States bombed Libya following terrorist attacks in several European cities.[202] In a letter to the Security Council reporting on the bombing, the U.S. representative wrote: "The United States objective was to destroy facilities used to carry out Libya's hostile policy of international terrorism and to discourage Libyan terrorist attacks in the future."[203] Again, the purpose was future deterrence, not defense in the moment of an attack. The United States presented evidence that the Libyan state had carried out the European attacks, so there was attribution to a state. In all other respects, however, the U.S. response failed to meet the criteria of lawful self-defense. A dozen years later, the Clinton Administration bombed Sudan and Afghanistan—not for any violence perpetrated by the two states, but for the suspected presence of non-state actor terrorist groups in the two states' territories.[204] The U.S. letter to the Security Council emphasized that the United States had suffered a series of terrorist attacks and that Article 51 permitted the air strikes in the circumstances.[205] "[T]he United States seemed to conceive of the response as having in part a retaliatory and in part a dissuasive function . . . ."[206] It did not aim to "halt and repel."

Clinton's attacks did not dissuade the Al Qaeda terrorist organization, which hijacked passenger planes and used them as missiles in the United States three years after the United States attacked Afghanistan and Sudan.[207] This time the Security Council made a finding that the 9/11 terrorism implicated Article 51.[208] The Council made no other findings on the additional conditions for lawful self-defense—attribution to a state, necessity, and proportionality.[209] Al Qaeda's

201. *See* Eric P.J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. CONFLICT & SEC. L. 5, 7 (2002); INGRID DETTER, THE LAW OF WAR 25 (2d ed. 2000); Henkin, *supra* note 94, at 69; *see also* Sina Etezazian, *The Nature of the Self-Defence Proportionality Requirement*, 3 J. ON USE FORCE & INT'L L. 260, 280 (2016).

202. *See U.S. Bombs Terrorist and Military Targets in Libya*, HIST.: THIS DAY IN HIST. (last visited Oct. 28, 2024), https://www.history.com/this-day-in-history/u-s-bombs-libya [https://perma.cc/HR82-W68B].

203. Acting Permanent Rep. of the United States of America to the U.N., Letter dated Apr. 14, 1986 from the Acting Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/17990 (Apr. 14, 1986).

204. *See* Cannizzaro & Rasi, *supra* note 119, at 541.

205. Permanent Rep. of the United States of America to the U.N., Letter dated Aug. 20, 1998 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998); *see also* Cannizzaro & Rasi, *supra* note 119, at 543.

206. Cannizzaro & Rasi, *supra* note 119, at 542 (discussing the decision to send U.S. missile strikes into Afghanistan).

207. *See id*. at 550.

208. *See* S.C. Res. 1373 (Sept. 28, 2001) ("Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter . . . .").

209. On the requirement that a state be responsible for the "armed attack" giving rise to the right of self-defense, see *supra* note 75 and accompanying text. For more on the general principles of necessity and proportionality as conditions of lawful self-defense, in addition to the conditions of Article 51, see *Nicaragua Case*, 1986 I.C.J. Rep. ¶ 176. *See also* HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 96–103 (1992); Rein Müllerson, *Self-Defense in the Contemporary World*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 13, 19–23 (Lori Fisler

leader, Osama bin Laden, was in Afghanistan directing the attacks, but the individuals involved in carrying them out were based in Germany. Nevertheless, the United States and the United Kingdom went to war in Afghanistan against the Taliban government. The British and American letters to the Security Council were silent on why going to war in Afghanistan was lawful beyond citing the Security Council's Article 51 finding.[210] No case was made for the Taliban's responsibility for Al Qaeda's actions or for why a war was necessary.[211]

After 20 years, the United States and the United Kingdom finally withdrew from Afghanistan in defeat.[212] Nevertheless, the "War on Terror" has continued, with persistent U.S. air strikes on at least five states.[213] The only apparent limit on attacks is that, in the view of U.S. officials, the states in which the individuals are located are "poorly governed places."[214] "Poorly governed" is another U.S.-created criterion that defies the status of an objective legal principle.[215] The United States can point to no treaty or principle of customary international law that includes it. Like the humanitarian intervention argument, "poorly governed" does not connote any specific list of characteristics. It is a phrase that can be used subjectively to fit almost any governance situation. This sort of open-ended subjective term can only be used as a lawful basis for resorting to force through the legal process of Security Council deliberation and authorization.

The war in Afghanistan and Bush's wider "War on Terror" were ongoing when the United States, the United Kingdom, and Australia invaded Iraq in 2003 in one of the most transparent attempts to date to assert the RBIO over the law of the

Damrosch & David J. Scheffer eds., 1991). *See generally* GARDAM, *supra* note 199 (discussing necessity, proportionality, and the use of force).

210. *See* Permanent Rep. of the United States of America to the U.N., Letter dated Oct. 7, 2001 from the 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 (Oct. 7, 2001); Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Oct. 7, 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001).

211. Afghanistan's Taliban leaders had poor relations with Al Qaeda and denounced its terrorist operations. The Taliban planned to hand over Osama bin Laden to Saudi officials in 1999, until the United States bombed Afghanistan. *See* LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 at 287–89 (2006). Following 9/11, the Taliban offered to hand over Al Qaeda members to any country aside from the United States, but the United States and United Kingdom invaded, and the Taliban and Bin Laden fled to Pakistan. *See* John Mueller, *What If the US Didn't Go to War in Afghanistan After 9/11?*, CATO INST. (Sept. 3, 2021), https://www.cato.org/commentary/what-us-didnt-go-war-afghanistan-after-9/11 [https://perma.cc/LXT5-CWDS].

212. *See The U.S. War in Afghanistan, 1999–2021*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/timeline/us-war-afghanistan [https://perma.cc/YV7L-5S6K] (last visited Oct. 28, 2024); Mueller, *supra* note 211.

213. *See* A. Trevor Thrall & Erik Goepner, *Step Back: Lessons for U.S. Foreign Policy from the Failed War on Terror*, POL'Y ANALYSIS CATO INST., June 2017, at 1, 4, https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-814.pdf.

214. Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. TIMES (Oct. 10, 2022), https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html.

215. *See* FULLER, *supra* note 197, at 39, 53, 212 (discussing the eight criteria to qualify as a valid legal rule).

Charter.[216] U.S. officials invoked Security Council resolutions from 1990–1991 connected with the liberation of Kuwait.[217] They specifically linked Resolution 678, which authorized the use of force against Iraq, with Resolution 687, which set out criteria for ending the conflict—including the demand that all weapons of mass destruction (WMD) programs be shut down.[218] The United States argued, as it had respecting the use of force in the Kosovo Crisis and to justify the Iraqi no-fly zones, that the old Security Council resolutions, while inadequate on their face to authorize the invasion, could be interpreted to permit it.[219] Russia and a majority of other Security Council members disagreed.[220] They strongly rejected any right to apply the old resolutions to the new situation. They also refused to vote for new authorization, so long as Iraq cooperated with international weapons inspectors, which it was doing at the time of the invasion.[221] Nevertheless, the United States, the United Kingdom, and Australia invaded. Russia's U.N. representative condemned the "unprovoked military action . . . undertaken, in violation of international law and in circumvention of the Charter."[222] In words that could have been used in the aftermath of Russia's invasion of Ukraine, he went on to say:

> However the situation concerning Iraq evolves, we cannot escape the need to search together for effective answers to new threats and challenges and to strengthen the mechanisms of the United Nations that are necessary to do so. The goal of the international community to find mutually advantageous collective solutions to global problems cannot become hostage to the situation in Iraq. However, the extent to which we can all resolve this problem together, pooling our efforts to minimize the damage caused by that crisis, will directly determine the kind of world in which we shall live in the future—be it a world based on the supremacy of international law or one in which chaos and the arbitrary use of military might prevail.[223]

U.S. officials downplayed the old resolutions in speeches before American audiences on the eve of the invasion. Instead, officials spoke in terms of the Bush doctrine of preemption.[224] The policy of using force when U.S. officials considered it prudent to act upon their assessment of a threat had already been included

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216. *See* Dugard, *supra* note 148, at 227 & n.27 (discussing the 2003 invasion of Iraq as an application of the RBIO in place of international law); *see also* Joseph Stieb, *Why Did the United States Invade Iraq? The Debate at 20 Years*, 6 TEX. NAT'L SEC. REV., Summer 2023, at 11, 17; Ackerman, *supra* note 42.

217. *See* H.R.J. Res 114, 107th Cong. (2002).

218. *See* Marc Weller, *The Iraq War—2003*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, supra note 94, at 639, 644–47, 652–53.

219. *See id*. at 646–47, 652–53.

220. *See id*. at 650.

221. *Id*. at 644. *See generally* HANS BLIX, DISARMING IRAQ (2004).

222. U.N. SCOR, 58th Sess., 4726th mtg. at 26, U.N. Doc. S/PV.4726 (Mar. 27, 2003).

223. *Id*. at 27–28.

224. *See* White House, *Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction*, *in* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF

in the 2002 U.S. National Security Strategy,[225] which departed dramatically from Article 51. Preempting future threats has been the claim underlying U.S. use of force to counter terrorism as well.

Bush's successor, President Barack Obama, taught law for years at the University of Chicago. He was in a position to understand the weakness of the U.S. legal case for the invasion of Iraq and the War on Terror. He critiqued both use of force policies on the campaign trail.[226] However, instead of ending uses of force that failed the Charter's strict tests, he and his lawyers offered yet more reinterpretations. Their first attempt exchanged Bush's "War on Terror" label for the phrase "armed conflict with al-Qaeda, the Taliban and associated forces."[227] Yet, the Administration had some people on its "kill list" who had no links to Al Qaeda.[228] Abu Bakr al-Baghdadi, the founder of ISIS, for example, was in deep conflict with Al Qaeda.[229] Others were not directly involved in violence, let alone armed conflict hostilities, such as the U.S. citizen Anwar Al-Awlaki, an Al Qaeda propagandist.[230] After much criticism, Obama's lawyers tried again, producing what became known as the "Targeted Killing" memos.[231]

The memos relied on proposals by a former U.K. Foreign Office Legal Adviser, Daniel Bethlehem, who argued that military force was permissible under the Charter if a defending state attacks another state that is "unable" or "unwilling" to deal with a terrorism problem on its soil.[232] The Obama and Biden administrations have included the words "unable" and "unwilling" in a number of letters to the U.N. Security Council to justify military operations as acts of self-defense

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AMERICA (2002), https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html [https://perma.cc/3X35-HH3A].

225. *See id.*

226. *See Obama's Remarks on Iraq and Afghanistan*, N.Y. TIMES (July 15, 2008), https://www.nytimes.com/2008/07/15/us/politics/15text-obama.html; Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES (July 30, 2008), https://www.nytimes.com/2008/07/30/us/politics/30law.html.

227. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at https://2009-2017.state.gov/s/l/releases/remarks/139119.htm [https://perma.cc/HLV2-XV2H]).

228. *See, e.g.*, Barbara Starr, *Official: U.S. Keeping ISIS Kill List*, CNN POL. (Feb. 18, 2015, 4:59 PM), https://www.cnn.com/2015/02/18/politics/us-isis-kill-list/index.html [https://perma.cc/2EDZ-QSMX].

229. *See* Daniel L. Byman & Jennifer R. Williams, *ISIS vs. Al Qaeda: Jihadism's Global Civil War*, BROOKINGS (Feb. 24, 2015), https://www.brookings.edu/articles/isis-vs-al-qaeda-jihadisms-global-civil-war [https://perma.cc/D5B8-KL46]; *see also* INT'L CRISIS GRP., EXPLOITING DISORDER: AL-QAEDA AND THE ISLAMIC STATE 18 (Mar. 14, 2016), https://www.crisisgroup.org/sites/default/files/exploiting-disorder-al-qaeda-and-the-islamic-state_0.pdf [https://perma.cc/WA73-B3XB] (discussing "aggressive IS[IS] efforts to win over al-Qaeda loyalists").

230. *See* Jameel Jaffer, *How the US Justifies Drone Strikes: Targeted Killing, Secrecy and the Law*, GUARDIAN (Nov. 15, 2016, 7:30 AM), https://www.theguardian.com/us-news/2016/nov/15/targeted-killing-secrecy-drone-memos-excerpt [https://perma.cc/G5BX-H39J].

231. DEP'T OF JUST., *supra* note 122, at 1; *see* Luca Trenta, *The Obama Administration's Conceptual Change: Imminence and the Legitimation of Targeted Killings*, 3 EUR. J. INT'L SEC. 69, 86–87 (2017).

232. *See* Bethlehem, *supra* note 171, at 776.

under Article 51.[233] The Obama Administration's first such letter to the Council said in pertinent part: "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 . . . when . . . the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."[234]

A later letter seemed to revert to the post-9/11 War on Terror justifications to explain an attack in Iraq.[235] The United States took the official position that troops were present in Iraq at the invitation of the Iraqi government.[236] Yet, no permission from Iraq was sought to carry out attacks on its territory:

> [T]he United States has taken military action in order to protect and defend the safety of its personnel, to degrade and disrupt the ongoing series of attacks . . . and to deter the Islamic Republic of Iran and Iran-backed militia groups from conducting or supporting further attacks . . . . [N]ecessary and proportionate actions were directed at facilities used by groups involved in these ongoing attacks for weapons storage, command, logistics and unmanned aerial vehicle operations. This military response was taken after non-military options proved inadequate . . . .[237]

The Biden Administration cited no fighting between U.S. personnel and the groups it attacked. No other evidence was provided of an immediate urgent situation that necessitated the use of force. U.S. operations were aimed at deterring future provocations, not halting and repelling armed attacks underway.

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233. Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc S/2014/695 (Sept. 23, 2014) [hereinafter Letter dated Sept. 23, 2014]; Permanent Rep. of the United States of America to the U.N., Letter dated Feb. 27, 2021 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc S/2021/202 (Mar. 3, 2021) [hereinafter Letter dated Feb. 27, 2021]; *see* Brian Egan, Legal Advisor, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016) (transcript available at www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil [https://perma.cc/H9B8-EFYF]) (explaining that the U.S. letter to the U.N. Security Council upon commencing air strikes in Syria in 2014 "articulated the United States' position that Syria was unable or unwilling to effectively confront the threat that ISIL posed").

234. Letter dated Sept. 23, 2014, *supra* note 233.

235. Letter dated Feb. 27, 2021, *supra* note 233.

236. Jim Garamone, *U.S., Iraq Examine New Strategic Relationship*, U.S. DEP'T OF DEF. (Aug. 8, 2023), https://www.defense.gov/News/News-Stories/Article/Article/3486494/us-iraq-examine-new-strategic-relationship [https://perma.cc/2UGC-SF8X] ("The U.S. military has troops in Iraq at the invitation of the Iraqi government to support Iraqi security forces battling the terror group [ISIS]."). *But see* Timour Azhari & Ahmed Rasheed, *Iraq Eyes Drawdown of US-Led Forces Starting September, Sources Say*, REUTERS (July 22, 2024, 5:45 PM), https://www.reuters.com/world/middle-east/iraq-eyes-drawdown-us-led-forces-starting-september-sources-say-2024-07-22 [https://perma.cc/79ZG-VHS6] ("Iraq wants troops from a U.S.-led military coalition to begin withdrawing . . . .").

237. Permanent Rep. of the United States of America to the U.N., Letter dated June 29, 2021 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2021/614 (June 30, 2021).

Russia voted in favor of the Security Council's first post-9/11 resolution and did not particularly criticize the United States' long war in Afghanistan.[238] The Soviets fought for ten years there before giving up, like the United States, in defeat.[239] Russia has, however, criticized other U.S. uses of force in the name of counterterrorism or the War on Terror. Russia's 2016 Foreign Policy Concept noted that Russia would oppose "politically motivated and self-interested attempts by some States to arbitrarily interpret the fundamental international legal norms and principles such as non-use of force or threat of force, peaceful settlement of international disputes" and "attempts to represent violations of international law as 'creative' applications of such norms."[240] This statement came after Russia's seizure of Crimea. The arguments Putin used to justify this unlawful use of force were an early signal in Russia's shift from criticizing the construction of self-serving legal interpretations to making up its own.[241]

Russia did not reach that point fully until 2022. It joined, for example, with most of the international community in vehemently protesting the U.S. assassination of a high-ranking Iranian General, Qassem Soleimani, in Baghdad in January 2020.[242] The United States used a Reaper drone to destroy two vehicles transporting Soleimani and a number of others as the group was traveling from Iraq's international airport near Baghdad to the central city.[243] After the attack, Russian Foreign Minister Sergei Lavrov spoke on the telephone with then-U.S. Secretary of State Mike Pompeo, "urg[ing] Washington to give up 'illegal military actions to achieve its goals on the international arena and to settle all problems at the

238. *See* S.C. Res. 1368 (Sept. 12, 2001). During the Security Council meeting, prior to the vote to unanimously adopt the resolution, the Russian Representative, Sergei Lavrov, expressed on behalf of the Russian leadership "our most sincere and deepest condolences . . . . What took place on 11 September once again highlights the timeliness of the task of joining the efforts of the entire international community in combating terror . . . ." U.N. SCOR, 56th Sess., 4370th mtg. at 5, U.N. Doc. S/PV.4370 (Sept. 12, 2001); *see* Christopher S. Wren, *United Nations Proposes Joint Effort Against Terrorism*, N.Y. TIMES (Sept. 28, 2001), https://www.nytimes.com/2001/09/28/international/united-nations-proposes-joint-effort-against-terrorism.html; Pavel K. Baev, *Russia and America's Overlapping Legacies in Afghanistan*, BROOKINGS (Aug. 18, 2021), https://www.brookings.edu/articles/russia-and-americas-overlapping-legacies-in-afghanistan [https://perma.cc/P9YE-HKXN].

239. Some consider the Afghanistan war a major factor in the Soviet Union's disintegration. *See* Joy Neumeyer, *How Afghanistan Changed a Superpower*, ATLANTIC (Aug. 28, 2021), https://www.theatlantic.com/ideas/archive/2021/08/afghanistan-soviet-union-superpower/619897/.

240. *The Foreign Policy Concept of the Russian Federation 2016*, VOLTAIRE NETWORK (Nov. 30, 2016), https://www.voltairenet.org/article202038.html [https://perma.cc/5QVT-RDER]; Anna Nadibaidze, *Great Power Identity in Russia's Position on Autonomous Weapons Systems*, 43 CONTEMP. SEC. POL'Y 407, 414 (2022) (quoting the 2016 Foreign Policy Concept of the Russian Federation).

241. *See* Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES (Mar. 18, 2014), https://www.nytimes.com/2014/03/19/world/europe/ukraine.html.

242. *Russia's Officials and Media Commentators React to the Killing of Soleimani*, MIDDLE E. MEDIA RSCH. INST. (Jan. 6, 2020), https://www.memri.org/reports/russia%E2%80%99s-officials-and-media-commentators-react-killing-soleimani [https://perma.cc/38US-9UHS].

243. *See* Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html.

negotiating table.'"[244] The Russian Foreign Ministry spokeswoman Maria Zakharova said that "the killing of a representative of a government of a sovereign state, an official . . . [is] completely devoid of any legal basis."[245] As late as 2021, Russia's long-serving foreign minister, Lavrov, was still putting forward a "spirited defence of international law," explaining that Russia wanted "universally accepted principles of international law to govern international affairs."[246]

3. Intervention by Invitation

The United States and France have also conducted extensive military operations on the basis of invitation. Under international law, a de facto government has the legal right to invite or consent to a foreign military presence on the state's territory. In many cases of American and French intervention, however, the party issuing the invitation has not been the de facto government and, therefore, has not been a government under international law with the capacity to issue invitations to intervene militarily. An entity must exercise effective administrative control to a substantial extent over a state's territory to qualify as a government.[247] The United States has carried out targeted killings in Somalia since at least early 2007, often on the basis of an invitation from a group in need of outside support to control just the capital of Mogadishu.[248] In Syria, by contrast, Russia has had a formal invitation from the government of Bashar al-Assad.[249] Assad retained effective control despite fighting a civil war.[250] Human rights advocates have sought to reverse the effective control argument in the case of brutal regimes like Assad's, but no adequate alternative theory for determining a government has

244. MIDDLE E. MEDIA RSCH. INST., *supra* note 242 (quoting a report by the Russian Ministry of Foreign Affairs).

245. *Russian Senator Calls U.S. Killing of Top Iranian General 'Worst Case Scenario,' Expects New U.S.-Iran Clashes*, MOSCOW TIMES (Jan. 3, 2020), https://www.themoscowtimes.com/2020/01/03/russian-senator-calls-us-killing-of-top-iranian-general-worst-case-scenario-expects-new-us-iran-clashes-a68805 [https://perma.cc/YGF3-UDP5].

246. Sebastiaan Van Severen, *Lavrov's Lament: A Russian Take on the Rules-Based Global Order*, EJIL: TALK! (July 16, 2021), https://www.ejiltalk.org/lavrovs-lament-a-russian-take-on-the-rules-based-global-order [https://perma.cc/MP2C-J3SC]; *see also* PHILIP REMLER, CARNEGIE ENDOWMENT FOR INT'L PEACE, RUSSIA AT THE UNITED NATIONS: LAW, SOVEREIGNTY, AND LEGITIMACY 3 (2020), https://carnegie-production-assets.s3.amazonaws.com/static/files/files__Remler_UN_final.pdf [https://perma.cc/M28J-K325] (quoting Lavrov).

247. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 192–94 (1986); *see also* Dem. Rep. Congo v. Uganda, 2005 I.C.J. Rep. at ¶ 168.

248. *See, e.g.*, *The War in Somalia*, NEW AM., https://www.newamerica.org/future-security/reports/americas-counterterrorism-wars/the-war-in-somalia/ [https://perma.cc/J3GM-ELXW] (last visited Oct. 29, 2024); *US Military Shows Appalling Disregard for Civilians Killed in Somalia Air Strike*, AMNESTY INT'L (Sept. 30, 2019), https://www.amnesty.org/en/latest/press-release/2019/09/us-military-shows-appalling-disregard-for-civilians-killed-in-somalia-air-strike/ [https://perma.cc/UY5X-6FSY] (quoting AFRICOM as noting that the U.S. government "conduct[ed] a precision-guided airstrike" "[i]n coordination with the Federal Government of Somalia").

249. Laura Visser, *Russia's Intervention in Syria*, EJIL: TALK! (Nov. 25, 2015), https://www.ejiltalk.org/russias-intervention-in-syria [https://perma.cc/5CU5-5H2R].

250. *See id.*

been found.[251] Moreover, other, better means exist to promote human rights than trying to deny that a party administering control over a territory is the legitimate government. Because all governments fail to honor human rights to some extent, human rights compliance is not a workable criterion for defining a government.[252] U.S. forces entered Syria in 2014 in pursuit of ISIS fighters but without an invitation. In 2021, the Russian Embassy in Washington issued a tweet pointing out that U.S. troops had no legal right to be in Syria without an invitation from the government.[253]

As the preceding paragraphs indicate, since the end of the Cold War, the United States and close allies have constructed legal arguments far removed from the actual law on the use of force. Yet, U.S. presidents still submit letters to the U.N. Security Council, as they are required to do when a use of force implicates Article 51.[254] This practice raises the question: Why bother? One logical explanation is that the effort is for the benefit of the members of the RBIO, not the international community as a whole.

II. NEGATIVE CONSEQUENCES OF COMPETING SYSTEMS

Perhaps surprisingly to Western readers, Russia's 2014 takeover of Crimea was its first major violation of U.N. Charter Article 2(4).[255] The full-scale invasion of Ukraine was its second violation—and only the second attempt by any state to conquer a sovereign state since the adoption of the Charter. These significant developments and others, such as China's increasingly provocative military activities or the use of terrorism by non-state actors as a means of fighting for self-determination, have failed to move the United States or other RBIO states to reconsider promoting their alternative model of global order. When President Biden returned to Warsaw in 2023 to mark the one-year anniversary of the Russian invasion, he mentioned "democracy" and "freedom" but left out any mention of the international legal prohibition on the use of force that is binding

251. *See, e.g.*, CHIARA REDAELLI, INTERVENTION IN CIVIL WARS: EFFECTIVENESS, LEGITIMACY, AND HUMAN RIGHTS 229, 258–62 (2021).

252. *See* Brad R. Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L.J. 384, 406, 411–12 (2015). These concerns extend to any human right to democratic governance. For sources arguing there is such an emerging right, see *supra* note 40.

253. Brendan Cole, *Russia Tells U.S. Only Their Troops Are Welcome in Syria*, NEWSWEEK (May 6, 2021, 5:45 AM), https://www.newsweek.com/syria-russia-assad-pentagon-1589111 [https://perma.cc/8UWS-5NZ8] (quoting a tweet by the Russian Embassy).

254. *See supra* notes 203 and 233 and accompanying text.

255. In 2008, Georgia launched a military operation to end a Russian peacekeeping effort in Georgia's South Ossetia province. Russia counterattacked, moving swiftly beyond South Ossetia to within thirty miles of the capital, Tbilisi. An independent fact-finding commission found Russia's counterattack excessive, meaning it violated the principle of proportionality. Georgia, however, initiated the unlawful use of force. 1 COUNCIL OF THE EUR. UNION, REPORT ON THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 10, 22–24 (2009), https://www.echr.coe.int/documents/d/echr/HUDOC_38263_08_Annexes_ENG.

on all states.[256] Biden championed NATO. He did not praise the United Nations or the U.N. Charter. As will be explained in Part III, certain legal principles and precepts do not end even when ignored or violated, but such disregard may affect compliance in the wider community. Before considering this phenomenon and how to reverse the negative impacts of the RBIO on compliance with international law, the discussion below surveys the damage of competing systems to the law against war.[257] It shows the link between Russia's two invasions of Ukraine and the post-Cold War legal claims of the United States and its allies. It also shows the negative impact on U.S. standing globally as a result of shifting support away from authentic law and global institutions to the RBIO.

A. THE UNDERMINING OF ARTICLE 2(4)

In discussing Russia's 2022 invasion, Nico Krisch has pointed to U.S. and Western actions as having undermined the Charter principles on the use of force.[258] Western violations, he argues, have "corroded" the Charter to the point it provides almost no psychological barrier, even to conquest of a sovereign state member of the United Nations.[259] The West, however, has long committed violations of the Charter without damaging the prohibition on conquest (consider, for instance, the Suez Crisis or the Vietnam War). The issue, then, is what changed to result in the wars in Ukraine and Gaza, and the answer is the West's effort to change the law itself.

It is true that long before the invention of the RBIO, violations of the Charter prohibition on force abounded.[260] As early as 1970, Thomas Franck asked in the pages of the *American Journal of International Law*, "[W]ho killed

256. *See* Joseph R. Biden Jr., President of the U.S., Remarks by President Biden Ahead of the One-Year Anniversary of Russia's Brutal and Unprovoked Invasion of Ukraine (Feb. 21, 2023) (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/21/remarks-by-president-biden-ahead-of-the-one-year-anniversary-of-russias-brutal-and-unprovoked-invasion-of-ukraine [https://perma.cc/99KN-ZXVT]); *see also* Kevin Liptak, *Biden Makes Surprise Visit to Ukraine for First Time Since Full-Scale War Began*, CNN POL. (Feb. 20, 2023, 5:15 PM), https://www.cnn.com/2023/02/20/politics/biden-ukraine-zelensky-visit-one-year-war-anniversary-intl-hnk/index.html [https://perma.cc/5U2S-Z265] (noting Biden's use of the terms "freedom" and "democracy" as well as his impending visit to Poland).

257. Dugard finds that the negative impacts of the RBIO reach beyond the use of force, but he is particularly critical of the RBIO's undermining of the law of peace. Dugard, *supra* note 148, at 231–32.

258. *See* Nico Krisch, *After Hegemony: The Law on the Use of Force and the Ukraine Crisis*, EJIL: TALK! (Mar. 2, 2022), https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis [https://perma.cc/7PPT-5UWB]; *see also* Marko Milanovic, *What Is Russia's Legal Justification for Using Force Against Ukraine?*, EJIL: TALK! (Feb. 24, 2022), https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine [https://perma.cc/8ZEK-W3QK] ("Prior violations of international law by Western allies . . . have corroded the Charter prohibition on the use of force.").

259. Milanovic, *supra* note 258; *see* Krisch, *supra* note 258.

260. Christopher Mullins found over 300 serious armed conflicts between 1945 and 2008, some of which began with a violation of Article 2(4). Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, *in* 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 67, 75–81 (M. Cherif Bassiouni ed., 2010). Since 2008, a dozen or more conflicts could be added to Mullins's list. *See* Center for Preventive Action, *supra* note 1.

Article 2(4)?"[261] He argued that repeated violations had left Article 2(4) a dead letter, no longer imposing the sense of a legal duty on states.[262] It was a case of desuetude. Franck saw Article 2(4) as only a treaty principle, not an enduring peremptory norm based on natural law theory; so, his understanding of what it would take to "kill" Article 2(4) was inaccurate.[263] Nevertheless, using Franck's own limited conception, Louis Henkin was able to quash his argument. In a memorably titled response, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, Henkin demonstrated that states treated violations of Article 2(4) as violations of law, not as conduct that had become acceptable through the fading away of the legal duty involved.[264] For example, a city may have a high murder rate, but that does not prove murder is lawful—what matters is how murder is treated in the legal system and by society. Despite the many violations of Article 2(4), Henkin discussed the fact that only a few—a "fingers-full" of cases—amounted to war.[265] No state as of the time the article was published had attempted the ultimate Charter violation of invasion and conquest of a U.N. member.[266] That did not happen until 1990, and even then, world reaction was swift and certain in defense of Article 2(4).[267] By 2022, however, regard for the prohibition had seriously waned. Such disrespect cannot eliminate a natural law principle like the prohibition on force, but it can weaken the norm's pull to compliance. The final Part of this Article is devoted to repairing that pull to compliance through renewed recognition of the law of the Charter over the RBIO.

Before reaching the proposals for reinvigorating the law against war, the case against the RBIO will be set out in more detail. Part I noted Russia's and China's long-standing opposition to RBIO positions under standard international law arguments. This Part shows the RBIO's direct influence on lowering the barriers to using major force and violence, despite the law against war having remained stable as of the end of the Cold War. This can be seen by comparing the global response to Iraq's invasion of Kuwait with the reaction thirty-two years later to Russia's invasion of Ukraine.

1. Iraq–Kuwait

The years 1989–1991 were ones of immense change as the Cold War came to an end with the collapse of the Soviet Union. Iraq took advantage of the political tumult and mixed signals from the United States to invade Kuwait. Iraq had long had grievances against Kuwait, but the invasion was an unprecedented move,

261. *See generally* Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

262. *Id.* at 809.

263. On the prohibition of force as an enduring natural law norm in distinction to a changeable positive law rule, see *infra* notes 359–413 and accompanying text.

264. *See* Henkin, *supra* note 83, at 544.

265. *Id.*

266. *See generally id.*

267. *See, e.g.*, S.C. Res. 660 (Aug. 2, 1990) ("The Security Council . . . [d]etermine[es] that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait.").

involving tens of thousands of soldiers rolling into Kuwait City to seize control on August 2, 1990.[268] The Security Council met quickly in an emergency session and demanded in Resolution 660 that Iraq's troops "withdraw immediately and unconditionally" to their locations as of August 1.[269] All members voted in favor of the resolution except Yemen, which abstained.[270] Iraq attempted to justify its actions under international law by arguing that historically, Kuwait had been part of Iraq and should never have been separated.[271] Iraq's main defense was thus its right to use force on its own territory.[272] To add weight to the argument, Iraq complained of Kuwait cheating Iraq out of oil revenues from shared oil fields, Kuwait's retention of two islands rightfully belonging to Iraq, and other territorial and economic issues.[273]

U.N. members overwhelmingly rejected the arguments as inadequate in light of the Article 2(4) prohibition and the duty to resolve all disputes peacefully in compliance with Charter Articles 2(3) and 33.[274] Even a state with a colorable territorial claim may not use force to alter the status quo. Any attempt to do so implicates the duty of all states not to recognize the results of an unlawful use of force. In 1970, the General Assembly spelled out these principles in its Declaration on Friendly Relations:

> Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States. . . . No territorial acquisition resulting from the threat or use of force shall be recognized as legal.[275]

When Iraq had not withdrawn from Kuwait by August 5, 1990, the Security Council adopted Resolution 661, imposing comprehensive

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268. R.W. Apple Jr., *Invading Iraqis Seize Kuwait and Its Oil; U.S. Condemns Attack, Urges United Action*, N.Y. TIMES (Aug. 3, 1990), https://www.nytimes.com/1990/08/03/world/iraqi-invasion-invading-iraqis-seize-kuwait-its-oil-us-condemns-attack-urges.html.

269. S.C. Res. 660, *supra* note 267, ¶ 2.

270. *See id.*

271. *See* Erika De Wet, *The Gulf War—1990–91*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH, *supra* note 94, at 456, 456; *see also* Judith Bell et al., *Iraq-Kuwait*, *in* BORDER AND TERRITORIAL DISPUTES 244, 244–46 (Alan J. Day ed., 2d ed. 1987).

272. *See* De Wet, *supra* note 271, at 456.

273. *See id. See generally* Samuel L. Aber, *Worldmaking at the End of History: The Gulf Crisis of 1990–91 and International Law*, 117 AM. J. INT'L L. 201 (2023) (providing an account of the "modern international [world] order" that prevailed during Iraq's invasion of Kuwait).

274. U.N. Charter art. 2, ¶ 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."); *id.* art. 33, ¶ 1("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."); *id.* art. 33, ¶ 2 ("The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.").

275. G.A. Res. 2625 (XXV), *supra* note 43, at 122–23.

economic sanctions.[276] Sanctions also failed; thus, on November 29, the Council adopted Resolution 678, authorizing the use of force to enforce the demand on Iraq to withdraw all troops from Kuwait.[277] The Council voted 12 to 2, with Cuba and Yemen voting against and China abstaining.[278] The Resolution gave Iraq six weeks to leave Kuwait before counter-military action would begin.[279] Next, "the Soviet Union undertook several diplomatic efforts through meetings with Iraqi leaders and representatives of the . . . United States."[280] Iraq rejected the overtures and refused to end its occupation.[281] On January 16, 1991, a massive U.S.-led military coalition began bombing key sites in Iraq, followed by a ground invasion involving almost 700,000 U.S. troops on February 24.[282] One hundred hours later, Kuwait was liberated, and Iraq agreed to the terms of Security Council Resolution 687 to establish peace.[283] President Bush declared that the success was the beginning of a new world order under the rule of law.[284]

From the near-unanimous initial vote in the Security Council to the comprehensive plan to ensure peace between Iraq and Kuwait in Resolution 687, states generally followed the procedures laid out in the Charter and international law. Some U.S. officials sympathetic to the emerging RBIO thinking wanted Saddam Hussein, Iraq's President, ousted in favor of a democratic, pro-U.S. candidate. Bush rejected that call. [285] His decision aligned with the legal requirement to use only the force necessary to liberate and defend Kuwait. His decision thus conformed to the scope of the Security Council's authorization, with Article 51, and with related principles of general international law—in particular, necessity and proportionality. Yet, when Bush lost the next presidential election, the United States moved in a new direction, away from the Charter and toward the RBIO and the next attempt to eliminate a fully sovereign state—Russia's invasion of Ukraine.

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276. *See* S.C. Res. 661, ¶ 3 (Aug. 6, 1990).

277. *See* S.C. Res. 678, ¶ 2 (Nov. 29, 1990).

278. *Id.*

279. *See id.* ¶ 2.

280. De Wet, *supra* note 271, at 457–58.

281. *See id.* at 258.

282. *See* David Vergun, *Nation Observes Anniversary of Operation Desert Storm*, U.S. DEP'T OF DEF. NEWS (Jan. 15, 2022), https://www.defense.gov/News/News-Stories/Article/article/2879147/nation-observes-anniversary-of-operation-desert-storm/ [https://perma.cc/L6RG-VKVY]; Shannon Collins, *Desert Storm: A Look Back*, U.S. DEP'T OF DEF. (Jan. 11, 2019), https://www.defense.gov/News/Feature-Stories/Story/article/1728715/ [https://perma.cc/3HZW-TT4U].

283. *See* Collins, *supra* note 282.

284. *See* George H.W. Bush, President of the United States, Address to the Nation on the Suspension of Allied Offensive Combat Operations in the Persian Gulf (Feb. 27, 1991) (transcript available at https://www.govinfo.gov/content/pkg/PPP-1991-book1/pdf/PPP-1991-book1-doc-pg187.pdf [https://perma.cc/56QS-UG5C]); George H.W. Bush, President of the United States, Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit (Sept. 11, 1990) (transcript available at https://bush41library.tamu.edu/archives/public-papers/2217 [https://perma.cc/4S97-WFML]).

285. *See* Fred Kaplan, *Why Did We Invade Iraq?*, N.Y. REV. BOOKS (July 22, 2021), https://www.nybooks.com/articles/2021/07/22/why-did-we-invade-iraq (reviewing ROBERT DRAPER, TO START A WAR: HOW THE BUSH ADMINISTRATION TOOK AMERICA INTO IRAQ (2020)).

2. Russia–Ukraine

Unlike Kuwait, Ukraine was not a fully sovereign state when it first became a member of the United Nations in 1945.[286] At the time, Ukraine was one of fifteen constituent republics of the Soviet Union.[287] While it had most of the necessary features of a sovereign state, including a government, population, and defined territory, Ukraine was not free to conduct its own foreign affairs separately from Moscow.[288] This fact was widely acknowledged, and few outside the Soviet sphere of influence recognized Ukraine as independent. As the Soviet Union was collapsing, the leaders of the Soviet Socialist Republic of Ukraine held a republic-wide referendum on independence.[289] In December 1991, over 92% of Ukrainian voters voted in favor of independence.[290] Ukraine retained its pre-1991 borders under the agreement. By then, there was no doubt that Ukraine was a fully sovereign state with internationally recognized borders and the right to noninterference from Russia or any other state.

Russia respected Ukraine's independence and borders until February 27, 2014, when its troops entered Crimea from the Black Sea port of Sevastopol, where Russia had treaty rights to a naval base.[291] The seizure of Crimea occurred against the backdrop of pro-Western civil unrest sweeping Ukraine in 2013 and 2014.[292] Ukraine's then-President Viktor Yanukovych requested Russian military assistance in restoring order and ultimately in helping him flee the country for his own

286. *See* Andrij Makuch & Lubomyr A. Hajda, *Ukraine in the Interwar Period*, BRITANNICA, https://www.britannica.com/topic/history-of-Ukraine/Ukraine-in-the-interwar-period [https://perma.cc/HAD5-PLFV] (last visited Oct. 29, 2024).

287. *Union of Soviet Socialist Republics Summary*, BRITANNICA, https://www.britannica.com/summary/Soviet-Union [https://perma.cc/8Q66-VZLK] (last visited Oct. 29, 2024).

288. For the common factors constituting states, see generally SEVENTH INT'L CONF. AM. STATES, MONTEVIDEO CONVENTION ON THE RIGHTS AND DUTIES OF STATES (1933), https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf [https://perma.cc/2VMP-9PX5] and JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2d ed. 2007).

289. *25 Years of Independence: The Ukrainian Referendum*, WILSON CTR. (Dec. 1, 2016), https://www.wilsoncenter.org/event/25-years-independence-the-ukrainian-referendum [https://perma.cc/D85M-PSQR]; *see also* Adam Twardowski, *The Return of* Novorossiya*: Why Russia's Intervention in Ukraine Exposes the Weakness of International Law*, 24 MINN. J. INT'L L. 351, 354–56 (2015). Six attempts were made during the twentieth century alone to establish an independent state of Ukraine, culminating in 1991. During the nineteenth century, present-day Ukraine was mostly divided into east and west between Tsarist Russia and the Austro–Hungarian Empire along the Dnieper River. This division largely accounts for the language, religious, and identity distinctions of today. Prior to 2022, Ukraine was more heavily Russian and Orthodox in the east, and Ukrainian and Catholic in the west. *See generally* PAUL ROBERT MAGOCSI, A HISTORY OF UKRAINE: THE LAND AND ITS PEOPLES (2d ed. 2010); SERHY YEKELCHYK, UKRAINE: BIRTH OF A MODERN NATION (2007).

290. WILSON CTR., *supra* note 289.

291. *See* Martin Hurt, *Lessons Identified in Crimea – Does Estonia's National Defence Model Meet Our Needs?*, ESTONIAN WORLD (May 5, 2014), https://estonianworld.com/security/lessons-identified-crimea-estonias-national-defence-model-meet-needs [https://perma.cc/4LUL-TWZ7]; *History of Crimea*, BRITANNICA (Nov. 1, 2024), https://www.britannica.com/place/Crimea/History [https://perma.cc/ZW7F-H8JX].

292. *See* Gabriela Baczynska, Pavel Polityuk & Raissa Kasolowsky, *Timeline: Political Crisis in Ukraine and Russia's Occupation of Crimea*, REUTERS (Mar. 8, 2014, 2:26 PM), http://www.reuters.com/article/us-ukraine-crisis-timeline-idUSBREA270PO20140308.

safety.[293] Ukraine's parliament had voted just days before to remove him from office and charge him with mass murder in the deaths of pro-Western protestors.[294] Russia did help Yanukovych leave—but instead of helping restore him to office, Russian troops took control of Crimea.[295] Yanukovych later expressed regret for the invitation, but Putin ignored him, holding onto the peninsula.[296] In response, the Ukrainian Interim President ordered Ukraine's armed forces to mobilize.[297] Although Ukraine ultimately withdrew its troops,[298] it has never consented or acquiesced to Russian control of Crimea. Indeed, Ukrainian officials have persistently objected to and challenged the annexation in multiple international forums.[299]

Ukraine had more success against Russia in its eastern provinces. Pro-Russian separatists began an armed action to secede from Ukraine and join Russia, but Ukraine was able to hold on to the region. Fighting continued, however, thanks to extensive Russian assistance to the separatists.[300] Germany and France attempted to broker two ceasefire agreements in the East, known as "Minsk I" and "Minsk II."[301] These had little impact.[302] As it was, the fighting went on for eight years until it was engulfed by the full-scale invasion.

States did much to defend Kuwait in 1990 but very little to defend Ukraine in 2014. The impact of the RBIO is evident. Involvement in a military crisis was simply seen as not worth the cost. German Chancellor Angela Merkel wanted to

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293. *See* Statement by the President of Ukraine, Letter dated Mar. 3, 2014 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/146, annex (Mar. 3, 2014).

294. *See* Baczynska at al., *supra* note 292.

295. *See* Caro Kriel & Vladimir Isachenkov, *AP Interview: Yanukovych Admits Mistakes on Crimea*, AP (Apr. 2, 2014, 4:30 PM), https://apnews.com/general-news-8b795952e78a47a3beff026800eb508a# [https://perma.cc/ED8P-9CNW].

296. *Id.*; *see also Ukraine Profile – Timeline*, BBC (Mar. 5, 2020), http://www.bbc.com/news/world-europe-18010123 [https://perma.cc/X7M8-QLEL].

297. *See* Alison Smale & Steve Erlanger, *Ukraine Mobilizes Reserve Troops, Threatening War*, N.Y. TIMES (Mar. 1, 2014), https://www.nytimes.com/2014/03/02/world/europe/ukraine.html.

298. *See* Claire Phipps & Ben Quinn, *Ukraine Pulls Forces Out of Crimea as Russia Takes Over Military Bases*, GUARDIAN (Mar. 24, 2014, 7:10 PM), https://www.theguardian.com/world/2014/mar/24/ukraine-crimea-russia-military-bases-live [https://perma.cc/42PH-FCGR].

299. *See, e.g.*, *UN Resolution Condemns Russia's Occupation of Crimea*, AL JAZEERA (Dec. 10, 2019), https://www.aljazeera.com/news/2019/12/10/un-resolution-condemns-russias-occupation-of-crimea [https://perma.cc/2DEZ-K36S].

300. *See* The Associated Press, *9,333 Killed Since Ukraine Conflict Began, U.N. Says*, N.Y. TIMES (Apr. 28, 2016), https://www.nytimes.com/2016/04/29/world/europe/9333-killed-since-ukraine-conflict-began-un-says.html.

301. *Ukraine-Russia Crisis: What Is the Minsk Agreement?*, AL JAZEERA (Feb. 9, 2022), https://www.aljazeera.com/news/2022/2/9/what-is-the-minsk-agreement-and-why-is-it-relevant-now [https://perma.cc/SWD6-9NJE].

302. *See id.* The Minsk process might have been abandoned were it not for the fact that a Malaysian passenger plane traveling from the Netherlands to Kuala Lumpur, Malaysia, was shot down over Ukraine. The evidence pointed to a Russian anti-aircraft weapon as the cause of the disaster. *See* Mike Corder & Raf Casert, *3 Convicted in 2014 Downing of Malaysian Jet Over Ukraine*, AP (Nov. 18, 2022, 2:12 AM), https://apnews.com/article/russia-ukraine-business-kuala-lumpur-malaysia-netherlands-099084a82b49b77b116878e24fc63a18 [https://perma.cc/B99G-LMJV].

continue natural gas purchases from Russia.[303] Cutting those purchases and imposing tough sanctions immediately might have persuaded Russia to withdraw from Crimea before its position had hardened. However, advanced economies were still dealing with the 2008–2009 financial crisis, and Germany had the additional challenge of stabilizing the European currency.[304] The United States and other states imposed some limited economic sanctions on Russia in the form of bans on export of technology and bank financing for oil and gas exploration, as well as some travel bans on individuals, with no real results.[305] By 2014, the West had been manipulating the meaning of Articles 2(4) and 51 for almost twenty-five years, reducing it to little more than a guideline without binding power—hardly worth even the sacrifice of money. Putin cynically invoked "the well-known Kosovo precedent - a precedent our Western colleagues created with their own hands in a very similar situation" as a justification for seizing Crimea.[306] In addition, the United States and the United Kingdom were still fighting in Afghanistan and Iraq after more than a decade. The War on Terror was continuing and failing to stem terrorist organizations as they spread to multiple North African states. Libya was in turmoil following NATO's excessive use of force in 2011, leading to the challenge of mass migration through its chaotic borders.[307] Moreover, realists were adding criticism of international law to the RBIO's negative impact on the Charter and the will to uphold it. Realists asserted that it was natural for Russia to react as it did in Ukraine to NATO expansion and pointless to resist it.[308] Some advocated for a new division of the world into three spheres

303. *See Merkel Says in Kyiv That Natural Gas Should Not Be 'Geopolitical Weapon*,' RADIO FREE EUR./RADIO LIBERTY (Aug. 22, 2021, 1:49 PM), https://www.rferl.org/a/merkel-ukraine-russia-crimea/31422208.html [https://perma.cc/6K4S-Y5HZ].

304. *See* Stefan Auer, *Carl Schmitt in the Kremlin: The Ukraine Crisis and the Return of Geopolitics*, 91 INT'L AFFS. 953, 960 (2015).

305. *Ukraine and Russia Sanctions*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/e/eb/tfs/spi/ukrainerussia [https://perma.cc/F7DL-NS7F] (last visited Oct. 29, 2024) (discussing sanctions imposed in 2014).

306. Vladimir Putin, President of the Russian Federation, Address by the President of the Russian Federation on Crimea (Mar. 18, 2014) (transcript available at https://www.bbc.com/news/world-europe-26652058 [https://perma.cc/X4HQ-HTZU]); *see also* Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 ZaöRV 367, 372 (2014) (explaining that Russia also justified the legality of its invasion of Crimea based on the protection of nationals abroad and intervention upon invitation). *See generally* Paul Lewis, Spencer Ackerman & Jon Swaine, *US Concedes Russia Has Control of Crimea and Seeks to Contain Putin*, GUARDIAN (Mar. 3, 2014, 2:56 AM), https://www.theguardian.com/world/2014/mar/02/us-russia-crimea-ukraine-putin [https://perma.cc/EM9R-D4BC].

307. *See* Steven Feldstein, *Moral Failure in Libya*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 22, 2018), https://carnegieendowment.org/posts/2018/05/moral-failure-in-libya?lang=en [https://perma.cc/W5XC-2ZM6].

308. *See, e.g.*, John J. Mearsheimer, *Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions That Provoked Putin*, FOREIGN AFFS. (Aug. 18, 2014), https://www.foreignaffairs.com/articles/russia-fsu/2014-08-18/why-ukraine-crisis-west-s-fault; Isaac Chotiner, *Why John Mearsheimer Blames the U.S. for the Crisis in Ukraine*, NEW YORKER (Mar. 1, 2022), https://www.newyorker.com/news/q-and-a/why-john-mearsheimer-blames-the-us-for-the-crisis-in-ukraine [https://perma.cc/MUR4-7HZY].

of influence—respectively under the United States, Russia, and China—with new rules to support the division.[309]

In 2022, the United States, the European Union, Japan, and other states took more substantive action than in 2014. They quickly imposed a variety of sanctions on Russia and Russian nationals and rushed military equipment to Ukraine. At the United Nations, the General Assembly held its vote of condemnation—discussed at the outset of this Article.[310] Initiatives were undertaken, aimed at holding Putin individually accountable for the crime of aggression.[311] Investigators poured into Ukraine to gather evidence of war crimes and other human rights violations, including the mass transfer of children, violence against prisoners-of-war and detainees, and looting and destruction of Ukraine's cultural heritage.[312] Nevertheless, the West's record on the use of force is a critical factor in understanding why Russian leaders felt no compunction in 2014 about using force unlawfully or in 2022 about committing the ultimate Article 2(4) violation: conquest.[313] The West's record also helps explain the significant number of states that have failed to condemn Russia's action.[314]

As in 2014, Putin adopted versions of U.S. RBIO arguments, including those on humanitarian intervention, expansionist self-defense, and intervention by invitation of non-government entities.[315] The humanitarian intervention claim was particularly brazen. Putin claimed the invasion was a "special military operation" to "demilitariz[e]" and "denazif[y]" Ukraine and specified the need to defend the human rights of ethnic Russians.[316] The need to protect ethnic Russians blended into another of Putin's claims that Ukraine is legally part of Russia. Like Saddam

309. *See, e.g.*, Azeem Ibrahim, *A New Cold War Needs Its Own Rules*, FOREIGN POL'Y (June 6, 2024, 4:16 PM), https://foreignpolicy.com/2024/06/06/china-cold-war-rules-competition [https://perma.cc/L55H-HRDS] (discussing "[a] new cold war" between the United States and China). For a discussion of the rise of the BRICS as an alternative to Western leadership, see *supra* notes 20 and 56 and accompanying text.

310. *See supra* note 7 and accompanying text.

311. *See A New Court to Prosecute Russia's Illegal War?*, INT'L CRISIS GRP. (Mar. 29, 2023), https://www.crisisgroup.org/global-ukraine/new-court-prosecute-russias-illegal-war [https://perma.cc/8CUT-TBML].

312. *See, e.g.*, ANDREW S. BOWEN & MATTHEW C. WEED, CONG. RSCH. SERVS., WAR CRIMES IN UKRAINE 5–8, 14–16 (2023), https://crsreports.congress.gov/product/pdf/R/R47762 [https://perma.cc/U4U7-LNHJ].

313. Antonova, *supra* note 2 ("Russian President Vladimir Putin confirmed that in Ukraine, he is fighting a war of imperialist conquest . . . ."). Putin ordered the invasion of Ukraine to restore "the Russian Empire, a dream he'd harbored since witnessing the collapse of the Soviet Union." Kaplan, *supra* note 2.

314. *See supra* notes 7–8 and accompanying text.

315. *See* Vladimir Putin, President of the Russian Federation, Address by the President of the Russian Federation (Feb. 21, 2022) [hereinafter Address by President Putin (Feb. 21, 2022)] (transcript available at http://en.kremlin.ru/events/president/news/67828 [https://perma.cc/GFR2-8A9U]); Address by President Putin (Feb. 24, 2022), *supra* note 52 (discussing Libya, Iraq, and Syria as examples of such actions by the West); *see also* Milanovic, *supra* note 258; James A. Green, Christian Henderson & Tom Ruys, *Russia's Attack on Ukraine and the* Jus ad Bellum, 9 J. USE FORCE & INT'L L. 4, 7–23 (2022).

316. Associated Press, *1 Year After the Invasion Began, a Timeline of Russia's War in Ukraine*, PBS NEWS (Feb. 19, 2023, 10:25 AM), https://www.pbs.org/newshour/world/1-year-after-the-invasion-began-a-timeline-of-russias-war-in-ukraine.

Hussein did with respect to Kuwait, Putin constructed a history in which Ukraine is part of Russia, whereby the invasion was intended to reunite a single state that had been unlawfully divided.[317] If Russia and Ukraine are one state, there is no inter-state use of force in violation of Article 2(4). This position reverses the view Russia held in 1990, when it voted with the vast majority of states to demand that Iraq withdraw behind the borders of Kuwait—the borders Kuwait had when it became a member of the United Nations in 1963.[318] Russia has also rejected Israel's assertion of historic rights to territory within the borders of Syria and Lebanon.[319] Just prior to the start of the 2022 invasion, a Russian diplomat made clear that "Russia doesn't recognize Israel's sovereignty over [the] Golan Heights that are part of []Syria."[320]

The justification that the United States has used the most under the RBIO is a central feature of Putin's claims—the assertion of a right of preemptive self-defense. Putin argued that Russia has a right to preempt NATO expansion. He had for years opposed any move by Ukraine to join NATO. In a long speech just before the full-scale invasion, he again cited Ukraine's interest in joining NATO, but this time used the complaint as a reason to use force.[321] Putin declared that Russia was facing future threats against which it had to respond.[322] Preempting a future threat is the same argument that was made by the United States, the United Kingdom, and Australia to justify invading Iraq in 2003.[323] In both cases, force was used to prevent greater potential future threats as understood by Putin in one case and by Bush and the United States' allies in the other. In making the claim, Russia reversed its past official positions that rejected preemptive uses of force. Russian officials also suggested that Ukraine was developing biological weapons

317. *See* Vladimir Putin, *On the Historical Unity of Russians and Ukrainians,* PRESIDENT OF RUSS. (July 12, 2021, 5:00 PM), http://en.kremlin.ru/events/president/news/66181 [https://perma.cc/5D9M-L5XE]; *see also* Address by President Putin (Feb. 21, 2022), *supra* note 315 (claiming "the territory of modern Ukraine was formed" when "Khrushchev took Crimea away from Russia . . . and also gave it to Ukraine"); Al Jazeera Staff, *'No Other Option': Excerpts of Putin's Speech Declaring War*, AL JAZEERA (Feb. 24, 2022), https://www.aljazeera.com/news/2022/2/24/putins-speech-declaring-war-on-ukraine-translated-excerpts [https://perma.cc/GU5L-ZQZN].

318. *See* S.C. Res. 660, *supra* note 269, ¶ 2.

319. *See* U.S. Mission Isr., *Proclamation on Recognizing the Golan Heights as Part of the State of Israel*, U.S. EMBASSY IN ISR. (Mar. 27, 2019), https://il.usembassy.gov/proclamation-on-recognizing-the-golan-heights-as-part-of-the-state-of-israel [https://perma.cc/FEE3-STML]; Tovah Lazaroff, *Russia Takes Issue with Israel's Sovereignty Over Golan Heights and Jerusalem*, JERUSALEM POST (Feb. 24, 2022, 7:28 PM), https://www.jpost.com/middle-east/article-698512 [https://perma.cc/5BML-THX7]. *See generally* Iain Scobbie & Sarah Hibbin, *The Israel-Palestine Conflict in International Law:* Territorial Issues (SOAS School of Law, Research Paper No. 2, 2010).

320. Lazaroff, *supra* note 319.

321. Address by President Putin (Feb. 24, 2022), *supra* note 52.

322. *Id.*

323. *See* Rajeesh Kumar, *Iraq War 2003 and the Issue of Pre-emptive and Preventive Self-Defence: Implications for the United Nations*, 70 INDIA Q. 123, 129 (2014); Jonathan Steele, Opinion, *Compare Iraq with Ukraine. It's Clear the Era of US Global Supremacy Is Over*, GUARDIAN (Mar. 20, 2023, 4:00 AM), https://www.theguardian.com/commentisfree/2023/mar/20/iraq-ukraine-us-global-supremacy-washington-power-china-global-south [https://perma.cc/9EPH-DJUU].

as another basis for justifying the use of force in self-defense.[324] Russia made these arguments despite criticizing the United States, the United Kingdom, and Australia for having invaded Iraq in 2003 to prevent the development of weapons of mass destruction.

Russia has also asserted a right to intervene on the basis of invitation. The invitations came from non-state actor armed groups in Eastern Ukraine[325] comparable to those the United States, the United Kingdom, and France have cited as issuing invitations authorizing them to fight in Syria and Yemen. Unlike governments in effective control of territory, organized armed groups have no right to issue such invitations.[326]

The Russian President condemned the West's pro-RBIO attitude even while he adopted the RBIO approach of manipulating the law to serve his purpose. In his pre-invasion speech, he asked:

> Why is this happening? Where did this insolent manner of talking down from the height of their exceptionalism, infallibility and all-permissiveness come from? What is the explanation for this contemptuous and disdainful attitude . . .? [T]he fundamental norms that were adopted following WWII and largely formalised its outcome – came in the way of those who declared themselves the winners of the Cold War.[327]

Russia jettisoned those norms, too, in a form of *tu quoque*:[328] if the United States can use force in violation of the Charter, so can Russia. Likewise, if the United States and Western states have special rights to make claims of justification regardless of standard legal interpretation, Russia has the same privilege.[329] Nevertheless, despite the similarities to RBIO claims and the causal links, the Russian invasion of Ukraine has taken the misinterpretation and violation of international law to a level not seen since Iraq's invasion of Kuwait.

Other examples of the RBIO's damage can also be cited. Since the start of the 2022 invasion, China, too, appears poised to shift from critiquing U.S. uses of force to adopting similar claims to exceptional rights.[330] RBIO arguments co-opted by Russia are now linked to growing concerns that China will take

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324. *See* Press Release, Security Council, United Nations Unaware of Any Biological Weapons Programmes in Ukraine, Top Disarmament Official Affirms, as Security Council Considers New Claims by Russian Federation, U.N. Press Release SC/14890 (May 13, 2022) [https://perma.cc/S9JN-9VKJ].

325. *See* Address by President Putin (Feb. 24, 2022), *supra* note 52.

326. *See supra* Section I.C.3.

327. Address by President Putin (Feb. 24, 2022), *supra* note 52.

328. *Tu quoque*, OXFORD ENG. DICTIONARY (last visited Oct. 29, 2024), https://www.oed.com/search/dictionary/?scope=Entries&q=tu+quoque [https://perma.cc/T454-LYFD].

329. *See* Address by President Putin (Feb. 24, 2022), *supra* note 52.

330. *See* Lanxin Xiang, Opinion, *US Talk of Defending the 'Rules-Based Order' Is Fooling No One,* S. CHINA MORNING POST (Jan. 21, 2023, 1:30 AM), https://www.scmp.com/comment/opinion/united-states/article/3207366/us-talk-defending-rules-based-order-fooling-no-one [https://perma.cc/SQ6B-48X2].

advantage of eroding norms to invade Taiwan.[331] China's President, Xi Jinping, has also followed visits by U.S. and other Western officials to Taiwan with demonstrations of military force.[332] In addition, leaders in Ethiopia and Sudan have chosen armed conflict to suppress opposition and consolidate their control without regard for human rights.[333] Any expansion of Article 2(4) to prohibit resort to civil war or resort to war in situations of long-term occupation is frozen. Turkey has provided extensive military training, weapons, and drone pilots to Azerbaijan in its military efforts against the Armenian population of Nagorno-Karabakh, which resulted in a two-day conflict and the evacuation of thousands from the region.[334] In Gaza, resistance groups have resorted to carrying out military operations in the exercise of self-determination against Israel's occupation.[335] Under international law, terrorism is never permissible, even as a form of self-defense or for other lawful goals, such as self-determination. Additionally, all use of force must have a chance of success against the adversary. Israel, too, has failed to honor the law explicated in the 2004 advisory opinion of the I.C.J., which held that Israel may not invoke self-defense under Article 51 as justification to use armed force on territory it occupies.[336] The failure to expand Article 2(4)'s reach to civil war is another casualty of the RBIO's pressure on the Charter regime.

The impact of this persistent disrespect for the prohibition on force was seen when Putin barely hesitated before crossing the legal barrier to conquering a sovereign state member of the United Nations.[337] That line had only been crossed once before since the adoption of the U.N. Charter in 1945, when Iraq invaded Kuwait in 1990.[338] Russia's attempt to seize Ukraine poses an arguably greater challenge than Iraq's invasion of Kuwait: it comes after the prohibition on force

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331. *See, e.g.*, David Sacks, *How Taiwan Is Assessing and Responding to Growing Threats from China*, COUNCIL ON FOREIGN RELS. (Nov. 14, 2022, 12:14 PM), https://www.cfr.org/blog/how-taiwan-assessing-and-responding-growing-threats-china [https://perma.cc/LLB8-4XYB].

332. *Id.*

333. *See* Abdi Latif Dahir, *Details in Ethiopia's Peace Deal Reveal Clear Winners and Losers*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/world/africa/ethiopia-tigray-civil-war-agreement.html; Declan Walsh & Abdi Latif Dahir, *War in Sudan: How Two Rival Generals Wrecked Their Country*, N.Y. TIMES (Aug. 13, 2024), https://www.nytimes.com/article/sudan-khartoum-military.html.

334. *See* Marianne Hanson, *The Nagorno-Karabakh Conflict: Increasingly Deadly and Destabilising*, LOWY INST.: INTERPRETER (Oct. 16, 2020), https://www.lowyinstitute.org/the-interpreter/nagorno-karabakh-conflict-increasingly-deadly-destabilising [https://perma.cc/LE32-W5JM]; *Nagorno-Karabakh Conflict*, CTR. FOR PREVENTIVE ACTION (Mar. 20, 2024), https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict [https://perma.cc/M4ZA-AP8R].

335. *See* Belal Ali AbuHasballah, *The Palestinian Operation on October 7 Between International Legitimacy and Criminalization*, 6 INT'L J. L. & POL. STUD. 87, 87–95 (2024) (discussing this characterization of the Palestinian groups' actions).

336. *Wall Case*, 2004 I.C.J. Rep. ¶ 139. Since 2004, Israel has continued to launch military operations in Gaza and the occupied Palestinian territories. *See* AbuHasballah, *supra* note 335, at 89.

337. Russian leaders did put forward a list of demands, widely considered to be unrealistic, eight weeks prior to the invasion. *See* Andrew Roth, *Russia Issues List of Demands It Says Must Be Met to Lower Tensions in Europe*, GUARDIAN (Dec. 17, 2021, 9:16 AM), https://www.theguardian.com/world/2021/dec/17/russia-issues-list-demands-tensions-europe-ukraine-nato [https://perma.cc/WV3R-EEPL].

338. *See* De Wet, *supra* note 271, at 456.

and the principle of equality among states, upon which all international law depends, have been actively undermined for decades by Western uses of force and claims of a Western rule-based order. When Kuwait was invaded, the world came together in near unanimity regarding the significance of Iraq's breach of international law, not only for Kuwait but for the global community as a whole. In February 2022, however, the global community was divided.[339] Kuwait was liberated in less than seven months, following only 100 hours of combat.[340] The comparison underscores that the loss of understanding and commitment to fundamental international legal principles has grave consequences.

B. U.S. STANDING ON DISAPPEARING GROUND

As just recounted, the most serious and tangible damage of the RBIO has been to undermine respect for the prohibition on the use of force. Damage to other international law principles and institutions is also evident. Russia and China's leaders have perceived that the United States and other RBIO members have suffered no negative consequences in their pursuit of superior status at the expense of legal principles of equality and peace. Both have indicated a change of course from rejecting the RBIO to creating their own versions of it, such as through the BRICS, founded by Brazil, Russia, India, China, and later South Africa, and other groupings. More importantly, the United States and Western RBIO members have sacrificed their standing in the world that they had gained through promoting the Charter, other legal norms adopted through legitimate law-making processes, and multilateral institutions from the United Nations to the I.C.J.[341] Commitment to the RBIO sends a different message.

Shirley Scott finds that the loss of U.S. standing is directly related to promoting the RBIO.[342] She predicted that Russia, China, and others would create their own RBIOs:

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339. Since 2022, there has been a notable further decline in support for Ukraine and criticism of Russia. *See* Josh Holder, Lauren Leatherby, Anton Troianovski & Weiyi Cai, *The West Tried to Isolate Russia. It Didn't Work.*, N.Y. TIMES (Feb. 23, 2023), https://www.nytimes.com/interactive/2023/02/23/world/russia-ukraine-geopolitics.html.

340. *See* Andrew Rosenthal, *War in the Gulf: The President; Bush Halts Offensive Combat; Kuwait Freed, Iraqis Crushed*, N.Y. TIMES (Feb. 28, 1991), https://www.nytimes.com/1991/02/28/world/war-gulf-president-bush-halts-offensive-combat-kuwait-freed-iraqis-crushed.html.

341. For example, the United States is credited with and gained stature from drafting the U.N. Charter. For a comprehensive history of the U.S. role in the drafting of the Charter, see generally STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS: A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD (2003).

The United States also played a leading role in other international law initiatives, such as the comprehensive UNCLOS. *See supra* note 162. The United States then infamously refused to join the convention when Reagan raised objections about the United States' ability to profit from deep seabed mining. *See Statement on United States Action Concerning the Conference on the Law of the Sea*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, NAT'L ARCHIVES (July 9, 1982), https://www.reaganlibrary.gov/archives/speech/statement-united-states-actions-concerning-conference-law-sea [https://perma.cc/3WQJ-MA3S]. As recounted above, the RBIO began under Reagan. *See supra* notes 109–11 and accompanying text.

342. *See* Scott, *supra* note 149, at 641–42.

> Although it is unlikely to be the intention of Western policy-makers using the term, another state using the ideology to seek to constrain United States policy choices could, particularly as other states have increasing influence over the design of new institutions and norms, potentially use the term against the United States.[343]

This is happening in the form of the BRICS and the many states refusing to support Ukraine.[344] The result is weaker law for the international community as a whole, making it more difficult to maintain peace, ensure compliance with human rights law, address climate change and global health challenges, and generally support the flourishing of all humanity.[345]

Despite any impression President Putin or President Xi may have had in 2022, however, U.S. status has actually waned the farther it has moved from authentic international law and the closer to the RBIO. The failure of so many states to follow the United States at the United Nations in condemning the Russian invasion is an objective indicator of decline in standing compared with 1990. Historically, the United States has been able to use international law to influence other states because the international community generally agreed on international law as an unbiased standard.[346] If the RBIO continues to be the basis of U.S. foreign and security policy at the expense of international law, "the United States [will] no longer be able to draw on the ideal [of international law] as a basis on which to influence the policy choices of other states."[347] The world will care little whether actions or policies of any state are "found to be inconsistent with international law."[348] The belief will grow that not only the prohibition on force but all international law "is dead."[349]

III. REVERSING NEGATIVE IMPACTS OF THE RBIO

The rise of the RBIO and the descent into war in Ukraine and Gaza demonstrate the current low regard for the prohibition on force and, relatedly, international law in general. Low regard can be reversed, however, which can in turn improve compliance with the law on the use of force. The starting place is to understand the durability of principles like equality and the non-use of force. Such principles do not end so long as international law continues. They are natural law norms, not subject to what international relations scholars refer to as

343. *Id.*

344. On the alternative leadership potential of the BRICS, see Alex Lo, Opinion, *BRICS of Today Also a Matter of Global Politics, Not Just Economics*, S. CHINA MORNING POST (June 2, 2023, 9:00 PM), https://www.scmp.com/comment/opinion/article/3222785/brics-today-also-matter-global-politics-not-just-economics and Walt, *supra* note 56.

345. *See* Dugard, *supra* note 148, at 231–32.

346. *See* Scott, *supra* note 149, at 642–43.

347. *Id.* at 634.

348. *Id.*

349. Hindi, *supra* note 62.

"norm death."[350] Attempts to weaken the prohibition on force or claim exceptional rights do not impact the substance of these principles. Such efforts only serve to weaken the sense of a legal duty to comply, not the obligation itself.

Rebecca Sanders observes that the United States has developed a culture of "legal rationalization" in which norms are "undone . . . through a quiet and unexceptional process of plausibly legal reinterpretation."[351] Government legal advisers "often find themselves in the position of facilitators 'constructing intricate technical arguments which might reconstruct seemingly illegal policies as legal.'"[352] John Dugard, too, sees the United States constructing new meanings for old norms to suit policy.[353] The prohibition on force and the principle of equality as natural law cannot be "undone" through interpretation. It is recognition and acceptance of the principles' binding quality that is undone.[354] Sanders shows in her book that the list of unlawful uses of force by the United States grew over time, coinciding with the rise of the RBIO.[355] She also shows that the lawyers advancing these claims have done so in response to demands by politicians.[356] The arguments developed in response to these demands contrast starkly with the actual requirements of the U.N. Charter and related principles restricting resort to force, as discussed above. The lawyers' arguments allow the United States to maintain, either in the United Nations or for public consumption, that the United States cares about law compliance, even while leaving it free to act. The "unable or unwilling" claim is a prime example of using legal-sounding terminology as a pseudo-standard for resort to force. It leaves the United States completely free to select any state to attack.[357] "Unable or unwilling" and other expansionist self-defense claims, as well as humanitarian intervention and intervention by invitation of non-government entities, are the claims that have led to the charges of a double standard discussed above and skepticism over U.S. representations of commitment to the rule of law around the world.

350. Diana Panke & Ulrich Petersohn, *Norm Challenges and Norm Death: The Inexplicable?*, 51 COOP. & CONFLICT 3, 4 (2016).

351. Sanders, *supra* note 96, at 167–68.

352. Luca Trenta, *Death by Reinterpretation: Dynamics of Norm Contestation and the US Ban on Assassination in the Reagan Years*, J. GLOB. SEC. STUD., Dec. 2021, at 1, 5 (quoting CHARLOTTE PEEVERS, THE POLITICS OF JUSTIFYING FORCE: THE SUEZ CRISIS, THE IRAQ WAR, AND INTERNATIONAL LAW 55 (2013)).

353. *See* Dugard, *supra* note 148, at 230–31.

354. Without compliance, a legal principle may appear effectively dead whether it is a natural law norm or not. Nevertheless, the natural law status of norms, even norms that may be widely disobeyed, remains significant because such norms remain in effect ready for enhancement of their pull to compliance. Positive law norms that are disobeyed may lapse and require a new treaty or the crystallization of a new principle of customary international law.

355. *See* Sanders, *supra* note 96, at 154.

356. *See id*. at 154, 168; *see also* Trenta, *supra* note 352, at 5; Victor Kattan, *Furthering the 'War on Terrorism' Through International Law: How the United States and the United Kingdom Resurrected the Bush Doctrine on Using Preventive Military Force to Combat Terrorism*, 5 J. ON USE FORCE & INT'L L. 97, 115–17 (2018).

357. *See* Bethlehem, *supra* note 171, at 776.

The solution to the crisis of compliance and respect triggered by the RBIO is the same as the solution introduced for what is known as "norm death."[358] International law and international relations scholarship on norm creation, norm regression, and improving compliance with international law all offer insights into how to restore the psychological barrier to the use of force exerted through well-respected law. The scholarship points to two factors in the solution: The first factor includes ensuring that legal duties are clearly understood because the substance of the law is clear and accurately imparted. The second factor involves influential states complying in their conduct with authentic law and restating the principles to counter attempts to manipulate meaning. Section III.A provides a succinct restatement of the law. Section III.B discusses how influential states that comply with the law draw other states into compliance by their example. This modeling effect can counteract the impact of the RBIO.

A. ENDURING NATURAL LAW NORMS

A central fact about the prohibition on force is that it is a peremptory norm or *jus cogens*.[359] Peremptory norms prohibit certain highly unethical conduct, including genocide, torture, slavery, and the use of force. International law prohibits any derogation from these norms. States may not create new treaties, rules of customary international law, or rule interpretations that dilute them, let alone negate them. Because *jus cogens* are not subject to contraction through the consent-based methods of positive law, they do not belong in the positive law category. Treaties and rules of customary law are the two types of positive international law. Peremptory norms and most general principles of law belong in the only other category of law that exists, natural law. Natural law principles and precepts are not created through some exercise of consent, as is required for positive law. Natural law principles are discerned through the application of reason, observation of the natural world, and openness to the transcendent sources of knowledge described in philosophy and faith traditions.[360] It falls to judges and legal scholars to undertake this discernment, not unlike the finding of principles of common law and customary international law.[361] Natural law norms can also be codified in treaties and statutes. The enduring, fundamental character of peremptory norms, such as the prohibition of genocide and fundamental precepts like *pacta sunt servanda* (legal agreements are binding), aligns with the natural

358. Panke & Petersohn, *supra* note 350, at 4.

359. Ample authority supports this statement in the case of the prohibition on force. *See, e.g.*, *Wall Case*, 2004 I.C.J. Rep. at 254 (separate opinion by Elaraby, J.).

360. One of the best-known invocations of natural law method is the Martens Clause, first included in the 1899 Hague Convention: "[P]opulations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899 (amended Oct. 18, 1907).

361. For a detailed discussion of natural law method, see generally Mary Ellen O'Connell & Caleb M. Day, *Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 562 (Samantha Besson & Jean d'Aspremont eds., 2017).

law method. Yet, despite the evident importance of these principles and precepts, discussion of natural law has been suppressed for decades. By the first decade of the twenty-first century, however, natural law had begun to return to mainstream theoretical discussions of law.[362] After a brief review of the natural law status of the prohibition on force and principle of equality, the discussion will turn to the West's attempts to derogate from both.

1. Natural Law and International Law

Only natural law can support a "systematic body of principles covering *all* aspects of international relations,"[363] and it is the legal theory behind the rise of modern international law. Nevertheless, various factors conspired to suppress natural law. By the late seventeenth century, the scientific method was in the ascendant. It stressed material evidence, including material evidence of law, even though law is only an idea. It exists only in the mind. Law does not exist in a form that can be studied in the same way as plants, animals, and minerals. Law can be studied as a historic phenomenon, which reveals that today's highly sophisticated concept of law is derived from early, basic ideas of natural law. These, in turn, were preceded by religious and philosophical concepts, including insights into gaining knowledge from transcendent sources. The consent-based theory of positive law followed long after but eventually became dominant. It is associated with material proof in the form of treaties and statutes, though the common law and international customary law are unwritten and lack material proof. Positive law, in contrast to natural law, is open to change through consent, practice, and interpretation.[364]

The approach described here to identify natural law has been accepted since the days of the Roman stoic and jurist Cicero, who lived in the first century BCE. His teaching was applied particularly to regulating the use of force, which was further refined by such noted natural law scholars as St. Thomas Aquinas and

362. For an example of twenty-first century scholarship on international law and natural law, see *id.* at 576 (discussing the writings of Judge Antônio Augusto Cançado Trindade). For additional examples, see generally Stefan Kadelbach, *Hugo Grotius: On the Conquest of Utopia by Systematic Reasoning*, *in* SYSTEM, ORDER, AND INTERNATIONAL LAW: THE EARLY HISTORY OF INTERNATIONAL LEGAL THOUGHT FROM MACHIAVELLI TO HEGEL 134 (Stefan Kadelbach et al. eds., 2017); RESEARCH HANDBOOK ON NATURAL LAW THEORY (Jonathan Crowe & Constance Youngwon Lee eds., 2019); Andreas Føllesdal, *Natural Law: Current Contributions of the Natural Law Tradition to International Law*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 39 (Jeffrey L. Dunoff & Mark A. Pollack eds, 2022).

Growth in interest in the United States has been rapid, promoted by, among others, Adrian Vermeule of Harvard Law School. Vermeule "advocates recovery of the natural law tradition that undergirded Western law for over two millennia and provided the basis for American law from before the founding of the country until it was unceremoniously discarded in the mid-twentieth century." Brian Z. Tamanaha, *Beware Illiberal Natural Law* 2 (Wash. Univ. St. Louis Sch. L., Paper No. 22-05-01, 2022), https://ssrn.com/abstract=4109402 [https://perma.cc/XX7V-7DCJ] (commenting on ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

363. *See* STEPHEN C. NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 7 (2014).

364. *See* Leslie Green & Thomas Adams, *Legal Positivism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2019), https://plato.stanford.edu/entries/legal-positivism [https://perma.cc/8N9F-DWLH].

Hugo Grotius.[365] Over centuries, the process of natural law discernment has led to the identification of other substantive normative principles of law as well as premises about the law.[366] Natural law provides for the fact "that the existence and content of positive law depends in some way on normative facts."[367] The most important natural law premise is that the law is binding.[368] Additional premises include that international law is universal law; positive law is invalid if in conflict with natural law; and finally, all law derives its force and authority from natural law premises.[369] Substantive natural law principles include, in addition to peremptory norms of *jus cogens*, the general principles of equality, good faith, due process, necessity, and proportionality.[370]

By the nineteenth century, Western states demonstrated a strong preference for positive law, which they believed they could control. They sought to be free of natural law principles like equality and the prohibition of force, which stood in the way of their legal justifications for taking and maintaining colonial control by force of non-Western people.[371] In place of natural law, they substituted a theory

365. O'Connell & Day, *supra* note 361, at 565–69.

366. *See* John Finnis, *Natural Law Theories*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 364, https://plato.stanford.edu/entries/natural-law-theories/ [https://perma.cc/7QJU-UKU6].

367. George Duke, *Aristotle as Natural Law Theorist*, *in* RESEARCH HANDBOOK ON NATURAL LAW THEORY 13, 16, *supra* note 362; *see* Lorraine Daston & Michael Stolleis, *Introduction: Nature, Law and Natural Law in Early Modern Europe*, *in* NATURAL LAW AND LAWS OF NATURE IN EARLY MODERN EUROPE: JURISPRUDENCE, THEOLOGY, MORAL AND NATURAL PHILOSOPHY 1, 2, 9–10 (Lorraine Daston & Michael Stolleis eds., 2008). *See generally* Hilaire McCoubrey, *Natural Law, Religion and the Development of International Law*, *in* RELIGION AND INTERNATIONAL LAW 177 (Mark W. Janis & Carolyn Evans eds., 1999); Hidemi Suganami, *Grotius and International Equality*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 221 (Hedley Bull et al. eds., 1990).

368. Sir Gerald Fitzmaurice, a rapporteur on the law of treaties for the United Nations International Law Commission, explained that *pacta sunt servanda* is a principle of natural law:

> [*Pacta sunt servanda*] is a principle of natural law in the nature of *jus cogens*; and it is as a principle of natural law that it can act as a postulate of international law, giving the latter system an *objective* validity—i.e. a validity not dependent on the consent of the entities subject to the system.

Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1954–9: General Principles and Sources of International Law*, 35 BRIT. Y.B. INT'L L. 183, 196 (1959) (footnote omitted); *see* Kleinschmidt, *supra* note 160, at 371 (Ger.).

369. *See* William Blackstone, *Of the Nature of Laws in General*, *in* 1 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 38, 41 (J.B. Lippincott Co., 1893) (1753).

370. *See* Int'l L. Comm'n, Second Rep. on General Principles of Law, U.N. Doc. A/CN.4/741, ¶¶ 94, 169 (Apr. 9, 2020). The report finds two types of general principles: those derived from national law systems and those "inherent" to international law. *Id.* ¶¶ 2, 56. The report is vague on the methodology related to identifying inherent general principles but points in the direction of natural law method. For an argument that natural law method is in fact the correct approach, see O'Connell & Day, *supra* note 361, at 562, 578.

371. According to Charles Henry Alexandrowicz, in the nineteenth century, the law of nations, which had been universal in the sixteenth, seventeenth, and eighteenth centuries, abandoned the centuries-old universalist tradition based on natural law theory and "contract[ed] into a regional (purely European) legal system." C. H. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS OF THE EAST INDIES (16TH, 17TH, AND 18TH CENTURIES) 2 (1967). Alexandrowicz uses the older term for international law, the "law of nations." Jeremy Bentham introduced the term "international law" in 1789. The two expressions are generally synonymous.

of civilizational hierarchy, referred to under various labels, most commonly "the standard of civilization."[372] Suppressing natural law was necessary to create the privileged status colonial powers sought. Colonial powers claimed the right to make and change international law for their own benefit, ignoring the natural law limits on positive law. Without natural law, international law became the "house rules" for the club of "civilized states."[373] The suppression of natural law also left no explanation for the existence of legal precepts and principles essential for the very existence of a legal system. For example, the basic precept that the law imposes binding duties, including the duty to keep agreements, cannot be just another consent-based concept, terminable through agreement. The same is true of the higher ethical legal principles of *jus cogens*. Natural law is known as "necessary law" in distinction to "voluntary" or positive law. These basic points of legal theory have faded from legal discourse but are now being revived to once again explain the foundations of all law.

Natural law theory is reemerging today but had an earlier resurgence following World War II. Natural law theory was needed to provide the legal basis for prosecuting crimes at Nuremberg and Tokyo that had not been part of a written code prior to the war.[374] Natural law was important to the legal critique of Nazi law. The German legal theorist Gustav Radbruch and others made the case that positive law, shorn of any connection to natural law, had played a significant role in the Third Reich.[375] The pure Aryan laws and other odious rules had been adopted in full compliance with the positive lawmaking procedures in place in Germany at the time, but they offended natural law. Even one of the firm pro-science, anti-natural law theorists of the twentieth century, Hans Kelsen, indicated that the prohibition on the use of force as incorporated in the U.N. Charter's Article 2(4) in 1945 is a codification of the ancient, natural law norm.[376]

By the late 1950s and the start of the Cold War, however, the suppression of natural law had begun again. The Soviet Union and the United States led the way with their strong opposition to categories of law that relied on methods they could not control.[377] By the end of the Cold War, natural law teaching had virtually

372. *See* Georg Schwarzenberger, *The Standard of Civilisation in International Law*, 8 CURRENT LEGAL PROBS. 212, 220, 224 (1955) (describing admittance to the international community based on the ability to "take binding commitments under international law and . . . protect adequately the life, liberty and property of foreigners"); *see also* Kleinschmidt, *supra* note 160, at 372–75 (Ger.); David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT'L L. 137, 140–41 (2001). For the original assertion of a "standard of civilization," see 1 JAMES LORIMER, THE INSTITUTES OF INTERNATIONAL LAW: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 94 (1883).

373. *See* Kleinschmidt, *supra* note 160, at 364, 375 (Ger.); O'Connell, *supra* note 160.

374. *See* David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2352 (1992).

375. For further discussion of Radbruch, see Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632–61 (1958).

376. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 330 (Anders Wedberg trans., 1945).

377. The leading Soviet international lawyer expressed the view that principles are not international law unless they are adopted through treaties or international custom. *See* LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 94 (2d ed. 1987) (discussing Grigory Tunkin's view of the sources of international law); *see also* Michel

disappeared in U.S. law schools.[378] Further, it was easy enough to argue that all law, including the prohibition of force and principle of equality, could be changed by amending the Charter, or through state practice, or new interpretations. The United States and close allies have even based some RBIO positions on manufactured state practice and expressions of legal opinion to assert they are customary international law.[379] The more common basis for RBIO positions, however, has been the reinterpretation of existing law.[380] In either case, these efforts ignore the fact that peremptory norms and general principles are not subject to derogation.

2. The Natural Law General Principle of Equality

To the extent the RBIO promotes a two-tier system, it conflicts with equality and, thus, conflicts with international law. "[T]he maxim, lying at the heart of the international legal structure, [is] that all states are sovereign and equal."[381] The alternatives to a legal system reflecting sovereign state equality are hegemonic imperialism or lawless chaos.

In the 1966 *South West Africa Cases*, Judge Kōtarō Tanaka explained why the equality of sovereign states was a natural law principle that could not be modified to suit the interest of a particular state or groups of states over others.[382] Tanaka looked to the sources of international law listed in Article 38 of the I.C.J. Statute and observed that Article 38(1)(c) incorporates "natural law elements" by extending the sources of international law "beyond the limit of legal positivism" and indicating that the general principles are binding on all states, even states that do not recognize them.[383] He explained how this conclusion could be reached by looking to the transcendent philosophy of Stoicism, religious scripture, human nature, and the common human capacity to reason.[384] Through this natural law discernment, it was clear to Tanaka that some legal principles bind regardless of consent and continue to bind even when consent is withdrawn or the principle is consistently breached.[385] Natural law does not depend on practice, and so

Virally, *The Sources of International Law*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW 116, 143–48 (Max Sørensen ed., 1968). The U.S. representative to the negotiations of the 1968 Vienna Convention on the Law of Treaties made clear America's opposition to any association of *jus cogens* with natural law in the Convention. The United States and Russia continue to reject law that is not made entirely through state consent. *See* U.N. Doc. A/CN.4/748, *supra* note 165, at 41 (citing comments by the Russian Federation).

378. *See generally* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021).

379. Victor Kattan found evidence in Wikileaks documents that U.S. and U.K. officials set out to expand the right to use force through developing a new rule of customary international law. *See* Kattan, *supra* note 356, at 115–16, 116 n.110, 124.

380. *See, e.g.*, DEP'T OF JUSTICE, *supra* note 122, at 1.

381. R. v. Hape, [2007] 2 S.C.R. 292, 316 (Can.) (citing U.N. Charter art. 2, ¶ 1); G.A. Res. 2625 (XXV), *supra* note 43; CASSESE, *supra* note 43, at 48.

382. *See* South West Africa Cases (Eth. v. S. Afr.) (Liber. v. S. Afr.), Judgment, 1966 I.C.J. Rep. 6, 250, 291, 298 (July 18) (Tanaka, J., dissenting).

383. *Id.*

384. *See id.* at 304–05.

385. *Id.* (quoting HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 115 (1945)).

compliance does not determine its validity. If reason dictates that the beauty and order of the natural world mean violence and war are prohibited in law, then that realization endures, regardless of how often the prohibition is violated. Tanaka concluded that international law relied on natural law even more than domestic legal systems to achieve "its supra-national and supra-positive character."[386] Hersch Lauterpacht reached a similar conclusion in 1946 about the need to expressly acknowledge the critical role of natural law in international law.[387]

The principle of equality does not forbid creating regional organizations with special rules for the group or specialized institutions like NATO. It is only when the group purports to alter natural law principles for the benefit of the group at the expense of non-group members that problems arise. The United States and its close allies have sought to do both. The claims for humanitarian intervention and for expanding self-defense and intervention by invitation grant extensive discretion to RBIO members. Such open-ended concepts do not fulfill the basic premises of positive law, let alone natural law.[388] They are claims to privilege by some states over others and raise once again "the specter of imperialism."[389] Attempts to carve out privileged groups create disrespect for law that is equally binding. Accepting the equal duty of all states to respect the law reverses this drag on respect and associated non-compliance. Acceptance is more likely when states are clear that equality, not the RBIO, is the valid norm.

3. The Natural Law Prohibition on Use of Force

Similar to how the RBIO discounts the principle of equality, the RBIO has a particular focus on freeing its members from restrictions on force. The United States has repeatedly resorted to force that it cannot justify "under the stricter rules of international law" but can justify under the RBIO.[390] This substitution cannot diminish the binding nature of the prohibition on force. It is an ancient norm that endures despite interpretations aimed at diluting its reach or outright breaches in practice. Nevertheless, the challenge remains of winning understanding and compliance. This Section presents a brief restatement of the authentic content of the prohibition, stripped of interpretations developed to make resorting to armed conflict easier for RBIO members. The aim is to show how straightforward and understandable the prohibition on force is in reality. Codified in the U.N. Charter of 1945, it is correctly considered a "basic rule of contemporary

386. *Id*. at 298.

387. H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 21 (1946).

388. These are not "rules as understood by lawyers." Dugard, *supra* note 148, at 225; *see also* FULLER, *supra* note 197, at 39 (explaining Fuller's eight criteria that characterize positive law rules as law). *See generally* Jeremy Waldron, *The Rule of Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 364, https://plato.stanford.edu/entries/rule-of-law/ [https://perma.cc/R3GK-KY69].

389. Anthony Carty, *The Play of Medieval Ghosts and Renaissance Demons in Birth, Death and Rebirth of European International Law*, *in* UNIVERSALITY AND CONTINUITY IN INTERNATIONAL LAW 61, 65 (Thilo Marauhn & Heinhard Steiger eds., 2011).

390. Dugard, *supra* note 148, at 227. For the discussion of U.S. uses of force under justifications aligned with the RBIO rather than international law, see *supra* notes 171–253 and accompanying text.

public international law."[391] Henkin has called Article 2(4) "the principal norm of international law in our time."[392]

Law exists to promote peace, namely through the provision rules against violence and means for the peaceful settlement of disputes. The earliest precursors of international law include a prohibition on force. The vital role of the legal prohibition and its close association with the moral and ethical value of peace mean that the prohibition is not only ancient but also part of natural law.[393] As natural law, it endures and can expand to prohibit more conduct. It does not shrink.[394] Once it is established as having a certain scope, that scope can later be discerned as greater and more expansive, but not lesser.

Because of the suppression of natural law in the nineteenth century, discussed above, international lawyers began drafting positive law agreements to fill what they saw at the time as a gap. Their efforts resulted in treaties rooted in the natural law prohibition on the use of force. The first important agreements emerged from the Hague Peace Conferences of 1899 and 1907.[395] Subsequently, in 1928, the United States and France concluded the General Treaty for the Renunciation of War, also known as the Kellogg–Briand Pact or Pact of Paris.[396] Within a decade, U.S. President Franklin Roosevelt assigned the first research that would lead to the U.N. Charter, with its comprehensive prohibition on resort to force and institutions for the preservation of peace.[397] By the 1950s, Louis Sohn was countering arguments made by Julius Stone, who wanted the Charter restrictions relaxed.[398]

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391. Oliver Dörr & Albrecht Randelzhofer, *Purposes and Principles*, *Article 2(4)*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 207 (Bruno Simma et al. eds., 3d ed. 2012).

392. Henkin, *supra* note 83, at 544.

393. *See* C. H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, RECEUIL DES COURS 455, 455 (1952); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 35 (rev. ed. 1954).

However, Oona Hathaway and Scott Shapiro argue that international law did not prohibit resort to war until the adoption of the Kellogg–Briand Pact in 1928 because no express, treaty-based prohibition existed until then. *See generally* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017). For a thoroughly documented refutation of the argument, see generally AGATHA VERDEBOUT, REWRITING HISTORIES OF THE USE OF FORCE: THE NARRATIVE OF "INDIFFERENCE" (2021).

394. In the future, the prohibition is likely to be discerned as restricting resort to force against long-time occupiers. For the positive law case for such a restriction, see generally Tom Ruys & Felipe Rodriguez Silvestre, *Military Action to Recover Occupied Land: Lawful Self-Defense or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited*, 97 INT'L L. STUD. 665 (2021).

395. *See* Convention for the Pacific Settlement of International Disputes (Hague I), July 29, 1899 (amended Oct. 18, 1907); Convention with Respect to the Laws and Customs of War on Land, *supra* note 360.

396. *The Kellogg-Briand Pact: The Aspiration for Global Peace and Security*, NAT'L MUSEUM OF AM. DIPL. (Aug. 24, 2021), https://diplomacy.state.gov/the-kellogg-briand-pact [https://perma.cc/P8PB-6JFT].

397. *See* SCHLESINGER, *supra* note 341, at 28–36.

398. *See* JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 100–03 (1958). *See generally* Stone, *supra* note 171.

Sohn responded that Article 2(4) must be read in the light of the entire Charter.[399] He emphasized, in particular, Article 1(1), which calls on states to settle disputes peacefully and to comply with international law.[400] In addition, the Charter's two limits on Article 2(4) were drafted narrowly, making them consistent with the natural law prohibition and the Charter scheme as a whole. Article 41 requires the Security Council to attempt measures short of force before authorizing military responses.[401] Article 39 limits the Council to authorizing measures to "restore international peace and security."[402] Article 51 is even narrower with its provision that force used in self-defense is allowed only if an armed attack occurs.[403]

The single other exception to the Article 2(4) prohibition on force is resort to force at the invitation of a government. Article 51 was specifically instituted to allow for a state that is a victim of an armed attack to request assistance from other states in "collective self-defence."[404] Beyond collective self-defense, invitation is not mentioned in the Charter. The I.C.J. implicitly accepted it in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* when the government of Congo requested assistance from neighboring states in response to the presence of organized armed groups in its territory.[405] As the court has also found in various cases, general principles of consent, attribution, necessity, and proportionality provide additional restrictions on the use of force not found in the Charter.[406] Intervention by invitation requires the actual consent of a government in effective administrative control of most of the state's territory.[407]

The prohibition as explained here—with limits for Security Council authorization, self-defense, and invitation—is a natural law norm. It is widely understood as part of the natural law category of *jus cogens*, which includes norms from which no derogation is permitted. Derogation can occur through adopting a treaty in conflict with the norm, recognizing a new rule of customary international law, or adopting an interpretation that results in a more permissive standard.[408] As *jus cogens*, the prohibition's reach can expand to prohibit more conduct, but never less. Interpreting words to permit greater use of force, even if based on the practice of states, leads to erroneous results. The three examples of the RBIO's

399. Sohn's critique is detailed in Stone, *supra* note 171, at 6, 8. Stone provides no source citation beyond mentioning that Sohn raised these points "vigorously" in the 1950s when Stone first developed his own interpretation of Article 2(4). *Id.* at 6.

400. *See id.* at 6.

401. *See* U.N. Charter arts. 41, 42 (providing respectively for non-military means of enforcing resolutions and then military means of enforcing resolutions, when such non-military means fail).

402. *Id.* art. 39.

403. *Id.* art. 51.

404. *See id.*

405. *See* Dem. Rep. Congo v. Uganda, 2005 I.C.J. Rep. ¶ 128.

406. *See id.* ¶ 147. The I.C.J. sometimes refers to these four general principles erroneously as customary international law. They are natural law general principles. *See, e.g.*, *Nicaragua Case*, 1986 I.C.J. Rep. ¶ 176.

407. *See supra* Section I.C.3.

408. *See* O'CONNELL, *supra* note 30, at 79.

expansion of rights to resort to force fail even under positive law analysis and fail more definitively under natural law.[409] The prohibition on force is a progressive principle; more excuses for using force can be prohibited, not fewer. The next obvious candidates for expansion are the clear outlawing of resort to armed force within states, then the outlawing of resort to force against occupiers.[410]

As this Section demonstrates, clear exposition of the prohibition's meaning is not difficult. Yet, Marko Milanovic, writing on the prohibition as applied in the Gaza War, argues the situation is too complex for a straightforward application of Article 2(4).[411] This is exhibiting a post-Cold War perception found in RBIO states. The I.C.J. has applied Article 2(4) in multiple cases without great difficulty. South Africa succinctly, clearly, and accurately restated the law on the use of force in its case against Israel.[412] Following South Africa's filing of the case, the African Union restated the law in line with the legal interpretations provided here, countering RBIO assertions.[413] These are high-profile expositions of accurate understandings of the law against war. They can help achieve consensus once again for accurate interpretation of international law in general and the *jus ad bellum* in particular, counteracting the false constructions of the RBIO. That leaves the second step in reversing norm regression—modeling compliance.

B. MODELING COMPLIANCE WITH AUTHENTIC NORMS

In modeling compliance to remedy weak respect for international legal norms, the modeling must be of authentic law. Modeling—persuading by example—requires clarity about and acceptance of the real content of the fundamental norm at issue. Modeling can then have a positive impact on reversing norm decline.

1. Clarity

Harvard Law School's Roger Fisher has argued persuasively about the link between rule clarity and compliance. He and several other international law scholars working in the 1980s and 1990s confirmed that uncertainty about the status or meaning of a rule, norm, or principle tends to undermine respect for it, and as a result, compliance suffers.[414] Fewer parties will pay the cost of enforcement

409. *See supra* notes 172–254 and accompanying text.

410. *See* Tom Ruys, *The Quest for an Internal* Jus Ad Bellum*: International Law's Missing Link, Mere Distraction, or Pandora's Box?*, *in* 5 NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW 169, 172–73 (Claus Kreß, & Robert Lawless eds., 2021).

411. Milanovic, *supra* note 258.

412. Verbatim Record of the Application of the Convention, *supra* note 32, ¶¶ 28–31.

413. *See* Peace & Sec. Council, African Union, Communiqué 1196, PSC/PR/COMM.1196, ¶ 2 (2024); *see also* Mohamed Helal, *The Common African Position on the Application of International Law in Cyberspace: Reflections on a Collaborative Lawmaking Process*, EJIL: TALK! (Feb. 5, 2024), https://www.ejiltalk.org/the-common-african-position-on-the-application-of-international-law-in-cyberspace-reflections-on-a-collaborative-lawmaking-process [https://perma.cc/7QCM-MMXG] (discussing the Common African Position on the Application of International Law to the Use of Information and Communication Technologies in the Cyberspace adopted pursuant to Communiqué 1196).

414. *See* Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 189–90 (1993); *see also* FRANCK, *supra* note 60, at 20–21.

in light of uncertainty, a fact demonstrated in the case of Ukraine.[415] Lack of compliance follows from lack of understanding of what a rule requires. The prohibition on force was well understood in the case of Iraq's invasion of Kuwait. Despite the many violations of the Charter's prohibition on force, no state had committed the most serious form of breach—conquest—until Iraq. So, when the first breach of the norm occurred, willingness to pay the price to enforce it was nearly universal. As Roger Fisher explained, when there is clarity, "there is a vast amount of routine compliance."[416] There is also readiness to impose costs for violations.

Thomas Franck wrote in similar terms, developing a theory of "legitimacy" to explain obedience to rules.[417] He observed that compliance results when legal principles reflect certain characteristics that are the equivalent of clarity, such as being determinant and coherent.[418] When such principles emerge from acknowledged sources of law, the principles are perceived as legitimate and attract willing obedience. Abram and Antonia Chayes, also Harvard Law professors, agreed with Fisher and Franck. Looking at rules lacking clarity, they found that such rules fail to attract voluntary compliance.[419] Ambiguity discourages compliance, while clarity adds to a community's perception of a rule's legitimacy. With perceived legitimacy comes respect. The sense of legitimacy is also "a function of the perception of those in the community concerned that the rule . . . has come into being endowed with legitimacy: that is, in accordance with right process."[420] Franck emphasized the link between compliance with international law and the legitimate process of creation.[421] The link is lost if rules are identified as coming through an illegitimate process of formation. Their "pull to compliance" is thus weakened. The Global South critique of the RBIO is a classic example of perceived illegitimacy. The unwillingness by some states to provide troops and resources, to forgo trade, and to sever economic ties to enforce the law in the case of Russia's invasion of Ukraine was predictable.

One advantage of both the prohibition on force and the principle of equality is that they cannot be eliminated through contrary action or interpretation.[422] Revitalizing respect does not need to start with recreating rules that have ended

415. *See* discussion *supra* notes 292–94 of Western states being unwilling to pay the high price of defending Ukraine in 2014 and 2022. For an overview of this argument, see generally ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW (1981).

416. FISHER, *supra* note 415, at 12.

417. *See* FRANCK, *supra* note 60, at 20–21.

418. *See id*. at 137.

419. *See* CHAYES & CHAYES, *supra* note 95.

420. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 711 (1988).

421. *Id.*

422. One author considers that the prohibition on force cannot be *jus cogens* because certain governments purport to change it through positive law methods. *See* James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215, 225 (2011). However, this critique begins in the wrong place. It assumes that what pro-force states are doing is valid. Starting with the premise that the prohibition is *jus cogens* and non-derogable leads to the conclusion that attempting to dilute such norms is invalid.

through neglect or developing new positive law to supersede the old. Reestablishing the clear meaning of the prohibition, equality, and other basic norms of international law takes only a review of pre-RBIO authority.

2. Modeling

Russia's invasion of Ukraine, the ongoing use of terrorism by non-state actors, civil wars, and Israel's war in Gaza are evidence that the United States' post-Cold War approach to international law on the use of force is failing. It has served to undermine basic principles—but recovering norms is possible according to social science research. During the 1990s, social scientists took up the topic of norm creation in the wave of post-Cold War liberal enthusiasm for human rights. Terms such as "norm cascade" were born to describe the process of norm adoption.[423] That work continues, but a smaller group of social scientists later took up the related topic of why norms decline.

Research on norm decline shows that, in addition to the findings on compliance by scholars just reviewed, legal principles erode when states breach them in the face of only minimal negative consequences. The erosion is exacerbated when the non-complying state is one that other states will emulate. Norms regress when an influential "actor violates a norm while no central enforcement authority or individual state is willing or capable of punishing non-compliance. This can trigger non-compliance cascades, in which other actors also start violating the norms instead of sanctioning non-compliance behaviour."[424] After persistent lack of compliance by one or multiple states, in particular by influential states, others become inured to the law violation at issue. This effect is likely accelerated by introducing ambiguity and new purported rules through false processes of lawmaking.

Diana Panke and Ulrich Petersohn have studied humanitarian intervention in their work on norm decline. They provide particular detail about how the proponents of R2P pushed the concept as a new justification for using force despite Article 2(4) and the non-derogation principle.[425] Government officials and academics in support of humanitarian intervention coined the new term "responsibility to protect" to distract from the word "intervention," a term associated with unlawful uses of force and an act clearly banned by the principle of non-intervention.[426] Proponents then began using an even more benign-sounding acronym, "R2P." Panke and Petersohn note how an argument was crafted using the 1994

423. *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895–96 (1998).

424. Diana Panke & Ulrich Petersohn, *Why International Norms Disappear Sometimes*, 10 EUR. J. INT'L RELS. 719, 721 (2011). An example of this theory can be seen with the U.N. Security Council's five permanent members. The P5 may have an advantage in avoiding Security Council sanction, but the General Assembly can still act. Moreover, the P5 can protect non-P5 states in the way the United States has exercised its veto so often on behalf of Israel.

425. *See id*. at 731–34.

426. *See supra* Section I.C.1 (discussing humanitarian intervention or "R2P" and the conflict with the prohibition on force and the principle of non-intervention).

Rwandan genocide and the assertion that the genocide could have been avoided if R2P had been the law at the time.[427] The Rwanda case, as well as the 1995 Srebrenica massacre in Bosnia, had already been used effectively to lobby for NATO's use of force in the Kosovo Crisis in 1999.[428] As discussed above, Canada issued the ICISS Report, a legal-looking document, to provide a formal basis for R2P.[429] The Canadian initiative was eclipsed by the 9/11 attacks in the United States. Focus turned swiftly and dramatically to the use of force in counterterrorism, which soon led to more challenges to the prohibition. By 2005, the U.N. membership included references to R2P in the World Summit Outcome report.[430] It made clear that the Security Council must authorize any use of force for humanitarian purposes, but proponents focused on the fact that R2P received some support in a document agreed to by all states.[431] The evolution of humanitarian intervention shows how rhetoric, emotion, the broader political context, and other factors led to willful misunderstanding of the prohibition on force and what it requires. The prohibition on force emerged weakened.

For Ryder McKeown, who has studied norm decline in the case of the United States' use of torture following 9/11, a norm "loses salience in the international arena through a process of emulation by leaders of other states who note that the normative stigma for breaking the norm is now significantly reduced."[432] Although McKeown was writing specifically about the use of torture after the 2003 invasion of Iraq, his ideas apply to the use of force as well. For example, after the Kosovo Crisis, the United States illegally invaded Iraq. The U.N. General Assembly voted to condemn the invasion, but the United States did not face significant normative consequences at the time, a cause of ongoing Russian critique. Several allies, including the United Kingdom and Australia, far from criticizing the United States, joined the invasion. As a result of the tepid reaction, the stigma against using unlawful force was weakened.[433] The United States went on to further develop its competing rule system, the RBIO. Australia, the United Kingdom, and others have followed suit, as laid out in Part I, demonstrating McKeown's process of emulation. Russia and China are also emulating by now building their own, competing RBIO.

Logically, if norms can decline because of the processes just described, they can recover when influential states model compliance. The United States may no longer be a state that influences behavior as it once did as a result of having

427. *See* Panke & Petersohn, *supra* note 424, at 733.

428. *See id*.

429. *See id*. at 733–34; ICISS Report, *supra* note 125; discussion *supra* Section I.C.1.

430. G.A. Res. 60/1, *supra* note 186, ¶ 139.

431. *See* Panke & Petersohn, *supra* note 424, at 734.

432. Ryder McKeown, *Norm Regress: American Revisionism and the Slow Death of the Torture Norm*, 23 INT'L RELS. 5, 11 (2009).

433. In addition to the General Assembly vote, the U.N. Secretary General declared the invasion unlawful. *See* MacAskill & Borger, *supra* note 123.

modeled rules that compete with international law.[434] For the United States to regain its stature as a rule-of-law nation, it must return to modeling compliance with authentic law. Others will have to join the effort. South Africa, in its resort to the I.C.J. against Israel, is modeling the sort of conduct that results in leading-state status. It may well be a new rising state that influences compliance with global law.[435] Following World War II, the United States and allied officials and academics led the way in elevating international law and institutions for the preservation of peace. At the same time, legal theorists again explained the essential role of natural law. All of this was done on the basis of the equal status of states before the law. The United States and its allies can return to authentic international law discourse and simply stop using RBIO rhetoric.

Much of the talk today in international law is about accounting for the past—the emphasis is on criminal trials and reparations. There are calls for the United States to admit wrongdoing in Iraq, Serbia, Syria, Yemen, Somalia, Afghanistan, Pakistan, Libya, and other places where the United States used military force, claiming a right of self-defense against terrorism.[436] Another perspective, the one animating this Article, is on how to renew respect for international law looking forward. One barrier to leaders of a state adopting new policies and practices is the fear that abandoning past unlawful actions signals weakness, dishonesty, and failure. Lawyers who developed the flimsy "unable or unwilling" or R2P arguments are likely loath to admit how these weak arguments rest on little if any legal authority, but rather on the ideas of a small number of people. The arguments make little sense as a matter of law. The way forward need not involve admission of past wrongs, let alone criminal trials or economic penalties. It will be enough to end the violations and embrace the authentic prohibition on the use of force and the principle of equality. U.S. officials and academics can adopt the "past exonerative" mode, referring to past positions as in error without the need to apologize or cast blame.[437] The emphasis can be on officially adopting public and accurate interpretations of the law and leading by a new example, both of which have a strong "power of attraction."[438] The negative impacts of the RBIO are penalty enough without the need to admit past wrongdoing. International lawyers can support the change regardless of their own past interpretations. They may be even more inclined to do so following the 2024 U.S. presidential election.

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434. *See* Scott, *supra* note 149, at 641–42.

435. *See* Cocks, *supra* note 36.

436. *See, e.g.*, Azadeh Shahshahani & Divya Babbula, *Reparations Owed to the Survivors of the Global War on Terror*, 47 N.Y.U. REV. L. & SOC. CHANGE 67, 69–70, 69 n.7 (2023).

437. *See, e.g.*, Weekend Edition Saturday, *A Political Sidestep: 'Mistakes Were Made,'* NPR (Mar. 17, 2007, 8:00 AM), https://www.npr.org/2007/03/17/8972606/a-political-sidestep-mistakes-were-made [https://perma.cc/8TWF-UJCJ]. The past exonerative mode has been critiqued for its use in journalism to avoid casting direct blame for wrongdoing. In the sense used here, it is a way of acknowledging past failures while focusing more fully on corrected conduct going forward.

438. *See* Auer, *supra* note 304, at 962.

CONCLUSION

Unlawful uses of force by the West cannot in any respect justify Russia's full-scale invasion of Ukraine or Israel's war in Gaza. This Article has shown, however, that Western violations do help explain the loss of respect for law against war. Western wars since the end of the Cold War have been paired with flexible, implausible interpretations of the law. These have been drafted in the context of a wider reconceptualization of international relations, known as the RBIO. Invented as the Cold War ended, the RBIO rests on a deeply flawed view of international law. It is one where a few states can reinterpret fundamental norms for their own benefit—in particular, norms governing the non-use of force and the equality of states. The RBIO's negative consequences have been considerable. They include lowering the psychological barrier to Russia's commission of the most egregious Charter violation since 1945, as well as the United States' obvious loss of standing as a champion of law. As the post-Cold War era ends amidst widespread violent conflict, human rights atrocities, global health emergencies, and environmental collapse, lessons from the end of World War II—another *Zeitenwende*[439]—indicate how to rebuild from what remains of the law against war.

439. *Zeitenwende* can be translated as "a changing of the times." *'Zeitenwende' Amid Ukraine War Named German Word of the Year*, DEUTSCHE WELLE (Dec. 9, 2022), https://www.dw.com/en/zeitenwende-amid-ukraine-war-named-german-word-of-the-year/a-64041617 [https://perma.cc/Q326-JK2C].