THE RUSSIAN REVERSAL
RUSSIA'S LEGAL INFORMATION / POLICY PLAYBOOK

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INTRODUCTION

As Russia's aggressive large-scale invasion of Ukraine drags into its third year, the circumstances that led the world to this point bear reflection. Russia's unprovoked act of aggression demonstrates a number of troubling truths. The first is the relative impunity with which a nuclear state, holding a United Nations ("U.N.") Security Council permanent seat ("P5"), can undertake an act of aggressive war against a smaller, less influential or diplomatically less powerful neighbor.[1] The second hints at flaws in the perceived strength of the liberal international order. President Vladimir Putin justifies the invasion based on the North Atlantic Treaty Organization ("NATO") expansion, and his concurrent desire for expressed security assurances from Ukraine, the U.S., and NATO writ large. This justification belies a compelling case that Putin is driven by a realist perspective on international events.[2] However, none of those considerations are the subject of this article.

Though legal legitimacy is in short supply, it is telling that President Putin and the Russian government still *try* to articulate legal bases for the invasion. These include unsubstantiated claims, circulated within the U.N., of Ukrainian efforts to deploy a "dirty bomb."[3] Similarly, Russia has claimed that Ukraine and the U.S. are cooperating in research and development of biological weapons.[4]

[1] *See* Tuukka Elonheimo, *Comprehensive Security Approach in Response to Russian Hybrid Warfare*, 15 STRATEGIC STUDIES QUARTERLY 113, 118 (2021); U.N. Charter, art. 27.3.

[2] *See generally* John J. Mearshimer, *Why the Ukraine Crisis is the West's Fault: The Liberal Delusions That Provoked Putin*, 93 FOREIGN AFFAIRS 77 (2014); Gabrielle Tetrault-Farber & Tom Balmforth, *Russia Demands NATO Roll Back from East Europe and Stay Out of Ukraine*, REUTERS (Dec. 17, 2021), https://www.reuters.com/world/russia-unveils-security-guarantees-says-western-response-not-encouraging-2021-12-17/.

[3] Julian Border & Peter Beaumont, *Russia Steps up Ukraine 'Dirty Bomb' Claim in Letter Delivered to UN*, THE GUARDIAN (Oct. 25, 2022), https://www.theguardian.com/world/2022/oct/25/russia-to-raise-ukraine-dirty-bomb-claim-at-un-security-council (describing Russia's 300-plus page letter to U.N. representatives).

[4] Olga Robinson, Shayan Sardarizadeh, & Jake Horton, *Ukraine War: Fact-Checking Russia's Biological Weapons Claims*, BBC NEWS (Mar. 15, 2022), https://www.bbc.com/news/60711705.

Russia has also attempted to justify the invasion with claims of collective self-defense of breakaway republics[5] and defense of Russian nationals abroad.[6] Closely related to the supposed defense of Russian nationals are claims that the invasion is necessary to "de-Nazify" radical elements of the Ukrainian government.[7] While many of these purported legal bases appear strained or fanciful, closer examination shows that they bear striking similarity to claimed legal justifications asserted by another nuclear-armed P5 member over the last 40 years—those of the United States.

Over the past 40 years, the U.S. has been one of the most active users of military force in international relations, if not the most active.[8] Furthermore, the U.S. has often proceeded without the universal international stamp of approval—a U.N. Security Council Resolution ("UNSCR"). In many ways, Washington's lack of transparency and reliance on novel or vague legal justifications has created a series of *de facto* precedents upon which revisionist powers like Russia and China can rely for their own ends. While not necessarily creating *de jure* customary international law, these U.S. precedents may provide a degree of plausible diplomatic or political cover that undermines U.S. security interests.

What explains the apparent similarity in conduct of these two nuclear-armed P5 superpowers? Is Russia taking a page from the U.S.

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[5] *Ukraine Crisis: Russia Orders Troops Into Rebel-Held Region*, BBC NEWS (Feb. 22, 2022), https://www.bbc.com/news/world-europe-60468237.

[6] *Russia Offers Passports to People in Eastern Ukraine Territories*, BBC NEWS (Apr. 25, 2019), https://www.bbc.com/news/world-europe-48045055.

[7] *See* Mark F. Cancian, *Aid to Ukraine Requires Increased Oversight*, CSIS (Jun. 17, 2022), https://www.csis.org/analysis/aid-ukraine-requires-increased-oversight; Tim Hume, *How a Far-Right Battalion Became a Part of Ukraine's National Guard*, VICE NEWS (Feb. 16, 2022), https://www.vice.com/en/article/3ab7dw/azov-battalion-ukraine-far-right; David K. Li, Jonathan Allen, & Corky Siemaszko, *Putin Using False 'Nazi' Narrative to Justify Russia's Attack On Ukraine, Experts Say*, NBC NEWS (Feb. 24, 2022), https://www.nbcnews.com/news/world/putin-claims-denazification-justify-russias-attack-ukraine-experts-say-rcna17537.

[8] *See* Infographic: US military presence around the world, AL JAZEERA, https:www.aljazeera.com/news/2021/9/10/infographic-us-military-presence-around-the-world-interactive (last visited Mar. 6, 2024); *see generally* Barbara Salazar Torreon & Sofia Plagakis, CONG. RSCH SERV., R42738, *Instances of Use of United States Armed Forces Abroad*, 1798–2023 (2023).

legal playbook, or is it simply a matter of convergent approaches based on broadly similar incentive structures? Perhaps more important than the causal relationship between U.S. and Russian legal justifications for the use of force is what to do about it. Superficial similarities aside, a closer examination of past U.S. uses of force, and the accompanying legal justifications for such force over the past 40 years show qualitative differences between the U.S.'s use of force and Russia's invasion of Ukraine.

Russia, in attempting to create the appearance of a customary international law norm, points to superficially similar uses of force by the U.S. or NATO as precedent. Russia's justifications for the invasion of Ukraine, and its actions in Georgia and Chechnya, mirror those for U.S. and NATO actions in Iraq, Syria, and Kosovo. This comparison is more than simple "whataboutism." Russia's actions are a deliberate attempt to create ambiguity within the applicable legal rules and about their application to the underlying facts of the invasion of Ukraine.[9] This, coupled with Russia's P5 status and nuclear saber rattling, leaves the U.S. and its allies with a range of viable tools *other than* the direct application of military force.

The U.S. must call out these factual distinctions and twisted legal rationales publicly. The U.S. should articulate how its historic use of force is factually and legally distinct from Russia's—this means demonstrating that those uses were, unlike Russia's, politically or diplomatically legitimate. While not a panacea, and likely of little deterrent value alone, one way that the U.S. can further this effort is by committing to the international rule of law and the responsible, legitimate, and disciplined use of force to secure national interests as *a component* of a broader competition strategy.

This article will proceed in three parts. Part I will include a survey of six U.S. military operations over the past 40 years, the stated (or apparent) legal justification for those operations, and any gaps or inconsistencies in the U.S.'s legal analysis. Part II will provide an

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[9] *See e.g.* Hal Brands, *Paradoxes of the Gray Zone*, FOREIGN POL'Y RESEARCH INST. (Feb. 5, 2016), https://www.fpri.org/article/2016/02/paradoxes-gray-zone/ (discussing strategy of revisionist states to create ambiguity using Russian aggression as one illustration).

overview of Russia's stated justifications for invading Ukraine. It will identify how those purported justifications are factually and legally similar to, as well as distinct from, the six U.S. case studies. Part II will also provide an overview of the international community's legal response. Finally, Part III will make a series of recommendations for a legal information strategy accompanying uses of military force that may effectively contribute to an information campaign in support of ongoing competition.

I. SELECTED U.S. USES OF MILITARY FORCE: 1983–2020

Over the past 40 years the U.S. has enjoyed unparalleled global military reach and economic power driven by an interconnected global world. This great power has also come with the attendant entanglements of global national interests. In this environment, the U.S. has become among the most active users of military force.[10] President Reagan's approach—using military force with little concern for procuring a UNSCR—foreshadowed the policies of his successors.[11] This section will provide a factual and legal overview of six instances in which the U.S. took this approach: Operation URGENT FURY in Grenada (1983); Operation EARNEST WILL in the Persian Gulf (1986 to 1988); Operation ALLIED FORCE in Kosovo (1999); the U.S. invasion of Iraq (2002); U.S. and British missile strikes against Syrian chemical weapons facilities (2018); and the U.S. air strike that killed Iranian Revolutionary Guards Corps—Qods Force Commander Qassem Soleimani (2020). This is not meant to be a thorough examination of these cases. Instead, this analysis is meant to provide a factual overview, the basic U.S. legal position, and identify key points of contention from scholars and the international community with those factual and legal bases.

As a threshold matter, the U.S. generally recognizes three traditional justifications under which international law permits the

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[10] *See, e.g.,* Salazar Torreon & Plagakis, *supra* note 8; *see also Top 10 Countries with Most Powerful Military Strength*, FORBES INDIA (Jan. 17, 2024), https://www.forbesindia.com/article/explainers/top-10-countries-with-most-powerful-military-strength/89891/1.

[11] Alfred E. Eckes & Brian Mulroney, *Ronald Reagan and the New Age of Globalization in* REAGAN'S LEGACY IN A WORLD TRANSFORMED 11–23 (Jeffery L. Chidester & Paul Kengor, eds., 2015).

use of military force:[12] (1) a U.N. Security Council Resolution authorizing "all necessary measures;" (2) national or collective self-defense; and (3) use of military force within another state with that state's consent, when that state is otherwise entitled to use force in its own right.[13] The first justification is relatively non-contentious and leaves little room for legal or factual dispute. As a result, this article will deal with the second and third justifications.

Regarding the second justification, there are a few variations of self-defense that are relevant. Most obvious is national self-defense or defense of a country's nationals abroad.[14] Collective self-defense at the behest[15] of, and in support of, a state entitled to use self-defense in the first instance is facially simple, but often more contentious in practice.[16] Anticipatory self-defense is another variant that can be particularly contentious, as the concept of "imminence" leaves a wide space for academic and public debate.[17]

Russian claims that the invasion of Ukraine was necessary to "de-Nazify" portions of that nation's government might be interpreted as an inartful articulation of the "unwilling or unable" variation of self-defense.[18] The basic concept of this test is that (1) a state may use force in the territory of a non-consenting state if there is a direct and imminent threat emanating from the non-consenting state's territory; (2) that state is made aware by the threatened state; and (3) the non-consenting state remains unwilling or unable to take sufficient

[12] Hon. Paul C. Ney, General Counsel, Dep't of Def., Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani, DOD General Counsel Remarks at BYU Law School (March 4, 2020) (transcript available at defense.gov).
[13] *Id.*
[14] *See* Memorandum from Steven A. Engel, Asst. Att'y Gen., Dep't of Just., on the January 2020 Airstrike Against Qassem Soleimani to John A. Eisenberg, Legal Advisor to the Nat'l Sec. Council 13 (Mar. 10, 2020) (on file with the Dep't of Just. Off. of Legal Couns.); *also see* John Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 U. MIAMI INTER-AM. L. REV. 271, 275, 329 (1987) (discussing justifications of defending one's national's abroad and preemptory acts of self-defense against a threat posed).
[15] *See* Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 2003 I.C.J. 161, ¶¶ 50 –51 (Nov. 6) [hereinafter Oil Platforms Case].
[16] *See* GEORGE K. WALKER, THE TANKER WAR, 1980–88: LAW AND POLICY, 147–48 (2000).
[17] *See id.* at 148–49.
[18] Li, Allen & Siemaszko, *supra* note 7; Cancian, *supra* note 7; Hume, *supra* note 7.

measures to mitigate the security threat.[19] The U.S. relied on this test to justify counterterrorist operations in Syria.[20]

Another potentially viable legal basis for the use of military force is the "responsibility to protect," ("R2P") which gained traction in international circles during a series of humanitarian crises in the Balkan states of the former Federal Republic of Yugoslavia.[21] The concept appears to have reached its apex of acceptance in the late 2010s when the U.K. cited it as legal justification for a series of missile strikes against Syrian chemical weapons facilities.[22] Scholarly circles, however, questioned the doctrine in the aftermath of Russia's invasion of Ukraine, given that one of its legal justifications appears similar to the R2P.[23]

A. *Operation Urgent Fury: Grenada (1983)*

At 5:00 AM on October, 25, 1983, a force comprised of U.S. Army Rangers, Navy SEALS, U.S. Marines, and supporting Naval and Aviation assets stormed ashore in Grenada.[24] The operation's purpose was to rescue some 600 American students and other U.S. nationals under threat in light of a deteriorating security situation.[25] Over the following week, the U.S. engaged with Grenadian forces and armed Cuban "advisors." U.S. forces eventually surrounded the Cuban

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[19] *See* DEP'T OF DEF., LAW OF WAR MANUAL, §§ 1.11.5.3, 15.4.2 (Updated July 2023) [hereinafter LAW OF WAR MANUAL].
[20] *Id.* at § 15.4.2.
[21] G.A. Res. 60/1, ¶ 138 –140 (Sept. 16, 2005).
[22] *See* Alonso Gurmendi Dunkelberg et. al., *Mapping States' Reactions to the U.S. Strikes Against Syria of April 2018 – A Comprehensive Guide*, JUST SECURITY (May 7, 2018), https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/.
[23] John Reid, *Putin, Pretext, and the Dark Side of the "Responsibility to Protect"*, WAR ON THE ROCKS (May 27, 2022), https://warontherocks.com; Ingrid (Wuerth) Brunk, *International Law and the Russian Invasion of Ukraine*, LAWFARE (Feb. 25, 2022), https://www.lawfaremedia.org.
[24] U.S. ARMY CTR. FOR MIL. HIST., OPERATION URGENT FURY: THE INVASION OF GRENADA, OCTOBER 1983, 12, 14–15 (available at https://history.army.mil/html/books/grenada/index.html).
[25] *Id.* at 3, 26.

embassy.[26] The U.S. extracted a concession from the Cuban ambassador to depart Grenada.[27]

Operation Urgent Fury was the culmination of a slow but predictable build up. Tensions began to mount in 1979, with a Marxist coup led by Maurice Bishop. Upon seizing power, Bishop began to reorient Grenadian diplomatic relations, in particular toward Cuban sympathies.[28] In 1983, however, the Bishop government was overthrown by "militantly anti-Marxist" agitators, which the U.S. Department of State assessed posed an immediate threat to nearly 1,000 total U.S. nationals on the island.[29] According to U.S. intelligence, American students had to repeatedly violate curfew under penalty of detention to secure sufficient supplies.[30] There was also a very real possibility of armed intervention from the Grenadian military junta as well as armed Cuban "construction workers."[31]

Based on this increased threat, the U.S. military's mission expanded from a non-combatant evacuation operation ("NEO") to a mission aimed at "neutraliz[ing]" Grenadian forces and reconstructing the Grenadian government in exile.[32] Though intelligence was spotty, the U.S. Ambassador to Grenada assessed that approximately 1,000 Grenadian People's Revolutionary Army, several thousand militiamen, and 250 or so armed Cubans posed a threat to U.S. nationals on the island.[33] The State Department also received requests for U.S. intervention from the Organization of Eastern Caribbean States ("OECS"), and Sir Paul Scoon—the Governor General of Grenada—to "free his country from the Revolutionary Military Council."[34] With these "two separate requests for intervention in hand," the U.S. was determined to intervene.[35] In

[26] *Id.* at 26–27.
[27] *Id.*
[28] *See* RONALD H. COLE, JOINT HIST. OFF., OFF. OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, OPERATION URGENT FURY: THE PLAN. AND EXECUTION OF JOINT OPERATIONS IN GRENADA, 12 OCTOBER – 2 NOVEMBER 1983 9 (1997).
[29] *Id.*
[30] *Id.* at 11.
[31] *Id.* at 2.
[32] *Id.* at 2, 18.
[33] *Id.* at 21.
[34] *Id.* at 22–23.
[35] Cole *supra* note 28, at 3, 23.

doing so, the U.S. garnered small supporting contingents from Jamaica, Barbados, and the OECS.[36]

Despite these two requests for support, the Joint Staff recommended that the Reagan administration undertake additional steps to shore up the international legal basis for U.S. intervention. First, the Joint Staff recommended sending notice to the U.N. that the U.S. intended to intervene on a self-defense theory pursuant to Article 51 of the U.N. Charter.[37] Second, though nominally independent, Grenada remained a British Commonwealth and the Joint Staff recommended that the U.S. seek U.K. approval for military intervention.[38] Finally, the Joint Staff recommended that the U.S. request to form an interim Grenadian government, with accompanying U.S. military support of peacekeeping operations to provide the Grenadians the opportunity to establish a stable regime.[39]

Despite these recommendations, the State Department determined that the U.S. could intervene as part of a regional security organization to preserve local peace and security pursuant to Article 52 of the U.N. Charter, and Article 22 of the Charter of the Organization of American States ("OAS").[40] With these twinned legal interpretations, President Reagan issued a National Security Decision Directive ("NSDD") outlining a threefold mission: "rescue of U.S. citizens, restoration of democratic government [to Grenada], and preclusion of Cuban interference."[41]

Though not clearly articulated in a single contemporaneous document, the U.S. legal basis for armed intervention in Grenada can be seen as a combination of three different justifications.[42] First, the

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[36] *Id.*
[37] *Id.* at 25.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 32–33.
[42] *See* Davis R. Robinson, *Letter from The Legal Advisor, United States Department of Defense*, 18 INT'L LAW. 381, 382, 385 (1984) (Legal Advisor Robinson articulates that the U.S. expressly did not rely on the inherent right of national self-defense for the actions taken in Grenada); *see generally* Quigley, *supra* note 14, at 273–74. Article 52 of the U.N. Charter contemplates the establishment of regional agreements amongst states to address matters relating to international peace and

U.S. was operating in defense of U.S. nationals abroad. Second, the U.S. was acting pursuant to Article 52 of the U.N. Charter at the request of the OECS as a regional security organization to preserve local peace and security. Finally, the U.S. was acting in collective self-defense of the Government of Grenada pursuant to a request from the Grenadian Governor General, Sir Paul Scoon. Taken in order, there are several factual and legal gaps or inconsistencies that led to an international backlash against the U.S. intervention.

Analysts have pointed out factual discrepancies with the purported U.S. purpose of defending U.S. nationals. These discrepancies generally begin with the critique that the U.S. manufactured feelings of danger on behalf of U.S. nationals, and that, absent U.S. military intervention, U.S. nationals did not "feel" threatened.[43] At least one other country with nationals in Grenada found it unnecessary to resort to military means, and announced plans to peacefully evacuate its citizens from the island.[44] In addition, the U.S. remained in Grenada after the evacuation of all U.S. nationals to achieve other ends—presumably those related to President Reagan's NSDD to restore democratic government and preclude Cuban interference.[45] All of this contributes to the perception among critical analysts that the defense of U.S. nationals was a pretext.[46]

There are also factual disputes regarding U.S. action pursuant to an OECS request. Some of these factual disputes are legally relevant, such as the contention that the OECS Charter only empowered the OECS member states to intervene in the face of external aggression, and not to counter an internal threat. [47] Other disputes are not legally relevant but give rise to the perception that the OECS request was

security best handled at the regional level. It further provides that member states of the U.N. should make every effort to resolve local disputes through these regional agreements (ordinarily through pacific means, consistent with the purposes and principles of the U.N.) before referring those disputes to the Security Council. Article 22 of the OAS Charter attempts to operationalize this principle for the "American States," which agree not to have recourse to the use of force "except in the case of self-defense" in accord with this charter and other governing treaties.

[43] Quigley, *supra* note 14, at 289.

[44] *See* Cole, *supra* note 28, at 50; *see also* Quigley, *supra* note 14, at 292.

[45] Quigley, *supra* note 14, at 277.

[46] *Id.* at 301–304.

[47] *See id.* at 308–09.

pretextual. This includes the fact that the U.S. "prompted" the OECS request and that the OECS did not approach the State Department in the first instance.[48] Another issue raised is that the U.S. and OECS relied on different factual bases, legal reasoning, and different provisions of the OECS Charter / Treaty of Basseterre in reaching their conclusion that U.S. intervention was permissible.[49] While not legally fatal, as lawyers from different countries and legal traditions can often reach similar conclusions with different rationales, the lack of consensus between the U.S., Grenada, and the OECS may contribute to a public perception of illegitimacy or "searching" for a rationale.[50]

Finally, U.S. action pursuant to a request from the Grenadian government has come under scrutiny. Questions range from whether any such request was actually made,[51] to whether the U.S. decided to invade before the request.[52] There were also questions as to whether the government recognized by the U.S.—in particular that represented by Governor General Scoon—had any actual authority to make the request.[53] This last critique appears most *legally* damaging. The basic premise in this argument is that, internal strife aside, the Revolutionary Military Council of Grenada was a functioning government, and thus would have had to approve any external use of force in Grenadian territory.[54]

International condemnation of the U.S. invasion of Grenada was swift and widespread. The U.N. General Assembly adopted Resolution 38/7 by a vote of 108 for, 9 against, and 27 abstaining, in which it "deeply deplore[d] the armed intervention in Grenada, which constitute[d] a flagrant violation of international law . . . ."[55] This occurred in the days following the U.S. veto of an identically worded UNSCR. Notably, P5 and NATO member France voted in favor of the

[48] *Id.* at 310.
[49] *See id.* at 320.
[50] *See id.*
[51] *Id.* at 330–31.
[52] *Id.* at 337.
[53] *Id.* at 347–50.
[54] *Id.* at 347.
[55] G.A. Res 38/7, ¶ 1 (Nov. 2, 1983).

UNSCR, joining China and the U.S.S.R. in condemning U.S. actions (the U.K. abstained).[56]

B. *Operation Earnest Will / Nimble Archer / Praying Mantis (The "Tanker War"): Persian Gulf (1986 to 1988)*

On September 22, 1980, Iraq invaded Iran to seize the oil fields in the Shatt al Arab.[57] This occurred less than six months after the failed U.S. Operation Eagle Claw, the goal of which was to rescue U.S. hostages held by the Islamic Republic.[58] In light of this environment, the U.S. government saw an opportunity and chose to support Iraq in the Iran-Iraq war.[59] Due to the critical role oil exports played for both countries, Iran exploited its advantageous position with respect to the Straits of Hormuz, declared its territorial waters to be part of the "war zone," and began to blockade/interdict Iraqi shipping.[60] After two years of bellicose rhetoric by both Iran and Iraq, and tit-for-tat strikes against each other's oil tankers, the Iranian air force struck the *Umm Casbah*—a Kuwaiti flagged oil tanker—in the Persian Gulf.[61] Iran justified the *Umm Casbah* strike based on intelligence that Iraq was receiving war materiel via Kuwaiti shipping, and that the states of the Gulf Cooperation Council were openly antagonistic towards Iran.[62] In this state of regional isolation, Iran had no other apparent recourse to counter Iraq's continued air strikes on Iranian shipping.[63]

The conflict in the Persian Gulf continued to escalate, with Iran—taking advantage of the constrained geography in the Straits of Hormuz—striking 50 ships in 1985, and 97 ships in 1986.[64] Perhaps as a means to secure access to the Middle East's petroleum resources

[56] U.N. SCOR, 38th Sess., 23d mtg. at 39, U.N. Doc. (Oct. 27, 1983). The output of this meeting was a *draft* U.N. Security Council Resolution S.C. Res. 1607 (Oct. 27, 1983). "Guyana, Nicaragua and Zimbabwe: Revised Draft Resolution."
[57] Andrew R. Marvin, *Operation Earnest Will – The U.S. Foreign Policy Behind U.S. Naval Operations in the Persian Gulf 1987-89; A Curious Case*, 73, No. 2 NAVAL WAR COLLEGE REVIEW 81, 83 (2020).
[58] *Id.* at 83–84.
[59] *Id.*
[60] Marvin, *supra* note 57, at 84–85.
[61] *Id.* at 85.
[62] *Id.*
[63] *See id.*
[64] *Id.* at 86.

and preclude Soviet access, the U.S. and Kuwait agreed to a scheme to reflag Kuwaiti oil tankers as U.S. vessels and provide U.S. Naval escorts.[65] Kuwait made the formal request to the State Department in December of 1986, and by March of 1987 the U.S. had agreed to place 11 Kuwaiti vessels under U.S. registry.[66] The U.S. Navy escort mission commenced on July 22, 1987.[67] In the span of three months, a series of incidents led the U.S. to escalate—from its escort mission (Operation Earnest Will) to retaliatory military actions against Iranian naval vessels and oil and gas platforms (Operations Nimble Archer, Prime Chance, and Praying Mantis).[68]

On July 24, 1987, the reflagged Kuwaiti tanker *Al Rekkah* (under the U.S. registry *SS Bridgeton*) struck an Iranian naval mine while transiting the Gulf.[69] The U.S. responded with a special operations raid to capture an Iranian mine-laying vessel and subsequently broadcast the mining on global television.[70] On October 16 of the same year, an Iranian *Silkworm* anti-ship missile struck the reflagged *SS Sea Isle City*, and the U.S. Naval vessel *USS Roberts* struck a moored naval mine.[71] In response to these two incidents, the U.S. launched a series of combined surface and aviation attacks against the Iranian Naval frigates *Sabalan* and *Joshan*, as well as a series of oil and gas platforms in the Gulf that the U.S. claimed doubled as Iranian military command and control centers.[72] In addition, on July 3, 1988, the *USS Vincennes* shot down civilian airliner Iran Air Flight 655.[73] This incident demonstrates the U.S. Navy's heightened alert based on its inability to match Iranian asymmetric techniques. Iranian sea-denial capabilities and tactics were built around hit-and-run air strikes, land and ship based anti-ship missiles, and a Fast Attack Craft/Fast Inland Attack Craft ("FAC/FIAC") maritime fleet of small

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[65] *See id.* at 81.
[66] David Crist, *Joint Special Operations in Support of Earnest Will*, JOINT FORCE QUARTERLY 15, 16 (Autumn/Winter 2001-02).
[67] Marvin, *supra* note 57, at 93.
[68] *See id.*
[69] *Id.* at 94.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

boats.[74] Iran used these relatively cheap capabilities in combination to swarm the larger ships' defenses and overwhelm U.S. Naval decision-makers by presenting them with too many threats to effectively engage.[75]

To counter this asymmetric threat, the U.S. developed an asymmetric threat of its own—one based largely on special operations forces, helicopter borne patrols and raids, and small boats operating off two leased barges in the Persian Gulf.[76] The U.S. calculated that Iran's relative lack of surface combat vessels would mitigate the risk to the relatively light and undefended force.[77] The goals of this approach were to deter further Iranian mining of the Straits of Hormuz, and to deter hostile actions against U.S. assets and U.S. flagged vessels.[78] As a result, the U.S. endeavored to use military force only in response to Iranian threats or force, and to employ military force only against Iranian military targets in a manner proportionate to the threat posed.[79]

The U.S.'s claims of a legal basis are less clear with respect to *Operation Earnest Will* and follow-on response actions. They appear, however, to have been a combination of self-defense and collective self-defense of Kuwaiti vessels that were reflagged as U.S. ships. Without a clearly identifiable specific request for collective self-defense after Iranian strikes against third-country shipping, the agreement between the U.S. and Kuwait to reflag Kuwaiti oil tankers was essentially an exercise of collective self-defense in accord with U.N. Charter practice at the time.[80] It also bolsters potential precedent for informal claims of collective self-defense, of which a country may avail itself in the absence of a specific request.[81] This conceptual picture is complicated by the U.S. reflagging of Kuwaiti vessels to U.S. registry, which may provide a basis for a U.S. claim of self-defense in

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[74] *Id.* at 94–95.
[75] *See* Crist, *supra* note 60, at 16.
[76] *Id.*
[77] *Id.*
[78] Michael Gurley, *Operation Earnest Will*, 11 (Mar. 8, 1994) (Paper, Naval War College).
[79] *Id.* at 13.
[80] Walker, *supra* note 16, at 135–37.
[81] *Id.*

its own right in light of Iranian attacks and mining against the civilian merchant vessels *Sea Isle City* and *Bridgeton*, and the Naval vessel *Roberts*.[82] U.S. actions might also indicate a "Charter era" concept of anticipatory self-defense of other U.S. or friendly vessels in the region.[83]

The international response, however, was less amenable to U.S. claims of collective or national self-defense. One commentator argued that U.S. actions were less about protecting neutral shipping than about countering potential Soviet influence in the Persian Gulf.[84] Even if true, that would not render the U.S.'s claimed legal basis null and void. Indeed, the U.S. could have a valid collective self-defense basis for military action yet choose to exercise it *only as a policy matter* to counter Soviet influence. More damaging to the U.S. legal claims was the International Court of Justice ("ICJ") Oil Platforms Case in which the ICJ concluded that the U.S. acted in contravention of international law.[85] A careful reading of the ICJ opinion indicates that the court did not believe that all complaints of Iranian actions against U.S. interests rose to the level of an "armed attack" that would justify the use of military force in response.[86] This ICJ opinion, however, was informed by the ICJ's conclusions that:[87] (1) the evidence presented by the U.S. was insufficient to support the U.S.'s claim that Iran fired the *silkworm* missile at the *SS Sea Isle City*; (2) the evidence was "inconclusive," as to Iran's role in laying the mines which the *USS Roberts* struck; and (3) the oil and gas platforms at issue may not have actually been used for military command and control purposes.[88] On balance, therefore, the opinion *may* reflect the ICJ's unexpressed judgment that, while the U.S. *legal* argument had merit, it was insufficiently based in fact.

[82] *Id.* at 146.
[83] *Id.* at 147.
[84] Marvin, *supra* note 57, at 95.
[85] Oil Platforms Case, *supra* note 15, at 199.
[86] *Id.* at 192.
[87] *Id.* at 162, 190–92, 198.
[88] *Id.* at 190–92, 198.

C. *Operation Allied Force: Federal Republic of Yugoslavia (Kosovo) (1999)*

During the 1980s and early 1990s, the Balkan states of the former Federal Republic of Yugoslavia ("FRY") began to display increasingly nationalist tendencies.[89] In many instances, rather than discourage these movements, the U.S. and NATO actively encouraged violent nationalist movements so long as they were nominally anti-communist.[90] This breakup, however, was far from peaceful, as demonstrated by the war in Bosnia, which culminated in the Bosnian-Serb massacre of some 800 Muslims at Srebrenica.[91] In February 1998, the Serbian Yugoslav government under Slobodan Milosevic occupied the nominally independent territory of Kosovo.[92] In response to nationalist agitation by the Kosovo Liberation Army ("KLA"), Serbian forces cracked down on Kosovar Albanians.[93] As late as October 1998, negotiations still seemed viable, with Milosevic, U.S. Special Envoy Richard Holbrooke, and others meeting at Rambouillet, France to negotiate the terms of a ceasefire and an end to the Serbian occupation of Kosovo.[94]

On March 24, 1999, after negotiations broke down, NATO initiated a bombing campaign *without* a UNSCR. The campaign was directed against military forces of the FRY, as well as selected targets of the Milosevic government.[95] The goals were twofold: first, put an immediate end to Serbian ethnic cleansing in Kosovo; and second, force Milosevic to sign the Rambouillet document terminating Serbian occupation and implementing a ceasefire.[96] The NATO bombing campaign lasted for 78 days before Milosevic relented, finally accepting NATO's terms.[97]

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[89] Indep. Int'l Comm'n on Kosovo, *The Kosovo Report*, at 1 (Stockholm, SWE. Oct. 19, 2000) [hereinafter *The Kosovo Report*].
[90] *Id.* at 188.
[91] *Id.* at 20.
[92] *See id.* at 1–2.
[93] *Id.* at 34–35.
[94] *See id.* at 76.
[95] *See id.* at 30.
[96] John E. Peters, et. al., OPERATION ALLIED FORCE: LESSONS FOR FUTURE COALITION OPERATIONS (RAND Corp., 2001); *The Kosovo Report*, *supra* note 89, at 85–86.
[97] Peters, *supra* note 96.

NATO members offered a number of legal justifications, as is to be expected given the number of different national interests and legal traditions at play.[98] As a threshold matter, the U.S. and NATO specifically declined to seek a UNSCR authorizing the use of force on the understanding that Russia and China would veto any such Resolution.[99] Thus, while there was a UNSCR demanding a stop to the crisis, there was none that could serve as a legal basis for a military intervention. At a top-line level, the bombing campaign appears to have been based on the legal theory that NATO could intervene pursuant to Article IV of the NATO Charter whenever and wherever its interests were threatened.[100] There also appeared to be the influence of a strong humanitarian interventionist perspective.[101] The U.S. adopted the first argument, claiming a sort of anticipatory self-defense based on the theory that U.S. and NATO interests on the eastern flank were directly threatened by the ongoing humanitarian crisis.[102] The U.K., on the other hand, explicitly claimed an intervention on humanitarian grounds.[103] In the end, the participating NATO members each fell into one of two competing camps.

The first, characterized as the French View, ceded primacy to the role of the U.N., and in particular of the Security Council.[104] This view made some concessions to the Office of Security Cooperation in

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[98] The DOJ Office of Legal Counsel did issue on opinion addressing the President's *domestic* legal authority to continue hostilities in Kosovo in December of 2000 in light of Pub. L. No. 106-31, 113 Stat. 57 (May 21, 1999), providing supplemental appropriations for combat operations in Kosovo. However, this opinion is exclusively concerned with domestic legal authority, and the interplay of the executive and legislative powers in light of the War Powers Resolution. *See generally* Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000).

[99] Ivo H. Daalder, NATO, THE UN, AND THE USE OF FORCE (Brookings Inst., Mar. 1, 1999).

[100] John E. Peters, et. al., EURO. CONTRIBUTIONS TO OPERATION ALLIED FORCE: IMPLICATIONS FOR TRANSATLANTIC COOPERATION 13. (RAND Corp., 2001).

[101] *Id.*

[102] *Id.* at 60. *See U.S. – Kosovo Policy: Testimony Before the Senate Armed Services Committee*, 106th Cong. 1 (Apr. 15, 1999) (Statement of Sec'y of Def. William S. Cohen); *U.S. – Kosovo Policy and Operations: Testimony Before the Senate Armed Services Committee*, 106th Cong. 1 (Jul 20, 1999); *Operation Allied Force: Testimony Before the Senate Armed Services Committee*, 106th Cong. 1 (Oct. 14, 1999).

[103] Peters, *supra* note 100, at 60.

[104] Daalder, *supra* note 99.

Europe ("OSCE") as a regional security arrangement, which could act pursuant to Article 52 of the U.N. Charter to maintain peace and security within its respective region.[105] In the absence of a UNSCR, the French View was that only Article 52 or an Article 51 self-defense justification would be legally viable.[106] The U.S. took a more expansive position regarding NATO's authority to act in the absence of a UNSCR.[107] The U.S. view provided that NATO could intervene whenever its interests were threatened.[108] Furthermore, the U.K. argued that failure to intervene in the case of Kosovo would leave an ongoing humanitarian crisis unpunished and undeterred.[109]

While NATO proceeded in the absence of a legal consensus amongst its members, Russia specifically called out the bombing campaign as illegal.[110] A non-partisan Independent International Commission on Kosovo issued a report ("The Kosovo Report"), which concluded that the NATO military intervention was "legitimate," but not legal.[111] While many NATO members were swayed by the need to alleviate or end the humanitarian crisis,[112] there were still competing views within NATO as to the appropriate international legal justification.[113] This left the Kosovo Commission with the unsatisfying conclusion that there was a "[n]eed to close the gap between legality and legitimacy."[114] Attempts to close this gap gave rise to a concept known as the "responsibility to protect" ("R2P").[115]

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[105] *Id.*
[106] *Id.* (Collective self-defense on behalf of the Kosovar Albanians would not be legally viable, on the theory that Kosovo though nominally independent was not a sovereign state afforded international recognition apart from the FRY.)
[107] *Id.*
[108] *Id.*
[109] *See id.*
[110] Eric Yesson, *NATO and Russia in Kosovo*, 13 Perspectives: Review of International Affairs 11 (Winter 1999-2000).
[111] *The Kosovo Report*, *supra* note 89, at 2.
[112] Daalder, *supra* note 99.
[113] Peters, et al., *supra* note 100, at 60.
[114] *The Kosovo Report*, *supra* note 89, at 10.
[115] *The Responsibility to Protect: A Background Briefing*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (Jan. 14, 2021), https://www.globalr2p.org/publications/the-responsibility-to-protect-a-background-briefing/.

Though the U.S. has not accepted the R2P as an independent legal basis justifying the use of force,[116] it gained significant traction in the 2000s among academic and international legal communities. The U.N. General Assembly adopted Resolution 60/1 in 2005, which claims that states owe a responsibility to their own citizens to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity.[117] This Resolution does *not* specifically purport to authorize external intervention, however.[118] Nonetheless, the R2P concept remained a talking point in international law circles and was specifically discussed with respect to Libya as early as 2011.[119] Talking points aside, the invocation of R2P in Libya is inapposite, as there was a specific UNSCR authorizing military intervention.[120] This lack of consensus led to a unique place in international law for the R2P. Some academics argue that it could create a positive obligation to intervene in cases of genocide.[121] Other academics argue that R2P is an amorphous concept, and a ready-made pretext for acts of aggression driven by self-interest.[122] Stated differently, it is an unworkable concept liable to abuse, and cannot remain a valid international legal basis for the use of force.[123]

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[116] LAW OF WAR MANUAL, *supra* note 19, at § 1.11.4.4.
[117] G.A. Res. 60/1, *supra* note 21.
[118] *Id.*
[119] Jonas Claes, *Libya and the "Responsibility to Protect"*, UNITED STATES INSTITUTE OF PEACE (Mar. 1, 2011), https://www.usip.org/publications/2011/03/Libya-and-responsibility-protect.
[120] *Id.*; U.N. SCOR, 66th Sess., 6498th mtg. at 2, U.N. Doc. S/PV.6498 (Mar. 17, 2011).
[121] Rebecca Barber, *Does the 'Responsibility to Protect' Require States to go to War with Russia?*, JUST SECURITY (Mar. 25, 2022), https://www.justsecurity.org/80833/does-the-responsibility-to-protect-require-states-to-go-to-war-with-russia/ (Though—to date—it does not appear that any state has adopted this interpretation).
[122] Dimitrious A. Kourtis, *Are States Allowed to 'Cry Wolf'? Genocide and Aggression in Ukraine v. Russia*, OPINIO JURIS (Mar. 21, 2022), https://opiniojuris.org/2022/03/21/are-states-allowed-to-cry-wolf-genocide-and-aggression-in-ukraine-v-russia/.
[123] John Reid, *Putin, Pretext, and the Dark Side of "Responsibility to Protect"*, WAR ON THE ROCKS (May 27, 2022), https://warontherocks.com/2022/05/putin-pretext-and-the-dark-side-of-the-responsibility-to-protect/.

D. *Weapons of Mass Destruction and the "Dodgy Dossier:" Iraq (2003)*

The failure of U.S. and Coalition forces to locate chemical weapons or other weapons of mass destruction ("WMD") after the 2003 invasion of Iraq is well documented.[124] Rather than a detailed exposition of the factual basis for that invasion, what follows is a brief outline of operative facts that *may* have contributed to an international law justification for the invasion, claimed or otherwise.

On February 5, 2003, Secretary of State Colin Powell spoke before the U.N. and outlined Iraq's history of violating its obligations with respect to chemical weapons.[125] In April 1991, after Saddam Hussein employed chemical weapons against Kurds in northern Iraq, the Security Council issued UNSCR 687, which set conditions for Iraqi chemical weapons disarmament.[126] At the time of Secretary Powell's address, Iraq had not allowed U.N. weapons inspectors into necessary areas since 1998.[127] With the events of September 11, 2001 still fresh in the minds of New Yorkers and the world, Secretary Powell also articulated a tenuous "potential" connection between Iraq and terrorists to play to fears of terrorist organizations armed with WMD.[128] Secretary Powell then pointed to the issuance of UNSCR 1441, which demanded Iraqi relinquishment of WMD, and to signals intelligence in which Iraqi officials purportedly discussed moving or disposal of chemical weapons.[129] Secretary Powell's address to the U.N. gives some clue as to the U.S.'s claimed legal basis to invade Iraq.

An October 23, 2002, opinion from the U.S. Department of Justice's ("DOJ") Office of Legal Counsel ("OLC") provides a detailed description of the U.S.'s legal reasoning to justify the invasion of Iraq. The OLC opinion relies on a two-pronged approach to develop an international legal justification. First, it builds a sort of daisy chain of past UNSCRs non-specific to this scenario, to build a case that force is

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[124] Esther Pan, *Iraq: Justifying the War*, COUNCIL ON FOREIGN RELATIONS (Feb. 2, 2005), https://www.cfr.org/backgrounder/iraq-justifying-war.
[125] *Id.*
[126] *See* S.C. Res. 687, ¶ 8-9(a) (Apr. 3, 1991).
[127] Collin Powell, Sec'y of State, Address to the U.N. Security Council (Feb. 5, 2003).
[128] *Id.*
[129] *Id.*

specifically authorized by UNSCR. Second, it articulates a case for anticipatory self-defense.[130] This OLC opinion, and a subsequent one issued on December 7, 2002, lay out the UNSCR framework, in broad strokes, as follows. U.N. Security Council Resolution 678 authorized states cooperating with Kuwait to use "all necessary means," to restore international peace and security.[131] Resolution 687, which was issued in April of 1991, after the Gulf War, set forth several WMD disarmament obligations for Iraq.[132] Finally, UNSCR 688 called on Iraq to end repression of the Kurdish population in its northern territory, and to permit access to humanitarian aid workers to mitigate the crisis brought on by Iraqi actions.[133] Though not specifically authorizing military force, the U.S. and U.K. relied on UNSCR 688 as the authority to establish a northern Iraq "no-fly zone."[134] In addition, the U.S. (under President Clinton) previously relied on UNSCR 688 as a "subsequent relevant resolution" to UNSCR 678, authorizing both the expansion of the U.S./U.K. no-fly zone and a series of air strikes in Iraq in 1996.[135]

UNSCRs 678, 687, and 688 were used to justify American intervention in the following way: Iraq's failure to abide by U.N. weapons inspection regimes was a "material breach" of the terms of the ceasefire between Iraq and the Coalition, which the U.N. authorized the use of force to uphold.[136] Furthermore, the U.S., as a party to said ceasefire, had the right to unilaterally suspend it and resume hostilities as a remedy in light of Iraq's material breach.[137] The October OLC Opinion offers that the U.S. has resorted to unilateral military force during a suspension of a ceasefire before, including in Iraq in 1993 and 1998.[138] The December OLC opinion dismisses the argument that UNSCR 1441, which was issued in November 2002,

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[130] Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 177 (2002).
[131] *See* S.C. Res. 678, ¶ 2 (Dec. 21, 1990).
[132] *See* S.C. Res. 687 (Apr. 3, 1991).
[133] S.C. Res. 688, at 31 (Apr. 5, 1991).
[134] *See generally* Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, *supra* note 130.
[135] *Id.*
[136] *Id.* at 162–164.
[137] *Id.* at 167.
[138] *Id.* at 169–173.

requires a further *subsequent* material breach of the ceasefire before triggering U.N. action.[139] This December OLC opinion, however, quickly found reason that Iraq had already committed such a "further material breach" even if not required.[140]

The Bush administration relied on UNSCR 1441, which provided Iraq with a "final opportunity," to comply with its disarmament obligations and cooperate with weapons inspection regimes.[141] The OLC concluded that Iraq's materially false statements concerning weapons disarmament, and its failure to comply with U.N. weapons inspectors were a "*further* material breach" under the terms of that UNSCR, and thus authorized the U.S. to use military means to enforce Iraq's disarmament obligations.[142] The OLC also relied on a perhaps over broad reading of paragraph 4 of UNSCR 1441 to conclude that immediate military force was justified. This stood in contrast to the plain language of that paragraph, which indicated any such "*further* material breach" would be referred to the Security Council for appropriate action.[143] Thus, on this basis, the U.S. government concluded that the U.N. authorized its invasion of Iraq.

The U.S. also articulated a theory of anticipatory self-defense.[144] The October 2002 OLC opinion outlined a definition of "imminent threat," that was not necessarily in accord with plain language meaning of that term.[145] Rather than characterize concepts of necessity and imminence with the traditional *Caroline* test that the threat be "instant, overwhelming, and leaving no choice of means, and

[139] *See generally*, Whether False Statements or Omissions in Iraq's Weapons of Mass Destruction Declaration Would Constitute a "Further Material Breach" Under U.N. Sec. Council Res. 1441, 26 Op. O.L.C. 217 (2002).
[140] *Id.* at 221.
[141] S.C. Res. 1441, at 3 (Nov. 8, 2002).
[142] Whether False Statements or Omissions in Iraq's Weapons of Mass Destruction Declaration Would Constitute a "Further Material Breach" Under U.N. Sec. Council Resol. 1441, *supra* note 139, at 217.
[143] Effect of a Recent U.N. Sec. Council Resol. On the Auth. of the President Under Int'l Law to Use Mil. Force Against Iraq, 26 Op. O.L.C. 199, 201-02 (2002).
[144] Auth. of the President Under Domestic & Int'l Law to Use Mil. Force Against Iraq, *supra* note 130, at 181.
[145] *Id.*

no moment for deliberation;"[146] the OLC articulated a different set of factors. In the OLC's opinion, determining "imminence" was an amalgamation of several factors including the probability of an attack; the likelihood that the probability of an attack would increase over time, providing a "window of opportunity" to forestall the attack; the availability of practical diplomatic alternatives; and the magnitude of any potential harm.[147] On this theory, the OLC found that there was no requirement to wait until there was "no moment for deliberation," to consider a threat "imminent."[148] Instead, the OLC found that when peaceful alternatives were not reasonably available, a state could use force in anticipatory self-defense when necessary (i.e., no other practical means) and proportionate (i.e., the force used is sufficient in nature, scope, duration, and intensity to preclude or neutralize the threat).[149]

In applying these factors to Iraq, the October OLC opinion relies primarily on the potential likelihood of an attack and the magnitude of harm likely to result. The OLC relied on Iraq's previous maintenance of a chemical weapons capability, and use of chemical weapons against its own citizens and enemy forces to conclude it likely that Iraq has an active and capable WMD program. This, coupled with Iraq's state sponsorship of international terrorism, increased the potential for an attack in the OLC's view. The OLC opinion then articulated, with scant factual basis, a link between Iraq, terrorist groups *writ large* (but no specific link to al Qaeda), WMD, and non-state proliferation concerns.[150] Finally, the October OLC opinion concluded that in the event of an attack, any harm would be potentially catastrophic.[151] Aside from the firsthand effects of a chemical weapons

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[146] Daniel Webster, Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), in THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECT'Y OF STATE 110 (Harper & Brothers, 1848).
[147] Auth. of the President Under Domestic & Int'l Law to Use Mil. Force Against Iraq, *supra* note 130, at 194.
[148] *See id* at 181, 194.
[149] *Id.*; LAW OF WAR MANUAL, *supra* note 19, at §§ 1.11.1-11.2, 1.11.5.
[150] Auth. of the President Under Domestic & Int'l Law to Use Mil. Force Against Iraq, *supra* note 130, at 195.
[151] *See* Auth. of the President Under Domestic & Int'l Law to Use Mil. Force Against Iraq, *supra* note 130, at 196.

attack against the U.S., the Levant region was already a "tinder box," ready to ignite upon the spark of a WMD attack.[152]

That articulated legal basis had two fundamental problems. The first was its factual predicate. No active WMD program was ever found in Iraq. While data indicates that Saddam Hussein's chemical weapons program was *not* fully reduced or destroyed pursuant to various UNSCRs, there was no indication of plans to use those weapons against Coalition forces in the event of an invasion. Moreover, there was no indication of an active Iraqi nuclear program after 1998.[153] Furthermore, while there were purported links between Iraq and al Qaeda—aside from the non-specific "state sponsor of terrorism" label—no hard evidence of such a linkage ever materialized.[154] The second concern is that, in hindsight, the U.S. invasion was hardly limited in nature, duration, scope, or intensity to what was necessary to neutralize the threat. Rather, the U.S. deliberately pursued regime change in Iraq. While this might have been a *post hoc* decision in light of a rapidly deteriorating security environment immediately following the initial invasion, the U.S. did not stop after failing to locate chemical or nuclear weapons.

There is also the problem of conflating different conflicts, and the U.S. domestic legal basis. From the beginning, the U.S. public (and presumably international audiences) conflated Iraq and Afghanistan, the governments of these nations, and non-state actors such as al Qaeda.[155] Furthermore, unlike other Coalition nations, the U.S. government largely conflated the Iraq war with linkages to the September 11, 2001, attacks.[156] The U.S. also relied almost entirely on the same *domestic* legal basis for all of these operations.[157] The 2001 Authorization for the Use of Military Force ("AUMF") empowered

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[152] Auth. of the President Under Domestic & Int'l Law to Use Mil. Force Against Iraq, *supra* note 130, at 197.
[153] Esther Pan, *Iraq: Justifying the War*, COUNCIL ON FOREIGN RELATIONS (Feb. 2, 2005), www.cfr.org/backgrounder/iraq-justifying-war.
[154] *Id.*
[155] CARTER MALKASIAN, THE AMERICAN WAR IN AFGHANISTAN 53, 59 (Oxford University Press, 2021).
[156] Dr. Afzal Ashraf, *Saddam Hussein's Rise & Fall*, HISTORY HIT: WARFARE PODCAST (Mar. 19, 2023).
[157] *See generally* Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) [hereinafter 2001 AUMF].

the U.S. to take action against those responsible for, or harboring those responsible for, the September 11, 2001, attacks against the U.S.[158] Initially, this applied to the Taliban, al Qaeda, and associated groups *in Afghanistan*.[159] The Iraq invasion was authorized under a separate *domestic* AUMF in 2002.[160] Eventually, the 2001 AUMF became *publicly* acknowledged as the domestic legal basis for counterterrorism operations against any and all al Qaeda affiliated or successor groups in locales as far flung as Afghanistan, Iraq, Syria, Yemen, Somalia, and Libya.[161]

E. *Strikes Against Chemical Weapons Facilities: Syria (2018)*

On April 7, 2018, the Syrian regime, embroiled in civil war, employed chemical weapons against resistance forces in an eastern suburb of Damascus. This was the latest in a string of chemical weapons attacks by the Assad regime. Earlier attacks included sarin gas employment in the vicinity of Damascus in November 2017, and as many as 15 other instances of chemical weapons employment since June 2017.[162] In response to these repeated violations of international law, the U.S., U.K., and France conducted a series of missile strikes against three Syrian chemical weapons facilities on April 13, 2018: the Barzeh Center, used for research, development, and production of chemical weapons; and two separate sites at Him Shinshar, a storage facility and a hardened military command post.[163] This series of strikes was the second conducted by the U.S.; it had, approximately one year prior, responded on a more limited basis to the use of sarin gas against resistance forces in Khan Shaykun.[164]

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[158] *See id.*
[159] Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, Dean's Lecture at Yale Law School, *reprinted in* 31 YALE L. & POL'Y REV. 141, 145 (2012).
[160] Pub. L. 107-243, 116 Stat. 1498 (Oct. 16, 2002) [hereinafter 2002 AUMF].
[161] Stephen W. Preston, Gen. Couns., Dep't of Def., Comments at the Ann. Meeting of the Am. Soc'y of Int'l Law: The Legal Framework for the U.S. Use of Mil. Force Since 9/11 (Apr. 10, 2015).
[162] Unless otherwise specified, all operative facts are drawn from: April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, Op. O.L.C. (slip opinion – on file with the U.S. Dep't. of Just., O.L.C.) (2018).
[163] *Id.* at 2.
[164] *Id.* at 3.

Though a May 31, 2018 OLC opinion gives a thorough overview of the *domestic* legal basis for the strikes, and offers a cogent explanation of the President's inherent authority pursuant to Article II of the Constitution, and the interplay with the War Powers Resolution, the opinion is relatively sparse in its description of an *international* legal basis for the strikes.[165] There are hints in this OLC opinion of protection of U.S. persons and property as a subset of self-defense;[166] assistance to U.S. allies;[167] support to the U.N.;[168] promotion of regional stability;[169] or the more recent trend of mitigating a potential humanitarian disaster.[170]

Separate and apart from the justifications proffered by the OLC, the President offered a number of *policy* justifications for the action. These ranged from the promotion of regional stability by mitigating the humanitarian crisis and potential refugee driven destabilization to deterring the use and proliferation of chemical weapons and the centrality of the Middle East as a core area of American interest.[171] Thus, neither the President nor the May 2018 OLC opinion offered a hard and fast international legal basis for the strikes against Syrian chemical weapons facilities. Despite the practical concerns of taking actions to deter and punish the use of chemical weapons, condemn Syria's actions, and address humanitarian concerns, there appeared to be little effort to base these actions on a legal foundation within one of the three traditional justifications for the use of military force. This raises the issue of whether the U.S. relied upon another legal basis, that of "executive prerogative,"[172] This raises a number of concerns, including to what

[165] *Id.*
[166] *Id.* at 10, 18.
[167] *Id.* at 10–11 (though perhaps not clearly delineated as collective self-defense).
[168] April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 162, at 11 (though in the absence of any UNSCR authorizing "all necessary means").
[169] *Id.* (though not through any regional security organization pursuant to Article 52 of the U.N. Charter).
[170] *Id.* at 11, 15.
[171] *See* Donald J. Trump, Statement by President Trump on Syria (Apr. 13, 2018) (transcript available on file with the White House Off. of the Press Sect'y).
[172] For an assessment of whether and how "crown prerogative" evolved to "executive prerogative" in the United States in the context of international affairs, *see* Mortenson, Julian Davis. "Article II Vests Executive Power, Not the Royal Prerogative." COLUM. L. REV. 119, no. 5 (2019): 1169, 1224–25, 1251–52. For an

degree the U.S. subscribes to "executive prerogative" as an independent legal basis, and its status in customary international law.[173]

Contrary to the U.S.'s position, both France and the U.K. each appeared to claim a specific international legal basis for their conduct in the strikes. France claimed that its actions were in "full conformity with the objectives and values enshrined in the U.N. Charter." France claimed that its actions were necessary both as a response to "chemical massacres" in Syria, and Syria's repeated violations of its obligations under international law.[174] This claim of necessity was bolstered by the fact that a previous, more limited strike did not deter Syria's continued use of chemical weapons.[175] Lesser means had thus already proven ineffective in curbing Syrian behavior. France also explicitly claimed that the strikes served to ensure the application of the law, and its political strategy.[176]

The U.K.'s justification rested on an exclusively humanitarian framework. This framework justified the use of force as part of the R2P doctrine "on an exceptional basis, to take measures in order to alleviate human suffering." The framework consists of three prongs:[177] (1) there is convincing evidence, generally accepted by the international community, of human suffering caused by a state's violation of international legal obligations; (2) it is objectively clear

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overview of "crown prerogative," the commonwealth counterpart to "executive prerogative," *see, e.g.*, Alexander J. Braden, Decision Instruments of the Federal Cabinet: Legally Exercising the "War Prerogative," 3 JOURNAL OF COMMONWEALTH LAW 157 (2021); House of Lords, Library Briefing, Prerogative Powers of the Crown (December 13, 2019); Sean Mattie, Prerogative and the Rule of Law in John Locke and the Lincoln Presidency, 67 THE REVIEW OF POLITICS 77 (Winter, 2005).

[173] Mortenson, *supra* note 172, at 1169, 1224–25, 1251–52.

[174] Alonso G. Dunkelberg et al., *Mapping States' Reactions to the U.S. Strikes Against Syria of April 2018 – A Comprehensive Guide*, JUST SECURITY (May 7, 2018), https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/.

[175] April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 144, at 2.

[176] *See* Dunkelberg et al., *supra* note 174.

[177] Policy Paper, *Syria Action – U.K. Government Legal Position*, PRIME MINISTER'S OFF. (Apr. 14, 2018), https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

that there is no practical alternative to the use of military force; and (3) the proposed use of force is necessary and proportionate to the aim of relieving the human suffering.[178]

On the other side of the international response, the lineup of those condemning the strikes is not surprising. Russia, which has provided extensive support to the Assad regime in the Syrian Civil War, condemned the action as an act of aggression without backing by the U.N.[179] China proclaimed that the strikes violated the U.N. Charter's prohibition on the threat or use of force, and that the "modern" international law did not permit the use of force to punish unlawful action.[180] Iran claimed that the attacks were a "flagrant breach of international laws and principles, and a violation of Syria's right to national sovereignty and territorial integrity."[181]

F. *Qasem Soleimani: Iraq (2020)*

Qasem Soleimani was the commander of the Islamic Revolutionary Guards Corps, Qods Force ("IRGC-QF"), which is the Iranian military organization primarily responsible for clandestine special operations and employment of proxy forces as the Islamic Republic's power projection capability.[182] On January 2, 2020, after a series of increasingly escalatory exchanges between the U.S. and Iran, the U.S. conducted an air strike that killed Soleimani while he was traveling in a vehicle after landing at Baghdad airport.[183]

The events that led to the strike—though *involving* a much larger geopolitical context—can be summarized as follows.[184] In June 2019, Iran shot down an unmanned American aircraft traveling in

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[178] *Id.*
[179] Dunkelberg et al., *supra* note 22.
[180] *Id.*; *see also* U.N. Charter art. 2, ¶ 4.
[181] Dunkelberg et al., *supra* note 22.
[182] KENNETH KATZMAN, CONG. RSCH. SERV., RL44017, IRAN'S FOREIGN AND DEFENSE POLICIES 3 (2021).
[183] January 2020 Airstrike in Iraq Against Qassem Soleimani, Op. O.L.C. (2020) (redacted slip opinion - on file with U.S. Dep't of Just., O.L.C.).
[184] *See* Ney, *supra* note 12.

international airspace.[185] The U.S. responded in a "measured and muted" manner via a series of cyberspace operations against Iranian intelligence services.[186] In July 2019, Iranian unmanned aerial systems ("UAS") conducted a series of provocative and threatening maneuvers in the vicinity of the *USS Boxer* amphibious ship.[187] Similar UAS conducted attacks against neutral shipping in the Straits of Hormuz.[188] In September 2019, Iran employed a number of "kamikaze" UAS and cruise missiles to conduct a devastating attack against an oil refinery and natural gas plant in the Kingdom of Saudi Arabia ("KSA").[189] Between November 9 and December 9, 2019, forces identified by the U.S. as Iranian/IRGC-QF proxies fired rockets at three different U.S. compounds in Iraq.[190]

The tipping point appears to have been the December 27, 2019, rocket attack by Kataib Hizbollah ("KH") against Kirkuk air base, which killed a U.S. contractor and injured both U.S. and Iraqi military personnel. For the first time, the U.S. responded with lethal force, conducting air strikes against a series of KH facilities. In apparent retaliation for these strikes, KH organized a protest at the U.S. Embassy on December 31, 2019, which turned violent and resulted in damage to U.S. embassy facilities.[191] In response to the continued belligerence by KH and the IRGC-QF, President Trump authorized, and the U.S. successfully executed a strike against Qasem Soleimani on January 2, 2020. The U.S. promptly delivered a notice to the U.N. pursuant to Article 51, indicating that it used force in self-defense against Iranian aggression.[192] In response, the Islamic Republic of Iran issued a competing Article 51 notice to the U.N.[193]

[185] Julian E. Barnes & Thomas Gibbons-Neff, *U.S. Carried Out Cyberattacks on Iran*, N.Y. TIMES (Jun. 22, 2019), https://www.nytimes.com/2019/06/22/us/politics/us-iran-cyber-attacks.html.
[186] *Id.*
[187] *See* Ney, *supra* note 12.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] Ney, *supra* note 12.
[193] Elura Nanos, *The Trump Admin's Likely Legal Justifications for Bypassing Congress to Kill Qassem Soleimani*, LAW & CRIME (Jan. 3, 2020, 12:18 PM),

A March 2020 OLC opinion that articulates the U.S.'s legal justification clearly laid out a self-defense rationale for the strike against Soleimani.[194] Of note, the OLC opinion declined to articulate that the U.S. and Iran were embroiled in a simmering low-level international armed conflict. This was despite the fact that such a conclusion may have been reasonable. The basic rationale views the months-long use of military force and competing Article 51 notices to the U.N.,[195] through the lens of the U.S.'s position that any exchange of lethal force between states is sufficient to precipitate an armed conflict.[196] Perhaps the OLC was hesitant to state that the U.S. and Iran were "at war" as a means to control escalation. As evidence that this may have been the case, the March 2020 OLC opinion went to lengths to describe the U.S. strike as necessary and proportionate, potentially to signal that hostilities were at an end should Iran cease its aggression.[197]

This OLC opinion laid out Soleimani's central role in the direction of IRGC-QF proxies generally, and KH specifically.[198] The OLC goes on to describe the factual predicate of the IRGC-QF and proxy attacks against the U.S., and articulated that KH generally, and Qasem Soleimani specifically, continued to "actively [develop] plans" for further attacks against the U.S.[199] The OLC opinion then recounted the U.S.'s use of force in response to attacks or threats in the past, arguing that a military option would not be inconsistent with past U.S. and larger international state practice. [200] The stated goal of the action was to protect U.S. personnel, deter Iran from further attacks, degrade the Iranian proxies, and end Iran's "strategic escalation."[201] The OLC concluded that Soleimani was a military commander based on the following factors: (1) Soleimani was developing plans for

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https://lawandcrime.com/legal-analysis/the-trump-admins-likely-legal-justifications-for-bypassing-congress-to-kill-qassem-soleimani/.

[194] *See generally* January 2020 Airstrike in Iraq Against Qassem Soleimani, *supra* note 183.

[195] Ney, *supra* note 12.

[196] LAW OF WAR MANUAL, *supra* note 19, at § 3.4.2.

[197] January 2020 Airstrike in Iraq Against Qassem Soleimani, *supra* note 183, at 18.

[198] *See id.* at 6.

[199] *See id.* at 8 (reasonably drawing an inference from redacted facts).

[200] *See id.* at 8.

[201] *See id.* at 13.

attacks against U.S. interests in Iraq *and* elsewhere within the region; and (2) Soleimani was the Commander of the IRGC-QF and its proxies.[202] The OLC opinion then stated that military commanders were legitimate targets pursuant to the law of war.[203] Articulating that Soleimani was a "status based target" due to his position as a military commander pursuant to *jus in bello*, rather than a "conduct based target," *may*, however, be inconsistent with the U.S.'s claim of self-defense as a *jus ad bellum* theory.[204] Conversely, the self-defense claim may still be valid, but the "status 'based" argument may undercut any claim that the U.S. and Iran *were not* engaged in an armed conflict.

The OLC opinion then articulated the necessary and proportionate nature of the use of military force, bolstering its claim that the U.S. acted in self-defense.[205] In particular, the OLC opinion recounted the series of mutual retaliatory actions, including the U.S.'s measured escalatory steps, to demonstrate that lesser means were unlikely to stop Iran.[206] The March 2020 OLC opinion then explained that the response was proportionate, in that it was "circumscribed," and designed to avoid escalation, collateral damage, and civilian casualties.[207] The U.S. claimed that the strike was meant to prevent future attacks against U.S. personnel and interests, *not* designed as an act of conquest or occupation of territory.[208] The U.S. also denied imposing a change of character in Iran's political regime through military means.[209] Though its rationale is not clear, the OLC also concluded that this strike was unlikely to escalate into "full scale war."

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[202] *See id.* at 14–15.
[203] *Id.*
[204] LAW OF WAR MANUAL, *supra* note 19, at § 4.3.2.
[205] *See* January 2020 Airstrike in Iraq Against Qassem Soleimani, *supra* note 183 (explaining that the U.S. and Iran both notified the United Nations that their actions in January of 2020 were undertaken pursuant to U.N. Charter Article 51 self-defense); *see, e.g.,* Letter from Hon. Kelly Craft, U.S. Permanent Representative to the United Nations, to the President of the SCOR (Jan. 8, 2020) (on file with author).
[206] *See* January 2020 Airstrike in Iraq Against Qassem Soleimani, *supra* note 183, at 20.
[207] *Id.*
[208] *See id.* at 18 (explaining that this expressed purpose stands in contrast to both Russia's invasion of Ukraine, but also the U.S. invasion of Iraq).
[209] *See id.*

Instead, the OLC claimed that the strike might result in strategic de-escalation.[210]

There are a number of confusing public statements that do not necessarily undermine the legal analysis but may undermine public confidence in the U.S.'s legal basis. First among these is the somewhat inconsistent analysis that classified Soleimani as a military commander (and hence a status based target) contrasted with the U.S.'s claim that it acted in self-defense (which would make Soleimani a conduct based target). There are additional reasons that the U.S.'s legal claims are confusing to observers. For instance, the Trump administration claimed that a statute related to the funding of U.S. proxy activities granted the authority to strike Soleimani.[211] Section 127e of Title 10 provides in pertinent part that "[t]he Secretary of Defense may … expend up to $100,000,000 during any fiscal year to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating authorized ongoing military operations by United States special operations forces to combat terrorism." This statute provides *no* operational authority however, and is a purely domestic funding authority which provides no *international* footing in this matter.[212] It has also been speculated that the IRGC-QF's designation as a Foreign Terrorist Organization ("FTO") provided a legal basis to conduct the strike.[213] This rationale can be easily dismissed because an FTO designation provides *criminal* sanctions for those providing direct support to such organizations,[214] as well as domestic legal vehicles to economically sanction those groups, associated individuals, their assets, and property.[215]

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[210] *See id.* (noting that although the Iranian government launched a series of intermediate range ballistic missiles at U.S. bases in the region, that was the end of the cycle of violence).

[211] Elura Nanos, The Trump Admin's Likely Legal Justifications for Bypassing Congress to Kill Qassem Soleimani, LAW & CRIME NEWS (Jan. 3, 2020), https://lawandcrime.com/legal-analysis/the-trump-admins-likely-legal-justifications-for-bypassing-congress-to-kill-qassem-soleimani/.

[212] *See* 10 U.S.C. § 127e.

[213] *See* CLAYTON THOMAS, CONG. RSCH. SERV., R46148, U.S. KILLING OF QASEM SOLEIMANI: FREQUENTLY ASKED QUESTIONS 1–2, 14 (2020).

[214] *See* 18 U.S.C. § 2339(a)–(b).

[215] *See* 8 U.S.C. § 1189(a)(1)–(3); AUDREY CRONIN, CONG. RSCH. SERV., RL32120, THE 'FTO LIST' AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 2–3 (2003).

Designation as an FTO is wholly separate from whether a group is "AUMF-able," and subject under domestic law to the use of offensive military force and has no bearing on international legal justifications to target a person or group using lethal force.[216] It is unhelpful that this conflation of "terrorism" under U.S. law continues to be a point of confusion, including it would appear amongst U.S. lawmakers.[217]

G. *U.S. Legal Justifications: The Gaps and Seams*

While the foregoing is neither an exhaustive review nor a critical analysis of any individual case, the six case studies presented above offer a representative sample of the application of U.S. military force and its legal bases. In four of these cases, the U.S. expressly relied on some formulation of self-defense: Grenada, the Tanker War, Iraq, and Qasem Soleimani.[218] Furthermore, while referencing UNSCRs as relevant considerations in some cases, the U.S. expressly relied on a UNSCR as a legal basis in only one instance: Iraq, 2003. Two instances, however, appear out of step with the legal bases used to justify the others: Kosovo, and Syria in 2018.[219] Neither was expressly based on one of the three traditional international legal bases for use of force. The primary legal basis for the Kosovo intervention appeared to have been NATO's intervention as a regional security organization acting to ensure regional peace and security pursuant to Article 52 of the U.N. Charter.[220] Syria, on the other hand, fell into an even hazier

[216] *See* THE JUDGE ADVOC. GEN.'S LEGAL CTR. AND SCH., NAT'L SEC. L. DEP'T., OPERATIONAL L HANDBOOK 2–4, 7 (2022) (demonstrating that use of force against a particular group is governed by UN Charter's requirements at the international level and is governed by the U.S. Constitution and various statutes at the domestic level); *See also* Stephen Preston, The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015) (describing uses of force as being determined by both domestic and international law).

[217] *See* Brad Dress, *Graham Says He Will Introduce Bill to 'Set the Stage' for U.S. to Use Military Force in Mexico*, THE HILL (Mar. 7, 2023), https://thehill.com/policy/international/3887479-graham-says-he-will-introduce-bill-to-set-the-stage-for-us-to-use-military-force-in-mexico/.

[218] *See* Robinson, *supra* note 42, at 382; Walker, *supra* note 16, at 133, 135–136; President on the Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, *supra* note 130, at 144; April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities *supra* note 175, at 16, 18.

[219] *See* Peters, *supra* note 89, at 60–61; April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 175.

[220] *See* Peters, *supra* note 89, at 60–61.

gray area as there is near no mention of an international legal basis. This may be indicative of the U.S.'s use of force as a matter of "executive prerogative," despite U.K. and French claims that the acts were facially lawful under some R2P rubric.[221]

In addition, a number of common threads arise regarding claimed or apparent deficiencies in the U.S.' legal justifications in these six case studies. In three of the six cases, the factual basis of the U.S. action was questioned by an international tribunal or a fellow NATO member: Grenada, the Tanker War, and Iraq.[222]

In at least four of the cases, the U.S.'s legal rationale was openly questioned as an improper application of the legal rule at issue. Those four cases include: (1) Grenada, and questions about Governor General Scoon's authority to request assistance on behalf of Grenada; (2)[223] Kosovo, which the Independent Kosovo Commission described as illegal but "legitimate;"[224] (3) Iraq, and the arcane daisy-chaining of UNSCRs in addition to stretching the then-understood limits of anticipatory self-defense; and (4) the Syria chemical weapons facilities strikes.[225]

Finally, even if the anticipatory self-defense claim is accepted, the U.S.'s invasion of Iraq failed to satisfy the U.S. Government's own articulated rule governing the minimal scope of the use of force in self-defense. Specifically, the U.S. invasion was not to be "circumscribed," and calculated to avoid conquest, occupation, or the change of the nature of the political regime.[226] The U.S. occupied Iraq, establishing the Coalition Provisional Authority, engaged in an overt regime change, remained at war with al Qaeda on Iraqi soil for 11 years, and then returned for further combat operations against Islamic State of

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[221] *See* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, *supra* note 175.
[222] *See* U.N. SCOR, 2941st mtg. at 39 (Oct. 27, 1983); Oil Platforms Case, *supra* note 15.
[223] Quigley, *supra* note 14, at 347–49.
[224] *The Kosovo Report*, *supra* note 89, at 2.
[225] *See* Dunkelberg et al., *supra* note 174.
[226] *See generally* Auth. of the President Under Domestic & Int'l Law to Use Mil. Force Against Iraq, *supra* note 130.

Iraq and Syria ("ISIS") a mere two years later.[227] With this background, Russia's invasion of Ukraine bears comparison.

II. Invasion of Ukraine: Justifications and Legal Bases

Russia's invasion of Ukraine, initiated under the pretext of military exercises, began in earnest on February 24, 2022.[228] Russia launched a multi-pronged attack, apparently seeking to secure ethnic Russian enclaves in Eastern Ukraine, establish a "land bridge" from Russia to the Crimean Peninsula, and encircle or isolate Kyiv.[229] With this last objective, it is unclear if Russia's goal was to isolate the Ukrainian government and extract concessions, to engage in regime change, or some other end.

Though claiming it was only engaged in Joint Russian/Belarussian exercises prior to the invasion, President Putin and Russian media outlets proffered a number of potential justifications.[230] Some were presented as legal justifications, while others served more as political or diplomatic fig leaves. Russian claims included: (1) Ukrainian efforts to secure and employ biological weapons or a "dirty bomb"; (2) protection of Russian nationals against Ukrainian "genocide;" (3) collective self-defense of the breakaway Republics of Donetsk and Luhansk; and (4) de-Nazification of the Ukrainian government.[231]

In many ways, Russia's scattershot approach of multiple legal, factual, and policy justifications is incomplete, contradictory, or

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[227] Sarhang Hamasaeed & Garrett Nada, *Iraq Timeline: Since the 2003 War*, UNITED STATES INSTITUTE OF PEACE (May 29, 2020), https://www.usip.org/iraq-timeline-2003-war.

[228] This has interesting historical connotations, as Russian strategic thinking has often viewed large scale military exercises as ideal pretexts to launch a surprise invasion. *See, e.g.*, Interview by Dan Oberdorfer with Bud McFarlane, National Security Advisor [unpublished], Oct. 18, 1989.

[229] Seth G. Jones, *Russia's Ill-Fated Invasion of Ukraine: Lessons in Modern Warfare*, CTR FOR STRATEGIC AND INT'L STUD. (Jun. 1, 2022), https://www.csis.org/analysis/russias-ill-fated-invasion-ukraine-lessons-modern-warfare.

[230] Nika Aleksjeva, *Narrative Warfare: How the Kremlin and Russian News Outlets Justified a War of Aggression Against Ukraine,* ATLANTIC COUNCIL, Feb. 2023, at 3, 4 (Andy Carvin, ed.).

[231] *Id.* at 26–27.

incoherent. This legal policy approach, however, parallels Russia's "firehose of falsehood" model of propaganda and information operations.[232] This model works by throwing different facts and theories at adversaries who feel compelled to counter each one on its merits.[233] This is done because marshaling the facts and legal arguments to soundly rebut this deluge of deceit takes far more effort and care than simply throwing the proverbial spaghetti against the wall to see what sticks.[234]

A. *Russian Justifications*

Russia claimed on numerous occasions that Ukraine is researching and producing biological weapons in cooperation with the U.S.[235] Russia, however, appears to be deliberately mischaracterizing U.S. efforts to support epidemiological research around Ukraine.[236] The U.S. also asserted that the purpose of the labs was to transition Soviet era labs *away from* production of biological weapons.[237] In fact, the U.S. program was active in Russia after the fall of the Soviet Union until Russia withdrew from the Biological Threat Reduction Program.[238] This purported justification can be seen as a deliberate callback to the U.S. invasion of Iraq, and the missile strikes against

[232] *Id.*
[233] *Id.*
[234] *See generally*, Paul & Matthews, *supra* note 193.
[235] *See* Kelsey Vlamis, *Why is Russia attacking Ukraine? Here are 5 Reasons Putin and Others Have Given for the Invasion*, BUSINESS INSIDER (Feb. 24, 2022), https://www.businessinsider.com/why-russia-is-attacking-ukraine-putin-justification-for-invasion-2022-2.
[236] John Parachini, *Debunking Russian Lies About Biolabs at Upcoming U.N. Meetings*, RAND CORP. (Sept. 12, 2022), https://www.rand.org/pubs/commentary/2022/09/debunking-russian-lies-about-biolabs-at-upcoming-un.html.
[237] *See U.S. dismisses Russian claims of biowarfare labs in Ukraine*, REUTERS (Mar. 9, 2022), https://www.reuters.com/world/russia-demands-us-explain-biological-programme-ukraine-2022-03-09/; *see also* U.S. EMBASSY IN UKRAINE, *Biological Threat Reduction Program*, https://ua.usembassy.gov/embassy/kyiv/sections-offices/defense-threat-reduction-office/biological-threat-reduction-program/ (last visited Mar. 30, 2024) (an explanatory page on U.S. efforts to help repurpose former biological weapons labs into other epidemiological research facilities as part of the Dept. of Defense Biological Threat Reduction Program in partnership with Ukraine).
[238] Parachini, *supra* note 237.

Syria in 2018. Both ventures were explicitly based on the use and alleged development of chemical weapons.

There appears to be no objective factual support for Russia's claims, however. Even though the U.S. found no active chemical weapons program in Iraq, the fact remains that Iraq previously used chemical weapons against northern Iraqi Kurds and against Iran in the Iran-Iraq War.[239] The U.N. also issued a number of Security Council Resolutions describing Iraq's chemical/WMD disarmament obligations. Iraq, however, continued to refuse U.N. weapons inspectors' access with no facially valid reason other than outright rejection. While the justification for the invasion may have been based on thin grounds, there was at least *some* factual basis and history of practice to justify the U.S.'s assessment. Similar factual deficiencies arise in the Oil Platforms case, in which the ICJ found that there was insufficient evidence to link Iran to the belligerent acts against U.S. shipping.

The failure of U.S. forces in Iraq to find chemical weapons, and the ruling of the ICJ in the Oil Platforms Case arising out of the Tanker War indicates that the U.S.'s proffered factual basis for the use of force was based on questionable facts at best. By contrast, there is no factual basis or history of practice to justify Russia's Ukrainian claims.

Russia also claims that it is protecting Russian nationals against Ukrainian "genocide."[240] Cultural and linguistic considerations are an integral part of Ukrainian and Russian identity, and Russia seeks to stoke dissension among ethnic Russians in Ukraine over pro-Ukrainian language and educational programs.[241]

[239] *See* The White House, *Saddam Hussein's Development of Weapons of Mass Destruction,* https://georgewbush-whitehouse.archives.gov/infocus/iraq/decade/sect3.html.

[240] Vlamis, *supra* note 236.

[241] *See* Dusan Stojanovic, *Explainer: Putin's Balkan Narrative Argument for Ukraine War*, ASSOCIATED PRESS (Mar. 5, 2022), https://apnews.com/article/russia-ukraine-vladimir-putin-racial-injustice-serbia-kosovo-756fa71c7ab417115ee3521a95791ca7; *see generally* Ben Connable et al., *Russia's Hostile Measures: Combating Russian Gray Zone Aggression Against NATO in the Contact, Blunt, and Surge Layers of Competition*, RAND CORP., Jan. 7, 2020 at 35–37.

In some respects, this can be compared to the U.S. intervention in Grenada or the Kosovo R2P intervention. There are, however, some operative factual distinctions.

First, Russia manufactured the security crisis in Ukraine by supporting separatist proxies, their occupation of Ukrainian territory, and issuance of Russian passports to ethnic Russians who were not previously Russian nationals.[242] Second, alleged corruption aside, there is no factual basis for "genocide" or broad human rights abuses of the type, scope, or scale seen in Kosovo.[243] Lastly, at least from the U.S. perspective, genocide does not create an independent legal basis for an armed intervention,[244] though the U.K. has taken the opposite stance.[245] There is, however, an interesting factual, though not legally operative, parallel. The U.S.'s reflagging of Kuwaiti vessels to U.S. registry can be *politically* compared to issuance of Russian passports to Ukrainian nationals. Though it lacks legal equivalency, this is an area for Russia to claim that it is behaving like the U.S. in manufacturing the conditions under which self-defense, or defense of nationals, interests, or property are justifiable.

Another variation of the self-defense justification is that Russia is acting in collective self-defense of the breakaway republics of Donetsk and Luhansk in eastern Ukraine. There are potential parallels in this justification to the Tanker Wars and the Kosovo intervention. There are, however, legally nuanced differences between those cases, and Russia's purported defense of these breakaway "republics." As a threshold matter, there is no unilateral right of secession in international law, and it violates a sovereign state's *domaine reserve* to hold a "referendum," or secession vote in occupied territory during an

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[242] Lily Hyde, *Forced to Fight Your Own People: How Russia is Weaponizing Passports*, POLITICO (Jan. 1, 2023), https://www.politico.eu/article/ukraine-citizenship-war-russia-weaponize-passport-passportization-mobilization-draft/; Connable et al., *supra* note 204, at 35–37.
[243] John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELATIONS (Feb. 28, 2022), https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law.
[244] Chimene Keitner, *US Intervention in Ukraine v. Russia at the ICJ: A Q&A with Chimene Keitner*, JUST SECURITY (Sept. 27, 2022), https://www.justsecurity.org/83144/us-intervention-ukraine-russia-icj-keitner/.
[245] *Id.*

armed conflict.[246] These semi-autonomous "enclaves" are not truly independent "states" despite recognition by Russia and a handful of its client states.[247] The argument that Russia is acting in defense against NATO expansion is also illegitimate, as Russia has failed to articulate any real threat of force to its territorial integrity.[248] That said, Russia's claim to act in collective self-defense of breakaway republics bears both contrast and comparison with past U.S. uses of force under the same justification.

As previously described, the U.S. relied, at least in part, on a request for collective self-defense from a government of dubious competence in Grenada,[249] just as it might be argued Russia is in this instance. Furthermore, the right to self-determination in international law is granted to distinct "people,"[250] with a cognizable grievance, under the concept of "remedial secession."[251] Disputes over language rights are not generally sufficient justification in international law,[252] which would cut against Russia's claim that Donetsk and Luhansk are entitled to statehood. This appears somewhat similar to Russia's denial that Kosovo was entitled to self-determination despite NATO's contentions that the nominally self-governing region was so entitled.[253] The distinction between Kosovo on the one hand, and Donetsk and Luhansk on the other is not readily apparent to the casual observer.

On the other side of the argument, NATO's support of Kosovo's independence provides Russia with a precedent in international law. Ultimately, Russia's support of breakaway

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[246] LAW OF WAR MANUAL, *supra* note 19, at § 11.4.2; Bellinger, *supra* note 244; Jeff Neal, *The War in Ukraine and International Law*, HARVARD TODAY: FACULTY SCHOLARSHIP (Mar. 2, 2022).
[247] Anthony Dworkin, *International Law and the Invasion of Ukraine*, EUR. COUNCIL ON FOREIGN RELATIONS (Feb. 25, 2022), https://ecfr.eu/article/international-law-and-the-invasion-of-ukraine/.
[248] Neal, *supra* note 209.
[249] Quigly, *supra* note 14, at 347–49.
[250] Neal, *supra* note 209 (defining this term as, generally, a homogeneous ethnic, racial, or religious group).
[251] Neal, *supra* note 209.
[252] *Id.*
[253] Bellinger, *supra*, note 244 (97 states supported Kosovar independence). *See The Kosovo* Report, *supra* note 89.

"republics" through the use of proxies is qualitatively different from NATO attempts to quell ethnic cleansing in Kosovo.[254] Russia's weaponization of the R2P concept to justify its intervention in Ukraine also led to a backlash against the concept of R2P, and calls to "reinvest" in the concepts of sovereignty and non-intervention even at the occasional expense of humanitarian objectives.[255]

Russia also claims that its intervention was launched to "de-Nazify" the Ukrainian government.[256] While there is no evidence of widespread Nazi sympathies in the Ukrainian government, some of the incorporated Ukrainian National Guard groups hold far-right beliefs.[257] These groups, however, did not appear to pose an offensive threat to Russia or ethnic Russians in Ukraine, but instead grew in assertiveness and power *after* the Russian occupation of Crimea.[258]

Perhaps most damaging to Russia's self-defense related claims is their operational design. As discussed, self-defense, including anticipatory and collective self-defense, necessitates the use of force when there is an inability to use lesser means to achieve defensive goals. Any defensive use of force should be proportionate in nature, duration, scope, or intensity to neutralize the threat.[259] The operational design of Russia's invasion suggests a different goal.

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[254] *Compare Relations with Russia,* NORTH ATLANTIC TREATY ORGANIZATION (Aug. 3, 2023), https://www.nato.int/cps/en/natohq/topics_50090.htm *But cf. NATO's Role in Kosovo,* NORTH ATLANTIC TREATY ORGANIZATION (Nov. 20, 2023), https://www.nato.int/cps/en/natohq/topics_48818.htm#:~:text=It%20assisted%20in %20the%20standing,professional%20and%20civilian%2Dcontrolled%20KSF *with*, NATO's Role in Kosovo (Nov. 2023), https://www.nato.int/cps/en/natohq/topics_48818.htm#:~:text=It%20assisted%20in%20the%20standing,professional%20and%20civilian%2Dcontrolled%20KSF (last visited Feb. 26, 2024).

[255] Ingrid (Wuerth) Brunk, *International Law and the Russian Invasion of Ukraine*, LAWFARE (Feb. 25, 2022), https://www.lawfaremedia.org/article/international-law-and-russian-invasion-ukraine; Reid, *supra* note 23.

[256] Vlamis, *supra* note 236.

[257] Josh Cohen, *Ukraine's neo-Nazi problem,* REUTERS (Mar. 2018), https://www.reuters.com/article/idUSKBN1GV2TC/.

[258] *Id.*

[259] Ney, *supra* note 12.

Specifically, regime change.[260] This is further bolstered by Russia's widespread and indiscriminate attacks against civilians and civilian infrastructure, far beyond the separatist territories that Russia seeks to "defend."[261] Further evidence of Russian efforts to change the political nature of Ukraine can be seen in the mass removal of Ukrainian children to patriotic education centers in Russia.[262] Based on the U.S.'s actions in Iraq, this is a particular weakness in arguing against Russia's actions that are aimed at a regime change.

Official Russian statements also indicate little respect for Ukrainian sovereignty. This is evidenced by Russia calling Ukraine a fictional or artificial country created by Premier Kruschev.[263] In sum, the Russian invasion fails to meet the criteria articulated by General Counsel Ney for a defensive response. Russia's invasion is hardly "circumscribed," and discriminate, or calculated to avoid collateral damage and civilian casualties.[264] Instead, the invasion is clearly designed with the goal of occupying large portions of Ukrainian territory, including entire eastern breakaway "enclaves," a land-bridge between the Donbass and Crimea, and north-easterly regions in the vicinity of Kharkiv.[265] Instead of aiming to deter or punish aggressive actions by small segments of the Ukrainian volunteer security apparatus, the Russian invasion appears focused on one goal: regime change in Ukraine.[266] It is conceivable, however, that Russia would

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[260] Jeffrey Mankoff, *Russia's War in Ukraine: Identity, History, and Conflict*, CTR. FOR STRATEGIC AND INT'L STUD. (Apr. 22, 2022), https://www.csis.org/analysis/russias-war-ukraine-identity-history-and-conflict.

[261] *Russian Military Commits Indiscriminate Attacks During Invasion of Ukraine*, AMNESTY INTERNATIONAL (Feb. 25, 2022), https://www.amnesty.org/en/latest/news/2022/02/russian-military-commits-indiscriminate-attacks-during-the-invasion-of-ukraine/; Allen S. Weiner (interview by Sharon Driscoll), *Stanford's Allen Weiner on the Russian Invasion of Ukraine*, STANFORD L. SCH. (Feb. 24, 2022), https://law.stanford.edu/2022/02/24/stanfords-allen-weiner-on-the-russian-invasion-of-ukraine/#main-content.

[262] Editorial Board, *Russia's Abductions of Ukrainian Children are a Genocidal Crime*, WASHINGTON POST (Dec. 27, 2022), https://www.washingtonpost.com/opinions/2022/12/27/russia-genocide-ukraine-children.

[263] Mankoff, *supra* note 261.

[264] Ney, *supra* note 12.

[265] *Id.*

[266] *Id.*

settle for a subjugated Ukraine that acts as a mere Russian client state.[267]

While the U.S.'s legal justifications for its use of force were often factually lacking, or pushed the envelope of widely accepted legal justifications for use of force, Russia's invasion of Ukraine takes these justifications to an extreme. For example, there are Russian claims about Ukraine's attempts to develop and employ WMD, engage in genocide against ethnic Russians, or spread Nazi-ism within the Ukrainian government.[268] There is no factual basis for any of Russia's claims. Russia also claims to defend Russian "nationals," with little connection to Russia as a state. Furthermore, Russian claims to act in collective self-defense on behalf of a pair of Russian separatist enclaves with no reasonable basis for secession in international law. Finally, Russia's use of force is grossly disproportionate to any of its articulated legal bases. Russia appears intent on a regime change for the sake of a regime change, without any nexus to a real, articulable threat to Russia - and when regime change is grossly disproportionate to the threat which Russia claims it faces. Thus, Russia's invasion of Ukraine shares *all* of the weaknesses associated with the U.S.'s legal claims in the six previously assessed cases. In the universe of legal claims that violate international law, this may be characterized as a difference of degree, rather than kind. Yet that is a distinction that matters.

III. RECOMMENDATIONS

The legitimacy in the use of force and the development of norms and customary international law in geopolitics requires clear factual and legal articulations. Ambiguity in legal standards and conclusions may provide the proverbial "maneuver space" to act in national interest without a clear international law prohibition in the future, but it comes at a cost. It cedes legitimacy to articulate vague,

[267] *Id.*

[268] *See, e.g.,* Veidlinger, Jefferey, *Analysis: Putin's claim that war on Ukraine is to target Nazis is absurd. Here's why*, PBS (Mar. 04, 2024), *https://www.pbs.org/newshour/world/analysis-putins-claim-that-war-on-ukraine-is-to-target-nazis-is-absurd-heres-why.*

strained, contradictory, or exceedingly unclear legal rationales.[269] It may serve as actual practice establishing customary international law, or more cynically be used as political precedent for a less scrupulous leader's own ends.[270] With more forceful measures off the table for political, practical, and legal reasons,[271] what is the solution? How does the U.S. maintain legal maneuver space, while also maintaining legitimacy? The U.S. must increase transparency with its legal justifications for the use of military force, and clearly communicate its legal rationale as near in time as possible. This must be deliberately planned in advance, as part of information operations, public affairs, and strategic communication.

A. *U.S. Transparency*

If the element of surprise is not vital, or is lost, then the U.S. should articulate its legal basis for military operations *in advance* of the operations. If operational security precludes this practice, then messaging should begin as soon as practicable after the use of military force and U.S. involvement becomes apparent. The Departments of Defense and State should articulate the operative facts that justify the use of force, the relevant rule(s) of law, and apply those rules to the facts. The U.S. should then articulate a set of overarching legal conclusions. To be sure, the U.S. does this on occasion, although OLC opinions are *not* publicly released for every U.S. use of force, and are often heavily redacted to the point that even the *appearance* of transparency is lost. The Departments of Defense and State should collaborate with OLC to develop an unclassified and publicly releasable legal opinion, that will not require significant redaction. These legal opinions would likely need to summarize or allude to key facts in the interest of protecting classified information and operational security; and this may lead to the appearance of factual or

[269] *See, e.g.,* Brian Michael Jenkins, *The Invasion of Iraq: A Balance Sheet* (Mar. 22, 2013), https://www.rand.org/blog/2013/03/the-invasion-of-iraq-a-balance-sheet.html.

[270] *See* Reid, *supra* note 23.

[271] *See Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto*, United Nations SC/14808 Meetings Coverage (Feb. 25, 2022).

logical leaps when articulating the applicable legal rules. The U.S. should confront this weakness head on.

Such opinions are *not* likely to include all of the classified facts and conclusions that often accompany a full and complete discussion of the necessary rules of law, justifications, and intelligence collection methods and sources. Where facts, intelligence, or collection methods cannot be disclosed the opinion should acknowledge this in the interest of security. Regardless, it will provide some public articulation. There is also reason to believe that the disclosure of underlying facts and intelligence will increase with the proliferation of commercial and open-source intelligence methods; in fact, it appears the U.S. has already begun to do so.[272] This trend renders the identification of the sources of U.S. intelligence more difficult, because it obscures more clandestine or high value intelligence collection methods.[273] With increased intelligence sharing and public disclosure, the U.S. has a prime opportunity to increase the sharing of its legal reasoning for the use of force, and to provide more of the underlying facts in this new information rich environment.

B. *Engage in Law of Armed Conflict ("LOAC") Pluralism*

To be sure, this degree of transparency will invite critique. Either it will be viewed as insufficiently transparent — a matter about which attorneys can do little — or it will provide gaps and seams for commenters to attack. Apparent inconsistencies in U.S. legal positions may emerge and highlight how the U.S.'s interpretation of a rule is inconsistent with the larger understanding in the international community or academia. That critique is already taking place.[274] The U.S. government should confront this issue head on. This provides an

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[272] Julian E. Barnes and Adam Entous, *How the U.S. Adopted a New Intelligence Playbook to Expose Russia's War Plans*, NEW YORK TIMES (Feb. 23, 2023), https://www.nytimes.com/2023/02/23/politics/intelligence-russia-us-ukraine-china.html; Julian Barnes, *A Threat to Abortion Pills. Plus, The U.S. Shares Secrets*, N. Y. TIMES (Mar. 1, 2023), https://www.nytimes.com/2023/03/01/podcasts/the-daily/abortion-pill-china-secret-intelligence.html.

[273] *Id.*

[274] *See, e.g.,* Alonso Gurmendi, *The Soleimani Case and the Last Nail in the Lex Specialis Coffin*, OPINIO JURIS (Jan. 13, 2020), http://opiniojuris.org/2020/01/13/the-soleimani-case-and-the-last-nail-in-the-lex-specialis-coffin/.

opportunity for the U.S. Government to engage in what Professor Charles Dunlap has termed "LOAC pluralism," or engagement amongst stakeholders with differing views.[275] Rather than giving other nations, international/non-governmental organizations, or academia the cold-shoulder, the Department of Defense should engage in this debate. All parties can seek to understand their different perspectives, how those perspectives drive different legal conclusions, and why a different legal conclusion may not automatically indicate illegality. Even if the criticism does not slow, the U.S. can still gain some operational utility

C. *Call Out Adversary Abuses*

The specific operational utility is to call out adversary abuses of international law in a clear, concise, and readily understood way. Rather than permitting revisionist powers like Russia and China to rewrite the rulebook to suit their own purposes, the U.S. should articulate *why* a use of force or other aggressive act is illegal, not just that it *is* illegal. The Department of State should articulate the legal rules applicable to any particular use of force by an adversary state and point out the ways in which that adversary is manipulating or stretching the commonly understood meaning of that rule. Furthermore, when inevitably confronted with "whataboutism," the Department of State should articulate key factual differences that lead to the U.S. or its allies' legal conclusions, and *why* those factual distinctions matter.

None of these recommendations is a silver bullet and are unlikely to deter aggressive acts by states that are committed to taking certain actions. For example, it is unclear what would have deterred Russia's invasion of Ukraine. The U.S., however, must seek to reclaim its legitimacy as the leading power in the international order after 20-plus years of counterterrorism operations based on simultaneously murky yet expansive publicly articulated legal bases. The U.S. has a clear opportunity to reinvest in the legitimacy of international institutions. As difficult as it may be given Russia and China's nuclear armaments and P5 status, the U.S. should take the opportunity to

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[275] *See, e.g.*, Charles J. Dunlap, Jr., *Lawfare*, NAT'L SEC. L. 823–38 (2015).

contribute to the legal, political, and diplomatic marginalization of these revisionist powers.