A TYPOLOGY OF STATE RELATIONSHIPS WITH THE RULES BASED ORDER: THE CASE OF RUSSIA

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If one accepts that there is a global rules-based order (RBO), and also that there is at any given time a dominant or orthodox, mainstream version of that RBO, then a question immediately arises. How do states relate to the RBO? This Article proposes that there are three basic types of relationships between states or international organizations and the RBO: (1) maintainers, seeking to buttress and advance the orthodox RBO; (2) delinquents, states that care little for the RBO but nevertheless employ certain RBO rule sets when it benefits them; and (3) insurgents, states that substantially operate within the mainstream RBO while simultaneously propagating the existence of an alternative RBO either as a parallel RBO or an insurgent "orthodoxy." After briefly describing the maintainer and delinquent typologies, this Article explores in more detail the most problematic form of relationship to the mainstream RBO —insurgency— with a focus on Russia as a leading example of an insurgent. The study concludes with a short discussion explaining how recognizing Russia as an RBO insurgent will better equip RBO maintainers to combat the deleterious consequences of a Russian-influenced RBO.

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INTRODUCTION

Russia's recent engagement with the RBO, and in particular its interpretation of and compliance with both the "rules" and the "order",[1] is indicative of the vexations faced in attempting to define the relationship of states with the RBO. On some readings, Russia is a completely self-interested engager and disengager. It engages when advantageous to Russia, such as by claiming the protection and applicability of rule sets like the United Nations Security Council (UNSC) procedures and the consequences of a P5 veto with respect to Syria,[2] or the international investment regime.[3] Meanwhile, it disengages when it calculates that its political interests are better served by avoiding being drawn in on an issue or refusing formal participation, such as with the *Arctic Sunrise Arbitration*.[4] As Paul Dibb observed:

> The re-emergence of Russia as an expansionist, revisionist actor on Europe's eastern border has profound strategic consequences for Europe. Some Russians consider that the paths for Europe and Russia are seriously diverging and

[1] *See* Patrick Stewart, *World Order: What, Exactly, are the Rules?*, 39 THE WASHINGTON QUARTERLY 7 (2016).
[2] *See generally* U.N. SCOR, 7785th Sess., U.N. Doc. S/PV.7785 (Oct. 8, 2016) (vetoed by Russia).
[3] *See, e.g.*, FOREIGN AFFAIRS COMM., MOSCOW'S GOLD: RUSSIAN CORRUPTION IN THE UK, 2017-19, HC 932, at 17-24 [hereinafter FOREIGN AFFAIRS COMM.].
[4] Arctic Sunrise Arb. (Neth. V. Russ.), Case No. 2014-02, Award on the Merits (Perm. Ct. Arb. 2015), at 1-2, https://pcacases.com/web/sendAttach/1438 ("[The Russian Federation] has not appointed any agents, counsel, or other representatives" and has stated "its refusal to take part in this arbitration.").

> will remain so for a long time, 'probably for decades to come'. Russia has neither the will nor the capacity to compete with the West on a global scale these days; however, even if it can't shape the international order, it may be able to spoil it.[5]

To some extent, this is simply a mode of behavior ultimately attributable to all states, albeit with different emphases and to differing degrees. To name just a few examples, China refused to participate in the *South China Sea Arbitration*;[6] the U.S. walked away from the merits stage of the *Nicaragua Case* in the International Court of Justice;[7] France refused to publicly disclose the legal basis for its interdictions of third state vessels during the Algerian conflict;[8] and in the United Kingdom, deep political discontent at the treatment of

[5] Paul Dibb, *Why Russia is a Threat to International Order*, THE STRATEGIST (June 29, 2016), https://www.aspistrategist.org.au/russia-threat-international-order/.

[6] *See generally* South China Sea Arb. (Phil. V. China), Award (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arb.]. "China did not appoint an agent. In a Note Verbale to the PCA on 1 August 2013, and throughout the arbitration proceedings, China reiterated 'its position that it does not accept the arbitration initiated by the Philippines.'" *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PERM. CT. ARB., https://pca-cpa.org/en/cases/7/.

[7] Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgment, 1986 I.C.J. 10 (June 27).

[8] Permanent Rep. of France to the U.N., Letter Dated Oct. 25, 1956 from the Permanent Rep. of France to the United Nations addressed to the Secretary-General, U.N. Doc. S/3689 (Oct. 25, 1956); 635 Parl Deb HC (5th ser.) (1961) col. 1196-7 (UK) (in respect of Mr Healey asking the Lord Privy Seal "what protest Her Majesty's Government have made to the French Government concerning the interception of the British Ship 'West Breeze' in international waters off the Algerian coast"); Anna Van Zwanenberg, *Interference with Ships on the High Seas*, 10 INT'L & COMP. L.Q. 785, 791-92 (1961); Arnold Fraleigh, *The Algerian Revolution as a Case Study in International Law*, *in* THE INTERNATIONAL LAW OF CIVIL WAR 179, 203-04 (Richard A. Falk ed., 1971); Eldon Van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT'L L.J. 37, 40-44 (1970); Bernard Estival, *The French Navy and the Algerian War*, 25 J. STRATEGIC STUD. 79, 85 (2002); James Kraska, *Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?*, 13 Y.B. OF INT'L HUMANITARIAN L. 367, 375 (2010); Russell Buchan, *The International Law of Naval Blockade and Israel's Interception of the Mavi Marmara*, 58 NETH. INT'L L. REV. 209, 218 (2011); Katherine Draper, *Why a War Without a Name May Need One: Policy-Based Application of International Humanitarian Law in the Algerian War*, 48 TEX. INT'L L.J. 575, 594-95 (2013); Rob McLaughlin, *The Law Applicable to Naval Mine Warfare in a Non-International Armed Conflict*, 90 INT'L L. STUD. 475, 477 (2014).

British military operations by the European Court of Human Rights has simmered for more than a decade, leading to calls to significantly limit that court's jurisdiction, at minimum.[9] To say that states sometimes do instrumental, self-interested things—that they consciously ignore or breach inconvenient rules, fail to comply with other aspects of the RBO, or both—is neither new nor surprising. Russia, however, appears to be marching to a different drum. For example, its noncompliance with a particular rule, a generally accepted interpretation of that rule,[10] or the place of that rule in the hierarchy of inter-related rules,[11] appears to be both serial and lacking

[9] Peter Walker & Owen Bowcott, *Plan for UK Military to Opt Out of European Convention on Human Rights: PM and Defence Secretary Will Announce Idea for Future Conflicts to Curb an "Industry of Vexatious Claims" Against Soldiers*, THE GUARDIAN, (Oct. 4, 2016), https://www.theguardian.com/uk-news/2016/oct/03/plan-uk-military-opt-out-european-convention-human-rights; *see generally* RICHARD EKINS ET AL., CLEARING THE FOG OF LAW: SAVING OUR ARMED FORCES FROM DEFEAT BY JUDICIAL DIKTAT (2015), *available at* https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf; *but see* Marko Milanovic, *A Really, Really Foggy Report*, EJIL: TALK!, (Apr. 15, 2015), http://www.ejiltalk.org/a-really-really-foggy-report/ (criticizing the report).

[10] *See* The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, RUSSIAN MINISTRY OF FOREIGN AFFAIRS (June 25, 2016), http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698.

[11] For example, the Russian argument that certain sanctions against states must be endorsed by the U.N. Security Council and may not be unilaterally imposed. *See* Tom Miles, *Russian Memo to WTO Says US Sanctions Are Illegal*, REUTERS (Apr. 24, 2014), http://www.reuters.com/article/us-ukraine-crisis-russia-wto-idUSBREA3N0QS20140424 ("Russia has told the United States that its Ukraine-related sanctions on a Russian bank and Russian citizens are illegal under World Trade Organization rules and must be scrapped"); *see also Russia Sees No Reason to Discuss "Illegal" US Sanctions*, THE SYRIA TIMES (Sep. 16, 2014), http://syriatimes.sy/index.php/news/world/14473-russia-sees-no-reason-to-discuss-illegal-us-sanctions ("We consider unilateral sanctions, imposed beyond territorial jurisdiction, to be illegal and in breach of…international law"). Similarly, the long-term Russian emphasis on the need for international rules to accommodate Russian action to protect nationals currently outside Russia's borders remains clearly evident in Russian Foreign Minister Sergey Lavrov's statement to the Duma on 25 January 2017. Ministry of Foreign Aff. Of the Russ. Fed'n Press Release, Foreign Minister Sergey Lavrov's Remarks and Answers to Questions During the Government Hour at the State Duma of the Federal Assembly of the Russian Federation, Moscow, January 25, 2017 (Jan. 25, 2017), *available at* http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2610167 ("Upholding the rights and

internal coherence. What explains Russia's behavior in these situations? As Lauri Mälksoo noted of a 2016 joint declaration by Russia and China on the promotion of international law:

> [T]he Russian-Chinese Declaration represents a defensive political document in which the signatory states reject Western suggestions that the two UN SC permanent members have a somewhat problematic relationship with international law. Within the Declaration, Russia and China offer their own interpretation of what the big picture of international law is – an interpretation according to which it is the West, especially the US, that emerges as an actor displaying a problematic record and attitude.[12]

Similarly, in remarks to the Duma on January 25, 2017, Russian Foreign Minister Sergey Lavrov stated:

> The current state of international affairs is to a large extent attributable to the determination by adepts of the obsolete concept of unilateral hegemony to maintain their global dominance at any cost and impose pseudo-liberal values across the board without taking into account the cultural and civilizational diversity in today's world. Never before have the principles of self-determination and respect for human rights been used so cynically as a cover for political and economic expansion.[13]

Despite the confrontational rhetoric, Lavrov's reference to elements such as hegemony, values, and legal principles perhaps indicates that Russia recognizes the concept of an RBO and is willing to describe its own and other states' conduct in terms of this architecture. This Article focuses on the various state relationships to the RBO, with an emphasis on Russia's relationship to the RBO.

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interests of our fellow citizens caught in a difficult situation in a foreign country is our all-time priority.").

[12] Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law,* EJIL: TALK!, (July 15, 2016), http://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/.

[13] Lavrov, *supra* note 11.

A. *Outline*

This Article grapples with the concept of the RBO by examining state relationships to it, as opposed to detailing the substance of the RBO. To achieve this, Part I of this Article will provide a definition and general characterization of the RBO, as well as a brief description of what I have termed the "mainstream" or "orthodox" RBO. Part II will describe a general scheme of indicative relationships a state may have with the RBO, within which I seek to contextualize Russia's relationship with the RBO. Part II will argue that there are three general types of relationships between states, international organizations, or entities spuriously claiming either status and the RBO: (1) Maintainers, (2) delinquents, and (3) insurgents. In Parts III and IV, I will briefly describe maintainers and delinquents, primarily in order to distinguish them from insurgents. Part V will outline the nature of an insurgent, while Part VI will focus on Russia as an illustration of this type of RBO relationship. Finally, I will conclude by suggesting that the recognition of Russia as an RBO insurgent might serve to better inform legal and policy responses to Russian conduct.

I. "THE" RBO? WHAT RBO?

Any analysis of the RBO must logically be preconditioned on the existence of an RBO and the capacity to define it. The first precondition is to some extent an article of faith as much as it is one of empirical evidence. The second precondition is varied and contested, in that there is a clear overlap between the concepts of the "rule of law" and the "RBO", given that each describes both a mechanism and a desired outcome.[14] In 2014, Japanese Prime Minister Shinzo Abe, ostensibly addressing claims management and the rule of law at sea, arguably described both a set of RBO attributes as well as the rule of law: "making claims that are faithful in light of international

[14] The literature is extensive and distinguished. *See, e.g.*, Martti Koskienniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 28 (1990); Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 542 (1993); Harold Koh, *Why do Nations Obey International Law?*, 106 YALE L.J. 2599, 2611 (1997); Dinah Shelton, *Normative Hierarchy in International Law* 100 AM. J. INT'L L. 291, 322 (2006); STEVEN RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS 422 (2015).

law, not resorting to force or coercion, and resolving all disputes through peaceful means."[15]

It is tangential but nevertheless important at this point to explain why I have chosen to examine types of state relationships with the RBO as opposed to state relationships with the rule of law. The position underpinning this approach is that while the rule of law is often expressed in internationally informed and assessed terms, the rule of law is ultimately an inwardly focused and domestically implemented criterion and aspiration regarding a state's organization and affairs.[16] These terms are then used to describe the internal

[15] Shinzo Abe, Prime Minister of Japan, Keynote Address at the 13th IISS Asian Security Summit (May 30, 2014), (transcript available at http://www.mofa.go.jp/fp/nsp/page4e_000086.html).

[16] The interchangeable use of the terms "rule of law" and "rules-based order" as two different ways of labeling the same phenomenon is evident in many sources. *See* Sue Wareham, *Malcolm Turnbull Won't Congratulate Australia's First Nobel Peace Laureate, Because He Supports Nukes*, THE AGE (Oct. 11, 2017), http://www.theage.com.au/comment/malcolm-turnbull-wont-congratulate-australias-first-nobel-peace-laureate-because-he-supports-nukes-20171010-gyxwdg.html ("Replete with irony, the Australian government repeatedly talks up the need for 'the rule of law.' In her speech to the UN General Assembly on September 22, [Australian Foreign Minister] Julie Bishop referred to an international 'rules-based order' no less than seven times."). There is, of course, a substantial and diverse literature on the rule of law; the inward-focused approach to defining rule of law is evident in many sources of scholarship. *E.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules* 56 U. CHI. L. REV. 1175 (1989); Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFFAIRS, Apr. 1998, at 95. It is also the form predominantly employed by the UNSC. *E.g.*, U.N. DEP'T OF PEACEKEEPING OPERATIONS & OFF. OF THE U.N. HIGH COMM'R FOR HUM. RIGHTS, THE UNITED NATIONS RULE OF LAW INDICATORS: IMPLEMENTATION GUIDE AND PROJECT TOOLS, at v-vi, U.N. Sales No. E.11.I.13 (2011) ("The definition below, articulated by the United Nations Secretary-General in a report to the Security Council in 2004, provides a foundation for the Rule of Law Indicators. 'It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'") (citing U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶ 6, U.N. Doc S/2004/616 (Aug. 23, 2004),; *see generally* Simon Chesterman, *'I'll Take Manhattan':*

condition of the state and are understood in terms of each state's individual reputation, conduct, and jurisdictions. For example, as a report on Russian corruption in the U.K. observed, the very fact that "the UK is governed by the rule of law" had significant implications and created challenges for U.K. authorities in their response to Russian exploitation of the internationally regulated U.K. financial system for money laundering.[17]

The concept of the RBO, on the other hand, is most commonly employed as an outward looking international aspiration, a system in which states are sovereign participants as opposed to *the* sovereign. This distinction is admittedly flawed, inexact, and vulnerable, and the crossover of rule of law discourse into the RBO sphere is evident in Prime Minister Abe's statement. Nevertheless, the analysis in this Article is based on the existence of a collaborative yet contested international RBO, and the conclusion that states see the RBO as an external framework within which they interact with other states and, to a lesser extent, other entities. This is different than the rule of law, which is more generally described in terms of an internationally assessed, but ultimately domestic, sovereign aspiration or measure as mediated between a state and those subject to its power.

Employing this formulation, the analysis in this Article assumes the following definition of the RBO: the RBO is the network of rules, rule sets, institutions, and mechanisms, along with their purposive and functional underpinnings, to which the majority of states and a significant number of other entities, such as international organizations, subscribe; the RBO can be said to guide their actions in relations with each other and other subjects of international law. The RBO is, consequently, both an objective and a framework. As an objective, the RBO represents the desired end state (*a* rules-based order). As a framework, to paraphrase one version of compliance theory in international law, the RBO facilitates achievement of that end state by promoting a mechanism (*the* rules-based order).[18] This

The International Rule of Law and the United Nations Security Council, 1 HAGUE J. RULE L. 67 (2009).

[17] FOREIGN AFFAIRS COMM., *supra* note 3, at 54-61.

[18] Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1855 (2002).

mechanism structures the ability of states to give and receive credible signals of commitment and engage in predictable conduct, and provides a coherent and universally accessible systemic lexicon underpinned by parallel understandings and attributions of meaning.

Further, it is necessary to briefly describe and explain the "mainstream" or "orthodox" RBO. This phrase is employed as a shorthand label for the version or image of the RBO that currently enjoys the most prominence in diplomatic, legal, and academic discourse. It is the version of the RBO characterized in public statements and observable in state practice as the primary point of reference for conduct and progressive development of international law. It is not, however, "hegemonic" in the sense of "decisionism" in terms of a U.S. approach to international law at the turn of the last century;[19] nor is it unreservedly "eurocentric,"[20] for there are other champions of this version of the RBO, such as Japan. Rather, this "mainstream" RBO is that which is characteristically defined by formal sovereign equality, strong yet permeable sanctions attaching to use of force,[21] a network of formal and informal dispute resolution mechanisms, the promotion of human rights, and the facilitation of trade and investment.[22] A useful, albeit inadequate label is the "liberal-internationalist RBO."[23] As noted at the outset, however, this Article does not aim to propose a comprehensive definition of the RBO, but rather sets out one possible framework for engaging with state relationships to the RBO and how this framework shapes an understanding of Russia's relationship with the RBO.

[19] Detlev Vagts, *Hegemonic International Law*, 95 A.J.I.L. 843, 846 (2001).
[20] *See generally* James Thuo Gathii, *Euro-centricity in International Law*, 9 EUR. J. INT'L L. 184 (1998).
[21] Chris Reus-Smit, *Liberal Hierarchy and the License to Use Force*, 31 REV. INT'L STUD. 71, 80 (2005).
[22] *See, e.g.*, Stewart, *supra* note 1, at 11-19.
[23] *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 509-514 (1995); *see also* G. John Ikenberry, *The Future of the Liberal World Order: Internationalism After America*, 93 FOREIGN AFF. 56 (2011).

II. RBO MAINTAINERS

The first type of RBO relationship is fostered by states and entities that view the mainstream RBO as something to be nurtured and mostly respected. The mainstream RBO includes rules, the inter-relationship and hierarchy of those rules, and the structures and order within which those rules operate. According to Louis Henkin's simple but significant observation, maintainers follow most of the rules most of the time, and will generally accept some short-term national costs to achieve the long-term benefits presaged by a stable, liberal-internationalist RBO.[24] There are, of course, variations amongst maintainers: uber-maintainers, including the Nordic countries, Germany, Canada, New Zealand, and the European Union;[25] middle-of-the-road maintainers, such as Australia, Mexico, the U.K., Japan, and Senegal;[26] and challenged maintainers, such as the U.S., Israel, and South Africa, namely states that believe in the RBO but nevertheless have a periodically difficult relationship with some of its aspects.[27] There are a myriad of variations of such subdivisions and arguments for and against how each state should be categorized, but this is only tangentially relevant to the general point. The key hypothesis is simply that a diverse group of states and institutions appear to endorse and generally act in accordance with the liberal-internationalist vision of the RBO.

The maintainer outlook is to some extent attributable to the function of two interconnected animating forces. The first is the need to maintain the liberal-internationalist RBO as an insurance policy against chaos.[28] In a security context, this argument is evident in remarks by one U.S. official:

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[24] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2nd ed. 1979).

[25] Robert McLaughlin, *Three Images of the Rule Based Order*, AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS (Jul. 26, 2018), http://www.internationalaffairs.org.au/australianoutlook/three-images-of-the-rules-based-order/.

[26] *Id.*

[27] *Id.*

[28] *See, e.g.*, Anthony Bergin & David Lang, *Foreword*, in STRENGTHENING RULES-BASED ORDER IN THE ASIA-PACIFIC: DEEPENING JAPAN-AUSTRALIA COOPERATION TO PROMOTE REGIONAL ORDER 1-2 (2014).

> On the one hand, our increasing interconnectedness has helped to fuel economic growth, allowed for the creation of new businesses and even new industries, and sparked social and political change… There is, however, a pervasive unease, a sense that the very forces that have brought our 24/7 world closer together and created enormous opportunities have also unleashed new dangers that threaten to drive us apart: terrorism; the use of technology to radicalize and recruit extremists and to plan attacks; extreme nationalism; conflicts over resources driven by population shifts and climate change; and great disparities in economic and social opportunity, which are made all the more apparent by the pervasiveness of technology.[29]

Similarly, in 2018, a U.K. House of Commons report on Russian corruption declared:

> The Government is right to respond robustly to the aggressive actions of President Putin's regime. But reacting in an ad hoc way to the Kremlin's behaviour has led to a disjointed approach. Despite the Government's strong rhetoric, President Putin's allies have been able to exploit gaps in the sanctions and anti-money laundering regimes that allow them to hide and launder assets in London. This undermines the strength and unity of the global diplomatic response to Russian state actions, threatens UK national security, and helps to enable corrupt kleptocrats to steal from the Russian people.[30]

The fear of consequences generally results in actions by maintainer states to reinforce the system and remain as faithful as possible to the orthodox interpretation of specific rules and norms. Maintainer states depart from this orthodoxy only occasionally and recognize the political and systemic costs of doing so. These states' recognition of the systemic cost involved in any situational or sectoral departure from the orthodox interpretation and application of a rule

[29] John Emerson, U.S. Ambassador to Germany, The Importance of a Rules-Based International Order, 14th Berlin Security Conference: Euro-Atlantic Partnership; Firm Anchor in a Turbulent World, Berlin (Nov. 17, 2015), *available at* https://de.usembassy.gov/the-importance-of-a-rules-based-international-order/.
[30] FOREIGN AFFAIRS COMM., *supra* note 3, at 30.

is often demonstrated by mitigation tactics, such as claiming an exception or asserting that, despite appearances, the conduct is nevertheless in compliance with the orthodox interpretation.

The second force contributing to the maintainer outlook emerges from the increasingly contested objective of locking in rules that reflect the liberal-internationalist, democratic, and human rights sensibilities that many states and multi-national institutions have progressively, albeit sometimes selectively, promoted since the end of World War II. One example of this impetus is Philip Alston's 2014 critical remarks concerning the World Bank's "failure to engage with human rights law in any meaningful way."[31] This aversion, Alston continues, left "the Bank outside the discussions about those human rights which are of particular importance to its work, and it helps to dilute the body of human rights law because the Bank needs to develop alternative surrogate formulae for addressing the same issues but in a supposedly sanitized and, of course, apolitical form."[32]

Maintainer status is not, however, a correlate of international saintliness, for maintainers can have periodic difficulties in their relationship with the RBO. Perhaps the most compelling and notorious recent example of a maintainer state experiencing a convoluted and transparently contradictory relationship with a fundamental aspect of the RBO was the U.S. approval of enhanced interrogation techniques.[33] On any reasonable assessment, these techniques amounted to torture, but the U.S. has previously asserted support for and compliance with a version of the RBO that expressly prohibits torture.[34] It is likewise important to observe that democracy is not a necessary condition precedent to maintainer status. The Soviet Union, for example, still operated within the evolving mainstream

[31] Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, Keynote Address at the Nordic Trust Fund for Human Rights and Development Annual Workshop: Rethinking the World Bank's Approach to Human Rights (Oct. 15, 2014).
[32] *Id.*
[33] Charlie Savage, *Trump Poised to Lift Ban on CIA 'Black Site' Prisons*, N.Y. TIMES, (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html?_r=0.
[34] S. Rep. No. 113-288, at 3-5, 14-17, 145-59 (2014). Examples are Findings #3, #5, #18-#20, and Report Section II-M.

RBO, attempting to shape its structure and content; during the Cold War, it employed the mainstream RBO's rules and tools as extensively and as cannily as its adversary bloc.[35]

III. RBO DELINQUENTS

The second type of relationship with the RBO is demonstrated by states or entities that clearly act contrary to it at most turns. Narco-states such as Guinea-Bissau,[36] and states that are essentially criminal kleptocracies veiled in the garb of a sovereign authority,[37] are typical

[35] For example, the USSR's significant influence on the ultimate shape of the 1982 *United Nations Convention on the Law of the Sea* through both its own advocacy and its ability to marshal like-minded states to create the requirement for compromises with other blocs. *See generally* Anthony P. Allison, *The Soviet Union and UNCLOS III: Pragmatism and Policy Evolution* 16 OCEAN DEV. & INT'L L. 109 (1986); Artemy A. Saguirian, *The USSR and the New Law of the Sea Convention: In Search of Practical Solutions*, 84 PROC. OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.) 295 (1990). An excellent example is provided by Emily Crawford's analysis of Soviet and U.S. Cold War engagement in the negotiations for the 1976 ENMOD Convention, noting that it provided a means of redirecting attention from other disarmament issues: "It is also possible that the drive to bring ENMOD to fruition so quickly was attributable to a desire, on the part of both the US and USSR, to be seen to be acting on disarmament issues, if not actually acting on disarmament issues… they could in effect suspend further discussion of nuclear disarmament while ENMOD remained the central focus of disarmament efforts. Indeed, this very point was made by the then Director of the Stockholm International Peace Research Institute (SIPRI), Frank Barnaby, who, in 1976 (before the adoption of the final draft of ENMOD) dismissed US and USSR advocacy for an environmental modification treaty as a cynical exercise in busywork, intended only to demonstrate that the superpowers wanted to keep open machinery for arms limitation talks without actually substantively grappling with actual arms limitation…" Emily Crawford, *Accounting for the ENMOD Convention: Cold War Influences on the Origins and Development of the 1976 Convention on Environmental Modification Techniques*, *in* INTERNATIONAL LAW AND THE COLD WAR 81 (Matthew Craven et al. eds., Cambridge Univ. Press 2020).

[36] Ed Vulliamy, *How a Tiny West African Country Became the World's First Narco State*, THE GUARDIAN (Mar. 9, 2008), https://www.theguardian.com/world/2008/mar/09/drugstrade ("In Guinea-Bissau, says the UNODC, the value of the drugs trade is greater than the national income. 'The fact of the matter,' says the Consultancy Africa Intelligence agency, [']is that without assistance, Guinea-Bissau is at the mercy of wealthy, well-armed and technologically advanced narcotics traffickers.'").

[37] *See* Joshua Charap & Christian Harm, *Institutionalized Corruption and the Kleptocratic State* (Int'l Monetary Fund, Wo, Working Paper No. 99/91, 1999)

examples of this typology. Three specific examples of delinquents help to illustrate this type. The first is Cambodia under the Khmer Rouge. Any web search of the term 'Khmer Rouge' predominantly results in posts on genocide and the long campaign to bring some of the few remaining perpetrators to justice.[38] The Khmer Rouge approach to the RBO can perhaps be neatly summed up in its shrill, yet entirely indicative, response to British efforts in 1978 to bring the ongoing genocide in Cambodia to global attention. As reported by the Washington Post:

> Perhaps the country's most serious international diplomatic problem remains the worldwide outcry generated by reports from Cambodian refugees of mass torture and executions. President Carter has labeled Phnom Penh the world's worst violator of human rights, and Britain took the reports of Cambodian atrocities to the United Nations Human Rights Commission, leading to a Cambodian reply that British citizens only enjoyed the right to be slaves, thieves, prostitutes or unemployed.[39]

Khmer Rouge Cambodia, even while eventually making perfunctory attempts to cloak some aspects of its external conduct in the mantle of RBO compliance, evidently cared little about the rules, order, or its success in demonstrating internal compliance with them,

("With few exceptions, unquestioned acceptance of property rights in the 'State of Law' has dictated the course of Economic Inquiry. However, the universal acceptance of the concept of property rights leads much of the analysis to overlook instances of legal failure.…[A] lawless environment … provides the opportunity for an individual to satisfy consumption demands via predation rather than production.") (exemplifying that the kleptocratic state will thus employ the mechanisms of the RBO both to exclude interference and to exploit favorable opportunities, while domestically curtailing or suppressing the benefits of the RBO to the general populace).

[38] E.g., Jay Mathews, *Imperiled and Reviled Cambodia Seeks to Win Friends*, WASH. POST (Oct. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/10/01/imperiled-and-reviled-cambodia-seeks-to-win-friends/4a3e0ce1-ce36-4b59-88ca-9cbd6e2a7639/?utm_term=.84806c5d5664; Jamie F. Metzl, *The UN Commission on Human Rights and Cambodia*, *1975-1980*, 3 BUFF. J. INT'L L. 67, 76 (1996) (quoting President Carter labeling the Cambodian government "the worst violator of human rights in the world today.").

[39] Mathews, *supra* note 38.

except to the extent of generating protective alliances and financial support.

The second example, the Democratic People's Republic of Korea (North Korea), is perhaps the archetypal current delinquent state. For example, while employing the legal rhetoric of "aggression," and "self-defence,"[40] as well as claiming the right to engage in proscribed conduct as a "legal" consequence of violations of the 1953 Armistice Agreement,[41] North Korea simultaneously and publicly flouts other obligations that equally draw their force from the RBO. These include the obligation to comply with UNSC directions to desist from further nuclear testing and sanctions imposed as a consequence of previous nuclear tests.[42]

A third, albeit non-state—and thankfully short-lived—example of RBO delinquency is the Islamic State (ISIS), which did not

[40] Justin McCurry & Michael Safi, *North Korea Claims Successful Hydrogen Bomb Test in "Self-Defence Against US,"* THE GUARDIAN (Jan. 6, 2016), https://www.theguardian.com/world/2016/jan/06/north-korean-nuclear-test-suspected-as-artificial-earthquake-detected ("An announcement on North Korean television said the country had successfully tested a 'miniaturised hydrogen bomb' underground on Wednesday morning, describing it as an 'act of self-defence' against the US.").

[41] Choe Sang-Hun, *North Korea Declares 1953 War Truce Nullified*, N.Y. TIMES (Mar. 11, 2013), http://www.nytimes.com/2013/03/12/world/asia/north-korea-says-it-has-nullified-1953-korean-war-armistice.html ("The exchange of bellicose language between the Koreas has recently intensified, recalling the level of tension after the North Korean artillery barrage in 2010, which left four South Koreans dead. After the United Nations imposed the new sanctions as a penalty for the North's third nuclear test, on Feb 12, the North said it would nullify the armistice and might pre-emptively attack Washington and Seoul with nuclear weapons… On Monday, the North's official Korean Central News Agency said the armistice had been nullified.").

[42] *See, e.g.*, S.C. Res. 2397 (Dec. 22, 2017); U.S. DEP'T OF STATE ET AL., NORTH KOREA SANCTIONS & ENFORCEMENT ACTIONS ADVISORY: RISKS FOR BUSINESSES WITH SUPPLY CHAIN LINKS TO NORTH KOREA (2018); Colum Lynch, *U.N. Report Details How North Korea Evades Sanctions*, FOREIGN POL'Y (Sept. 20, 2018), https://foreignpolicy.com/2018/09/20/un-report-details-how-north-korea-evades-sanctions/. Depending upon the outcome of several investigations into the killing of Kim Jong-nam, the use of chemical weapons may be added to this list. *See Kim Jong-nam: VX Dose was "High and Lethal,"* BBC (Feb. 26, 2017), http://www.bbc.com/news/world-asia-39096172.

acknowledge the orthodox RBO. Indeed, ISIS claimed to abide by an entirely separate set of rules, and indeed a different order. Although there are crossovers and points of intersection, such as a belief in the right and imperative to control territory,[43] the ISIS conception of "order" is in most cases entirely antithetical to that envisioned in the mainstream RBO. Such delinquent groups may claim a chimerical internal coherence to their supposed legal arguments, attempting to legitimize practices such as slavery,[44] execution of battlefield prisoners,[45] and extensive, often lethal persecution of minority groups.[46]

Delinquents, consequently, see little problem with professing, employing, and endorsing practices that are completely antithetical to the mainstream RBO. While not actually committed to the rules, delinquents will nevertheless draw upon the mainstream RBO to strengthen their status and diplomatic weapons. At some point,

[43] *See* Matt Bradley, *ISIS Declares New Islamist Caliphate: Militant Group Declares Statehood, Demands Allegiance From Other Organizations*, WALL ST. J. (June 29, 2014), http://www.wsj.com/articles/isis-declares-new-islamist-caliphate-1404065263; Press Ass'n, *Isis Announces Caliphate in "Declaration of War,"* THE GUARDIAN (June 30, 2014), https://www.theguardian.com/world/2014/jun/29/isis-iraq-caliphate-delcaration-war.

[44] *See* Paul Wood, *Islamic State: Yazidi Women Tell of Sex-Slavery Trauma*, BBC (Dec. 22, 2014), http://www.bbc.com/news/world-middle-east-30573385; GLOBAL JUSTICE CTR., DAESH'S GENDER-BASED CRIMES AGAINST YAZIDI WOMEN AND GIRLS INCLUDE GENOCIDE 1-4 (2016), *available at* http://globaljusticecenter.net/files/CounterTerrorismTalkingPoints.4.7.2016.pdf.

[45] *See* Samuel Osborne, *Isis Releases Video Showing Prisoners Being Killed "Like Sheep" to Mark Eid*, THE INDEPENDENT (Sept. 13, 2016), http://www.independent.co.uk/news/world/middle-east/isis-eid-video-prisoners-killed-like-sheep-syria-war-a7243786.html. This attitude is perhaps reflected in the comments reportedly by a female U.K. national who chose to live under ISIS rule. *See UK Schoolgirl Shamima Begum Who Fled to Join Islamic State "Wants to Return Home to England,"* AUST. BROAD. CORP. (Feb. 14, 2019), https://www.abc.net.au/news/2019-02-14/british-islamic-state-schoolgirl-shamima-begum-wants-come-home/10813578 ("She told The Times that life with IS alternated between the everyday and extreme horrors, but insisted witnessing shocking sights did not affect her: 'Mostly it was a normal life in Raqqa, every now and then bombing and stuff. When I saw my first severed head in a bin it didn't faze me at all. It was from a captured fighter seized on a battlefield, an enemy of Islam.'").

[46] *See, e.g.*, S.C. Res. 2249, (Nov. 20, 2015); Resolution on Systematic Mass Murder of Religious Minorities by ISIS, EUR. PARL. DOC. P8_TA(2016)0051 (2016).

however, even delinquent states may seek to ameliorate their reputation as an RBO non-conformist in order to gain access to "lawyers, guns, and money."[47] To this end, delinquents will employ the language of the rules and use the rules for propaganda and in "lawfare" against others,[48] despite the fact that they clearly care little for the rules and even less for most aspects of the order. Although states that subscribe to the mainstream RBO do not always conform with their own obligations, delinquents do not even attempt to do so.

IV. RBO INSURGENTS

The third type of states within the RBO are what I have categorized as "insurgents." Insurgents generally participate in and comply with the mainstream RBO, but often demonstrate significant sectoral non-compliance based on different interpretations of rules or even different rules. The sectoral non-compliance manifested by RBO insurgents, however, must be distinguished from the typical response of a mere rules-based persistent objector; the former is more significant by virtue of the breadth and scope of objection.[49] For example, Indonesia was a persistent objector to the mainstream understanding of archipelagic sea lane (ASL) claims; this objection

[47] WARREN ZEVON, *Lawyers, Guns, and Money*, *on* EXCITABLE BOY (Asylum Records 1978).

[48] Charles Dunlap Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008) ("Although I've tinkered with the definition over the years, I now define 'lawfare' as the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective. As such, I view law in this context much the same as a weapon. It is a means that can be used for good or bad purposes."). The term has also been more widely employed to cover use/misuse of law and legal process as a means to achieve operational objectives in broader political and security contexts. *See, e.g.*, Susan Tiefenbrun, *Semiotic Definition of "Lawfare,"* 43 CASE W. RES. J. INT'L L. 29, 51-59 (2010); John Morrissey, *Liberal Lawfare and Biopolitics: US Juridical Warfare in the War on Terror*, 16 GEOPOLITICS 280, 293 (2011) ("[T]he securing of 'Status of Forces Agreements'—to 'provide legal protections' against 'transfers of US personnel to the International Criminal Court.'").

[49] *See, e.g.*, Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 459 (1985); Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 23 (1986); Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 765-66 (2001).

manifested itself through the long disputed existence of an east-west ASL.[50] Such assertions differ qualitatively and quantitatively from the more comprehensive suite of objections raised by China regarding orthodox interpretations of the attenuated availability of security rights in maritime zones, which extend across issues of warship innocent passage, security regulation in the contiguous zone, and military surveying in the Exclusive Economic Zone.[51] It is important to remember that some current RBO insurgents were previously maintainers but rejected this status because of perceived deleterious consequences. For example, the financial crisis in Russia in 1998—after almost a decade of liberal-internationalist courtship—is said to have created a situation in which a recovering economy led the broadening middle class to withdraw trust in the "greater acceptance of liberal values."[52] Rather than re-engage with liberal-internationalism, they have instead adopted a course of "sacrific[ing] their freedoms in exchange for rising living standards and order":

> The new middle class thought they owed their better fortune to Putin and to the social compact they believed they had made with him – giving away their freedoms for rising incomes. Products of the 1990s, they associated democracy with social anarchy and impoverishment.[53]

This is the greatest challenge to RBO maintenance: whether the child of deep history or of more recent experience, RBO insurgents slip in and out of orthodox RBO compliance. Sometimes insurgents

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[50] *See, e.g.*, *Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes*, 52 L. SEA BULL. 20, 23-24 (2003) (Articles 11-12); *see generally* Barbara Kwiatkowska, *The Archipelagic Regime in Practice in the Philippines and Indonesia - Making or Breaking International Law?*, 6 INT'L J. ESTUARINE & COASTAL L. 1, 13-22 (1991).

[51] *See, e.g.*, U.S. DEP'T OF DEF., *China, Peoples Republic of*, *in* MARITIME CLAIMS REFERENCE MANUAL (2016), *available at* https://www.jag.navy.mil/organization/documents/mcrm/China2017.pdf; *Law on the Territorial Sea and the Contiguous Zone*, U.N. DOALOS/OLA (Feb. 25, 1992), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm.

[52] CHARLES CLOVER, BLACK WIND, WHITE SNOW: THE RISE OF RUSSIA'S NEW NATIONALISM 268 (2016).

[53] *Id.*

present themselves as mainstream, while at other times they assert a recognizably different RBO. Insurgents present a fluid and serious challenge to the orthodox, liberal-internationalist RBO.

A. *Exceptionalism and claims to authenticity*

To some extent, RBO insurgency can be characterized as a state of affairs. Simon Chesterman's point about the relationship between Asia and the international order is an indicative example:

> It is a paradox of the current international order that Asia… arguably benefits most from the security and economic dividends provided by international law and institutions and, yet, is the wariest about embracing those rules and structures.[54]

Some RBO insurgent states argue that they lack a sufficient voice in the development of certain aspects of the mainstream RBO. This may at times be true. For example, the People's Republic of China had little input into the practice and procedure of the UNSC until it took over the permanent seat from the Republic of China/Taiwan in 1971.[55] Further, it is also true that 19th and early 20th century China was routinely on the receiving end of "unequal treaties," humiliations, and other manifest injustices thinly veiled by imperialist and western conceptions of international law.[56] RBO insurgents, however, have occasionally used such histories to argue that they are, consequently, now entitled to assert new or different rules or norms,[57] to implement

[54] Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT'L L. 945, 945 (2016).
[55] G. A. Res. 2758, (Oct. 25, 1971), https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2758(XXVI).
[56] *See id.* at 951-53. Chesterman notes of Asia more broadly, this historical experience of being on the receiving end of international law employed for illegitimate ends is not limited to China. *See id.* at 964-65.
[57] An example is the expanded application of the law of armed conflict in international armed conflicts, via Article 1(4) of the 1977 Additional Protocol I, to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," which was in large part attributable to strong advocacy by post-colonial states that did not exist when the 1949 *Geneva Conventions* were negotiated and settled. *See Protocol Additional to the Geneva Conventions of 12 August 1949 and*

a norm in a different way,[58] to shuffle that norm within the 'order' or hierarchy in a manner that functionally differs from the mainstream hierarchy, or to re-negotiate those norms. Chinese Foreign Minister Wang Yi declared in 2014:

> [W]e must ensure an equal and democratic participation in the making of international rules, so as to highlight the nature of international rule of law. Promoting greater democracy in international relations is the aspiration of all countries and represents the historical trend of development. We must work hard to bring all countries, particularly the developing countries, into the rule-making process as equals. In international legislation, it is important to reflect countries' concerns in a balanced manner and to resist the attempt to make the rules of certain countries as 'international rules', and their standards 'international standards'.[59]

Such claims, however, must be interrogated for historical and legal accuracy. For example, it is disingenuous for China to claim that it has always maintained the existence of a body of law of the sea that sits apart from the 1982 United Nations Convention on the Law of the Sea (UNCLOS). In fact, China specifically argued on several occasions during the third United Nations Conference on the Law of the Sea (UNCLOS III) that the main thematic challenge to be faced by the law

Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1, June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Additional Protocol I]; *see generally* International Committee of The Red Cross, *Commentary of 1987 General Principles and Scope of Application*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7125D4CBD57A70DDC12563CD0042F793; Frederic Megret, *From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other,"* in INT'L L. & ITS OTHERS 265 (Anne Orford ed., 2006).

[58] For example, the extensively debated and discussed "African approach" to human rights and development, community and individual rights, and differing perspectives on leveraging law to achieve human rights outcomes. *See, e.g.*, Josiah Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309 (1987).

[59] Wang Yi, *Full Text of Chinese FM's Signed Article on International Rule of Law*, XINHUANET (Oct. 24, 2014), http://za.china-embassy.org/eng/zgxw/t1203793.htm.

of the sea was the threat of "maritime hegemony."[60] It also emphasized the need to maintain "a persistent endeavor against any maritime hegemonist acts in order to maintain world peace and international security and promote the progressive cause of mankind."[61] To this end, successive Chinese delegates argued that UNCLOS III and the anticipated agreement was an opportunity to wage "unremitting struggles to oppose maritime hegemonism and reform the unreasonable and unjust old maritime regimes."[62] At the signing of UNCLOS in December 1982, the Chinese delegate declared:

> The new Convention has laid down a number of important legal principles and regimes for safeguarding the common heritage of mankind and the legitimate maritime rights and interest of all States and brought about a change in the former situation, in which *the old law of the sea served only the interests of a few big Powers*. This is conducive to the fight against maritime hegemonism, the establishment of a new international economic order, and the promotion of friendly co-operation and exchanges between the peoples of all countries.[63]

Other RBO insurgents go even further, arguing that the true aberration is the relevant contested component of the mainstream liberal-internationalist RBO. This narrative suggests that many aspects of the orthodox RBO are irredeemably flawed, a consequence of the historically and legally correct version of RBO rule sets, to which the insurgent subscribes, having been seduced by an overzealous and distorting liberal-internationalist project. Regardless of the provenance of any particular RBO insurgent's propagation of an alternative rule, rule-set, or mechanism, their claim to authenticity is that they are justified in asserting a different rule or interpretation than that which is mainstream. To the insurgent, the mainstream liberal-internationalist RBO is either aberrant or merely a parallel rule set. An insurgent state or entity can thus operate recognizably and

[60] *See generally* Han Xu, PRC, 09 December 1982, 191st Meeting, Third United Conference on the Law of the Sea (A/CONF.62/SR.191, p102 ('09 December 1982 UNCLOS III Statement') p102, para 25.
[61] *Id.*
[62] *Id.*
[63] *Id.*

coherently within the mainstream RBO and employ many of its mechanisms and rule sets to the extent that they pose no major problems. Indeed, RBO insurgents will seek to exploit components of the mainstream RBO.

For example, Russia actively engages with global investment and financial market rules, championed by the liberal-internationalist RBO, to protect and wash funds and assets.[64] Simultaneously, it attempts to use the domestic or international leverage such assets can generate in terms of compliance or silence to undermine other fundamental liberal-internationalist norms in relation to aggressive territorial annexation.[65] China, similarly, is explicit regarding its strategic employment of useful law in its broader challenge to the liberal-internationalist RBO. The Chinese "three warfares" doctrine, for example, expressly mandates use of "legal warfare" to achieve strategic advantage over any likely adversary for whom compliance with international law and norms is more deeply ingrained. [66] However, in relation to other RBO component sectors, insurgents then assert different rules or different allocations of priority for the rules.

[64] *See generally* FOREIGN AFFAIRS COMM., *supra* note 3.

[65] Alison Smale, *Germany Puts Curbing Russia Ahead of Commerce,* N.Y. TIMES, 13 August 2014, https://www.nytimes.com/2014/08/14/world/europe/ukraine-crisis-hardens-germany-against-russia-an-old-partner.html; Jeff Rathke and Max Hammer, *Maximum Pressure on Germany Is a Big Mistake New sanctions from the United States risk pushing Berlin firmly into Moscow's geopolitical corner*, FOREIGN POLICY, Sept. 2, 2019, https://foreignpolicy.com/2019/09/02/maximum-pressure-on-germany-is-a-big-mistake/.

[66] *See* Sangkuk Lee, *China's 'Three Warfares': Origins, Applications, and Organizations*, 37 J. STRAT STUD. 198, 203 (2014); Elsa Kania, *The PLA's Latest Strategic Thinking on the Three Warfares* 16 CHINA BRIEF 1, 11 (Aug. 22, 2016), https://jamestown.org/program/the-plas-latest-strategic-thinking-on-the-three-warfares/ ("As warfare has evolved toward greater 'informationization' the three warfares have evidently achieved a 'breakthrough' beyond their 'traditional scope and model,' becoming an 'organic' aspect of national strategy and warfare. While the three warfares 'permeate' the 'whole course' of military struggle, their functions have also expanded and are relevant to the PLA's increasingly 'diversified' military missions.").

One example of an arguably non-exporting RBO insurgent perspective is the "ASEAN Way". This approach seeks to balance the fundamental RBO tenant of non-interference in domestic affairs, with the equally important RBO mechanism of diplomatically confronting— and on occasion, taking peaceful action via judicial and quasi-judicial fora against—states that do not comply with their obligations:

> When ASEAN was formed in 1967, it adopted a series of principles that have collectively come to be known as 'the ASEAN Way'. These principles place extreme emphasis on national sovereignty and the commitment to non-intervention into the affairs of member countries. ASEAN takes great pride in the fact that community decisions are made through extreme consensus.[67]

While accepting that both obligations exist within the RBO, and that there is a need to appropriately balance them against each other, many of the states within ASEAN disproportionately prefer the non-interference norm at the expense of all others. Compare, for example, the subdued, almost non-existent, initial ASEAN response to the South China Sea Arbitration,[68] with the more robust responses of RBO maintainer states and entities regarding the need for the parties

[67] CIMB, *ASEAN's Bright Future*, FINANCE ASIA (Nov. 7, 2015), https://www.financeasia.com/article/aseans-bright-future/403444.

[68] *South China Sea: South-east Asian Nations Avoid Criticising Beijing over Territorial Claims*, AUST. BROAD. CORP. (July 25, 2016), http://www.abc.net.au/news/2016-07-25/asean-nations-avoid-strong-rebuke-over-south-china-sea/7659126 ("Foreign ministers from the 10-member Association of South-East Nations (ASEAN) gathered for a regional summit in the Laos capital, Vientiane. . . . The Philippines and Vietnam both wanted the landmark ruling and a call to respect international maritime law to feature in the bloc's communique. China's ally Cambodia opposed the wording on the ruling, diplomats said, throwing talks at the weekend into disarray. The statement was finally released on Monday after Manila agreed to drop the reference to the ruling."). However, some individual ASEAN states were significantly more robust in their national views. *E.g.* Press Statement, Singapore Ministry of Foreign Aff., MFA Spokesman's Comments on the Ruling of the Arbitral Tribunal in the Phil. v. China Case Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) (July 12, 2016), *available at* https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2016/07/MFA-Spokesmans-Comments-on-the-ruling-of-the-Arbitral-Tribunal-in-the-Philippines-v-China-case-under.

to comply with the result, both to model RBO compliant conduct and safeguard the mainstream RBO from the corrosive effects of non-compliance.[69] The "ASEAN Way" thus provides a useful illustration of an introspective regional form of exceptionalism and RBO parallelism, in that ASEAN clearly focuses its collective political capital in maintaining the alternative perspective held by the majority of its member states on this critical RBO balancing priority.[70] ASEAN does not, however, actively seek to export its minority perspective.

B. *Challenging the orthodoxy*

In other situations, however, RBO insurgent states may seek to export a viewpoint precisely in order to undermine the orthodoxy so as to create political and legal space for uncertainty and eventually a parallel and equal orthodoxy. Recently, African states have debated whether to increase or erode the International Criminal Court's status, standing, and reach within Africa.[71] Another example involves China, an instrumental and engaged RBO maintainer and advocate in some areas of international law. In the South China Sea, China finds the fundamental and relatively clear UNCLOS rules on baselines for maritime territory inconvenient, which has required it to claim a parallel orthodoxy with respect to the nine-dash line.[72] These are

[69] *E.g.*, Delegation of the European Union in Cuba, *Declaration on the Award rendered in the Arbitration between the Philippines and China* (July 15, 2016), http://eeas.europa.eu/delegations/cuba/6873/declaration-on-the-award-rendered-in-the-arbitration-between-the-philippines-and-china_fr; Media Release, Austl. Minister for Foreign Affairs, Australia Supports Peaceful Dispute Resolution in the South China Sea (July 12, 2016), *available at* https://www.foreignminister.gov.au/minister/julie-bishop/media-release/australia-supports-peaceful-dispute-resolution-south-china-sea.

[70] *See* CIMB, *supra* note 67.

[71] African Union, *Decision on the International Criminal Court*, Twenty-Seventh Ordinary Session, Doc. EX.CL/987(XXIX) (July 17-18, 2016), https://www.au.int/web/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf; *UN/African Union: Reject ICC Withdrawal*, HUM. RTS. WATCH (Sept. 22, 2016), https://www.hrw.org/news/2016/09/22/un/african-union-reject-icc-withdrawal.

[72] South China Sea Arb., *supra* note 6, at 185, 200-01; *The South China Sea Arbitration Awards: A Critical Study*, 17 CHINESE J. INT'L L. 207, 420-21 (2018); Wu Shicun, *Why China is Right to Say No to the South China Sea Ruling*, NAT'L INST. FOR SOUTH CHINA SEA STUD., (July 28, 2016),

examples of RBO parallelism. The Chinese response has not been that the UNCLOS rules are wrong, but rather that they do not apply in the standard form in this instance because of asserted Chinese historical claims and strategic interests. In other words, they assert that there is an equally legitimate and lawful alternative set of rules to which they are entitled to subscribe.[73] This parallelism depends on an assumption that an extensive alternative rule set exists and is entitled to orthodox status. Such parallelism, however, is a qualitatively different, and less confronting, form of assertion than that which underpins more exclusive RBO insurgency arguments, such as assertions to the effect that the mainstream interpretation of the relevant RBO rule set is in fact aberrant because it is historically and legally divergent.

Russia is one example of an RBO insurgent state that asserts and elucidates a different, yet on its reckoning, principled and historically coherent, interpretation of specific norms or rules within the RBO. This form of RBO insurgency begins from the position that with respect to a discrete rule set at issue, the rules either mean something different than what the liberal-internationalist orthodoxy says they mean or must be balanced or applied differently. Like the maintainers, however, there are no saints in this category. Russia clearly obfuscates, lies, and exploits what it perceives to be areas of uncertainty or disquiet in the orthodox RBO to leverage opportunity by creating political time and space.[74] With Crimea, for example, Russia has clearly employed the uncertainty sown by opacity and temporary confusion,[75] combining this with conduct that wedges well-targeted fault lines and weaknesses in mainstream perceptions and appreciations of particular rule sets within the liberal-internationalist RBO. One example is debate over the indicators and evidence required to achieve a legally sufficient attribution of conduct to a state—one of

http://en.nanhai.org.cn/index.php/Index/Research/paper_c/id/112.html#div_content.

[73] "[W]e have to note that the dotted line came into existence much earlier than the UNCLOS, which does not cover all aspects of the law of the sea…" South China Sea Arb., *supra* note 6, at 200.

[74] *See generally* U.S. SPECIAL OPERATIONS COMMAND, WHITE PAPER: THE GREY ZONE (2015); *see also* INTERNATIONAL SECURITY AND ADVISORY BOARD, REPORT ON GREY ZONE CONFLICT 2-5 (2017).

[75] *See* Vitaly Shevchenko, *"Little Green Men" or "Russian Invaders"?*, BBC (Mar. 11, 2014), http://www.bbc.com/news/world-europe-26532154.

the very areas of legal uncertainty exploited by hybrid warfare.[76] Similarly, while those that subscribe to the orthodox RBO characterized the Russian occupation of Crimea as a blatant violation of Article 2(4) of the U.N. Charter and a clear example of illegal use of force, aggression, and territorial annexation,[77] Russia couched the official discourse on this issue in terms of the reunification of a part of Greater Russia. Namely, that Crimea had been "transferred" from the Russian SSR to the Ukrainian SSR by Stalin in 1954, in part to "commemorate the 300th anniversary of the 'reunification of Ukraine with Russia' (a reference to the Treaty of Pereyaslav signed in 1654 by representatives of the Ukrainian Cossack Hetmanate and Tsar Aleksei I of Muscovy) . . ."[78] That is, while "the West" saw this act as a blatant, irredentist breach of Ukraine's territorial integrity, Russia saw it as the restitution of its own territorial integrity; indeed, the Russian Prosecutor-General in 2015 provided advice that the original 1954 transfer had been illegal under the Constitution of the then USSR.[79] Yet this alternative interpretation of the relevant rule set was also

[76] *See, e.g.*, Alexander Lanoszka, *Russian Hybrid Warfare and Extended Deterrence in Eastern Europe*, 92 INT'L AFF. 175 (2016); Edgar Buckley & Ioan Pascu, *NATO's Article 5 and Russian Hybrid Warfare*, ATLANTIC COUNS. (Mar. 17, 2015), http://www.atlanticcouncil.org/blogs/natosource/nato-s-article-5-and-russian-hybrid-warfare; Benjamin Wittes, *What Is Hybrid Conflict?*, LAWFARE (Sept. 11, 2015, 5:11 PM), https://lawfareblog.com/what-hybrid-conflict; Vitalii Vlasiuk, *Hybrid War, International Law and Eastern Ukraine*, 2 EUR. POL. & L. DISCOURSE 14 (2015); Charles Bartles, *Getting Gerasimov Right*, MIL. REV., Jan.-Feb. 2016, at 30-38.

[77] *See, e.g.*, Press Release (2014) 062, NATO, Statement by NATO Foreign Ministers (Apr. 1, 2014), *available at* http://www.nato.int/cps/en/natolive/news_108501.htm ("1. We, the Foreign Ministers of NATO, are united in our condemnation of Russia's illegal military intervention in Ukraine and Russia's violation of Ukraine's sovereignty and territorial integrity. We do not recognize Russia's illegal and illegitimate attempt to annex Crimea.").

[78] *See, e.g.*, *Meeting of the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics*, WILSON CENTER: DIGITAL ARCHIVE (Gary Goldberg trans., 1954), *available at* http://digitalarchive.wilsoncenter.org/document/119638; Mark Kramer, *Why Did Russia Give Away Crimea Sixty Years Ago?*, WILSON CENTER: COLD WAR INT'L HIST. PROJECT (Mar. 19, 2014), https://www.wilsoncenter.org/publication/why-did-russia-give-away-crimea-sixty-years-ago.

[79] *1954 Transfer of Crimea to Ukraine Illegal – Russian Prosecutor General*, SPUTNIK NEWS (June 27, 2015), https://sputniknews.com/russia/201506271023916532/; *New Russian Bill Condemns 1954 Transfer of Crimea to Ukraine as "Illegal,"* MOSCOW TIMES (Feb. 5, 2015), https://themoscowtimes.com/news/new-russian-bill-condemns-1954-transfer-of-crimea-to-ukraine-as-illegal-43588.

accompanied by genuflection to a different, situationally useful component of the mainstream RBO: self-determination. Thus, the return of Crimea to Russia was also described as a manifestation of the 16 March 2014 referendum.[80] As William Burke-White has observed:

> In Crimea, Russia has cleverly embraced international law and, in so doing, exploited the tension between a fundamental principle that prohibits the acquisition of territory through the use of force and an equally fundamental right of self-determination to take Crimea as its own.[81]

Similarly, as Burke-White continues, the existence of an exploitable weakness within the liberal-internationalist RBO—coalescing around the unhealed scar of the Kosovo intervention—has created space for Russian rhetoric on intervention to protect ethnic Russians, which is clearly intended to leverage this fault-line.[82] By shifting "the balance between territorial integrity and self-determination far in the direction of the latter," Russia's policy objective has been to "render…international borders more permeable and the international system far less secure."[83] Thus by attempting to obscure the relationship between Russia and armed groups within Crimea, and by claiming and providing evidence for a veil of legality in relation to self-determination, the hesitant were given a basis for pause.[84] This delay in consequence granted Russia a relatively free hand in establishing a new set of facts on the ground. The confronting

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[80] *See Crimea Referendum: Voters "Back Russia Union,"* BBC (Mar. 16, 2014), http://www.bbc.com/news/world-europe-26606097; *see, e.g.*, Lea Brilmayer, *Why the Crimean Referendum is Illegal*, THE GUARDIAN (Mar. 15, 2014), https://www.theguardian.com/commentisfree/2014/mar/14/crimean-referendum-illegal-international-law; IVANNA BILYCH ET AL., THE CRISIS IN UKRAINE: ITS LEGAL DIMENSIONS 22-24 (2014), *available at* http://www.usukraine.org/pdf/The-Crisis-in-Ukraine-Its-Legal-Dimensions.pdf.

[81] William Burke-White, *Crimea and the International Legal Order*, 56 SURVIVAL: GLOBAL POL. & STRATEGY 65, 65 (2014).

[82] *Id.* at 68.

[83] *Id.*

[84] *See, e.g.*, Bruno Waterfield & Colin Freeman, *EU Leaders Divided Over New Sanctions to Punish Russia for Annexing Crimea*, THE TELEGRAPH (Mar. 20, 2014), https://www.telegraph.co.uk/news/worldnews/europe/ukraine/10710268/EU-leaders-divided-over-new-sanctions-to-punish-Russia-for-annexing-Crimea.html.

nature of these transparently irredentist acts also arguably created a form of liberal-internationalist shock at their very audacity and illegality. In doing so, this conduct further leveraged yet another perceived weakness in the mainstream RBO in terms of its innate reluctance to sanction the transition from attempts at peaceful conflict resolution in response to a use of force to use of force in response to a use of force.

V. RUSSIA AS AN RBO INSURGENT

Russia clearly and routinely acts contrary to both the orthodox, liberal-internationalist RBO and some of the RBO's most basic and fundamental rules on areas such as the use of force. However, what characterizes such action as that of an RBO insurgent, rather than the conduct of a delinquent, is the possibility that there is more to this pattern of behavior than simple opportunism and instrumentalism. That is, Russia may see some of the rules, rule sets, and rule hierarchies differently because of its particularized view of the RBO's purpose. This is particularly evident in the apparent contrast between the liberal-internationalist and Russian approaches to the RBO. The first manifests as a reasonably well- correlated set of post-WWII, western perspectives that hinge around the promotion of human rights and a basic belief that use of force to achieve political aims should in most cases be treated as an unlawful aberration.[85] The Russian view, on the other hand, appears to RBO maintainers to be more nakedly nationalistic and self-referential.[86] It conceives of use of

[85] United Nations Association of Australia, *The United Nations and The Rules-Based International Order*, UNAA 1, 7-8 (2015), https://www.unaa.org.au/wp-content/uploads/2015/07/UNAA_RulesBasedOrder_ARTweb3.pdf; Vince Chong, *If Not For Peace, Why Does Australia Favour Rules-Based Global Order?*, THE MANDARIN (Sept. 15, 2015), https://www.themandarin.com.au/70225-rules-based-global-order-australian-shift/; Michael Wood, *International Law and the Use of Force: What Happens In Practice?* 53 Indian J. of Int'l. L. 345, 350 (2013).

[86] Richard Sakwa, *The Problem of "the International" in Russian Identity Formation*, 49 INT'L POL. 449, 452 (2012) ("Russia is not a new USSR, but it has returned to the world stage as an assertive self-referential state with an agenda of its own, jealous to maintain its sovereignty and eager to advance its views"); *see, e.g.*, Luke March, *Nationalism for Export? The Domestic and Foreign-Policy Implications of the New "Russian Idea,"* 64 EUR.-ASIA STUD. 401 (2012); *see also* CLOVER, *supra* note 52, at 285 ("The mobilizational power of Russian nationalism was plain to see from recent

force in 19th and early 20th century terms as a caveated state right, at least insofar as national defense and defense of fundamental Russian interests are concerned:

> Russian concepts of federalism provide a useful lens into foreign policy contradictions. The central ideological construct of the post-communist period – sovereign democracy – informs us that from the Russian perspective both sovereignty and democracy are socially and culturally determined, and clash with Western readings of sovereignty and democracy.
>
> The emergence of a new, post-modern and Western-dominated set of norms limiting sovereignty appears to be at the root of continued tensions between Russia and the West.[87]

Because of the Russian trend to characterize the immediate post-Soviet years as a Russian "Weimar" period, the apparent political mainstreaming of "Eurasianist" sensibilities,[88] and Russia's political hagiography and legal defense of the territorial reach and coherence of Tsarist Russia and the Soviet Union,[89] it is tempting to describe this

history: in the right hands it could be the rocket fuel for gangs that could sweep the streets of Western-inspired opposition; in the wrong hands it could be a deadly virus – one that had already destroyed one incarnation of the state, the USSR, and could yet destroy the Russian Federation. Nationalist opposition groups were considered a mortal threat to the regime; but also, paradoxically, a new political force that could be tremendously useful if handled correctly.").

[87] Charles Ziegler, *Conceptualizing Sovereignty in Russian Foreign Policy: Realist and Constructivist Perspectives*, 49 INT'L POL. 400, 415 (2012).

[88] *See generally* CLOVER, *supra* note 52 (Ch. 11-15); Andrei Tsygankov, *Finding a Civilisational Idea: "West," "Eurasia," and "Euro-East" in Russia's Foreign Policy*, 12 GEOPOLITICS 375, 379 (2007) ("In the perception of many members of Russia's political class, today's challenge is to reconnect with Europe as the old 'significant Other,' while retaining those historical values that have defined Russia as a nation"); John Berryman, *Geopolitics and Russian Foreign Policy*, 49 INT'L POL. 530 (2012).

[89] *See* William Butler, *On the Origins of International Legal Science in Russia: The Role of PP Shafirov*, 4 J. HIST. INT'L L. 1, 7-8, 41 (2002) (referring to the legacy of Shafirov's views on territorial acquisition and the reach of jurisdiction); Lauri Mälksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. J. INT'L L. 211, 217-19, 221-23, 226-29, 231 (2008) (noting differences in perspective across issues as diverse as the sanctity of "unjust" contracts and treaties, the "Third Rome" influenced "Messaianic" and

particular insurgent vision as the "imperial-nationalist" RBO. That is, parallel to the clearly opportunistic, instrumentalist, and belligerent approach it has adopted to the orthodox RBO, Russia is also to some degree acting in coherence with a centuries-long Russian interpretation of one of the fundamental purposes of an RBO: to provide a platform for and mechanism by which states are entitled to assert their right to protect and defend their current and historic interests and claims, and their minorities, in the near abroad. For example:

> A recent decision by the Russian Prosecutor General's Office to review the legality of a 1991 decision granting the Baltic states independence from the Soviet Union has irritated the governments of the Baltic states and raised concern among their allies. At the same time, Russian officials confirmed that 'the matter has no legal prospects' and no direct implications for Estonia, Latvia and Lithuania. This paradoxical move can be better understood in the context of the other Russian government initiatives of the past two years that have indirectly challenged the sovereignty of the Baltic states. It also reflects a much deeper-rooted view held in Moscow on Baltic statehood and on the Soviet era that is much at odds with the view of the Baltic governments… Since the 2000s, many Russian government officials and pundits have consistently argued that the period of independence and sovereignty of the Baltic states is an 'abnormality,' as opposed to the 'normality' of the period when the region was under Russian or Soviet rule. Thus the recent effort to reassess the legality of Baltic independence and the efforts to enforce Soviet laws on Lithuanian citizens is very much in the same vein.[90]

Echoes of Tsarist Russia's long claimed intervention rights on behalf of Russian and Orthodox populations in the Ottoman Empire,[91]

exceptionalism streak in Russian legal theory, and Russian/Soviet departures from "the idea of [European-defined] universal international law.").

[90] Agnia Grigas, *How Russia Sees Baltic Sovereignty*, MOSCOW TIMES (July 14, 2015), https://themoscowtimes.com/articles/how-russia-sees-baltic-sovereignty-48143.

[91] *See* Treaty of Küçük Kaynarca, Russ. Empire-Ottoman Empire, July 10, 1774 (Intervention of rights are found in Articles VII and XIV of treaty); Rodebic

or the Polish Commonwealth[92], are currently unmistakable in the Donbas region.

A. RBO Provenance

It is certainly arguable that Russia is not merely provocatively trampling upon the liberal-internationalist interpretation of the RBO because it is simultaneously arguable that Russia is re-interpreting an underpinning purpose of the RBO in order to weaponize certain rules and rule sets by re-reading and reducing the inconvenient caveats or limitations that attend them. This warps the RBO as the liberal-internationalist mainstream understands it, but it also points to a fundamental Russian acceptance of the fact that there is an RBO, and that it does and should guide state conduct. The Russian image of the RBO hearkens back to an understanding that held significant sway a century ago. To wit:

> It would be tempting to chalk up this behaviour to hypocrisy and cynicism. But doing so makes the fundamental error of seeing empire and international law as mutually contradictory. It risks falling into a trap that imagines law mattering only when it constrains by forcing them to do something that they would not otherwise do. Law does sometimes function in this way, and states do sometimes seek to evade it for this reason. But law just as often enables aggressive behaviour, and not just by creating 'exceptions' to be exploited by the powerful. International law has often permitted the use of force... Behaviour that is deemed 'legal' is more likely to be considered legitimate…

Davison, *"Russian Skill and Turkish Imbecility": The Treaty of Kuchuk Kainardji Reconsidered*, 35 SLAVIC REV. 463, 463 (1976); F. Ismail, *The Making of the Treaty of Bucharest, 1811-1812*, 15 MIDDLE E. STUD. 163, 176 (1979) (on the subsequent 1812 Treaty of Bucharest). The Russians, in fact, had the best (although still weak) claims to legality in terms of the 1827 Battle of Navarino because of Russia's view that it had treaty rights to protect Christians (Orthodox Greeks) within the Porte. Will Smiley, *War without War: The Battle of Navarino, the Ottoman Empire, and the Pacific Blockade*, 18 J. HIST. INT'L L. 42, 50-52 (2016).

[92] *See* Nicholas Czubatyj, *Ukraine - Between Poland and Russia*, 8 R. POL. 331 (1946); Geoff Gilbert, *Religio-Nationalist Minorities and the Development of Minority Rights Law*, 25 R. INT'L STUD. 389, 395 (1999).

> Believing in the legality of one's own actions can displace hesitation and guilt.[93]

This could have been commentary on Russia today. An analysis of the U.S. relationship to international law and the RBO in the early twentieth century summarized it as follows:

> In the early twentieth century, empire was itself an international norm that was part of, not external to, the law, and many of the 'norm entrepreneurs' of that era worked to convince Americans of the benefits and moral necessity of empire.[94]

Nor was this imperial-nationalist approach to the RBO the only historically evident other form of RBO that subsisted at that time. Another closely related conception was arguably the "balance of power" RBO, where public rule selection and associated justificatory discourse depended on the over-riding purpose of maintaining the balance of power.[95] As TJ Lawrence surmised in 1885:

> The Concert of Europe exists as a kind of International Court of Appeal; and incidentally it sometimes assumes legislative functions, as when by the neutralization of Switzerland, Belgium and Luxemburg, it virtually imposed new rights and obligations on states who may be brought into contact with them, or when in 1878 at Berlin it decreed that on certain conditions Servia and Romania should be raised to the rank of wholly independent powers. But though, like an English Court, in deciding difficult cases it may occasionally be said to legislate, its procedure is not settled, nor is the nature and extent of its jurisdiction determined. Over some questions it exercises undisputed

[93] BENJAMIN COATES, LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY 5 (2016).
[94] *Id.* at 7.
[95] *See* THOMAS LAWRENCE, ESSAYS ON SOME DISPUTED QUESTIONS IN MOD. INT'L L. 209, 216-17, 219, 221 (1885); FRIEDRICH MEINECKE, MACHIAVELLISM 413 (Transaction Publishers 1998) (1957); M. ANDERSON, THE RISE OF MODERN DIPLOMACY 1450-1919 186-188 (1993); MICHAEL SHEEHAN, THE BALANCE OF POWER HISTORY AND THEORY 123, 125-26, 130-31, 138-39 (1996).

> control. Others it does not attempt to influence in the slightest degree.[96]

A case study in point was the British, French, and U.S. (Union) policy towards the Polish rebellion of 1863. While these states arguably assessed that the Polish rebels ought to be afforded formal recognition of belligerency, they employed other rule sets. These included the intricate network of agreements and arrangements that stitched together the Concert of Europe, as well as the desire of the U.S. to be seen as the sophisticated equal of its European peers to avoid unsettling the balance of power.[97] As the Earl of Derby explained to the House of Lords in February 1863:

> Another set of circumstances under which recognition is legitimate is where other nations, having in the interests of humanity determined that a desolating warfare shall no longer be continued, in order to put an end to it agree to recognise the revolting party. But in that case recognition is always followed by something further, for it means nothing unless the Powers who join in it are ready to support by force of arms the claims of the State which they recognise.[98]

Similarly, the balance of power RBO was arguably on full display during the Spanish Civil War, when a number of European states denied the Nationalists their much desired status as a formally recognized belligerent.[99] To this end, these states employed an

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[96] LAWRENCE, *supra* note 95, at 228-29.

[97] *See Art. V - The Treaty of Vienna: Poland*, 80 WESTMINSTER REV. 412, 429-33 (1863); *Art. IX – Poland*, 80 WESTMINSTER REV. 171, 189 (1863); *see generally* Henryk Wereszycki, *Great Britain and the Polish Question in 1863*, 50 ENG. HIST. REV. 78, 80-88 (1935); John Kutolowski, *Mid-Victorian Public Opinion, Polish Propaganda, and the Uprising of 1863*, 8 J. BRIT. STUD. 86, 89-91 (1969); *see generally* Laurence J. Orzell, *A "Favourable Interval": The Polish Insurrection in Civil War Diplomacy, 1863*, 24 CIV. WAR HIST. 332 (1978); Remigiusz Bierzanek, *Humanitarian Law in Armed Conflicts: The Doctrine and Practice of Polish Insurgents in the 19th Century*, 17 INT. REV. RED CROSS 128 (1977); ELLERY STOWELL, INTERVENTION IN INTERNATIONAL LAW 91-102 (1921).

[98] 169 Parl Deb HC (3rd ser.) (1863) col. 24-25 (UK).

[99] Franco placed great emphasis on this point, making it—in essence—a bargaining chip with respect to his assistance in extricating members of the Republican

assortment of ill-fitting secondary rules, such as piracy,[100] in order to avoid the legal invocation of neutral and belligerent rights and obligations, as well as the deleterious consequences this step would have had for legitimizing German and Italian intervention.[101]

B. *Applying this framework to Russia*

If current Russian RBO insurgency is in fact underpinned by adherence to an imperial-nationalist vision of the RBO, then this says two important things about insurgent approaches to the RBO more generally. First, although Russia's version of the RBO is opportunistic as a legal, political, and diplomatic tool, such approaches often have some historical provenance.[102] It is important to recognize this provenance regardless of justifiable mainstream concerns about the implications for the modern orthodox RBO caused by reintroduction of archaic approaches. This recognition is not to excuse it but to understand it. Second, the probable internal coherence of insurgent approaches to the RBO means that they may ultimately be susceptible to more robust mainstream RBO responses. Whereas RBO delinquents are generally responsive to practical consequences rather than argument, RBO insurgents—precisely because they assert an internally coherent alternative orthodoxy—must be dealt with on both the categorical and prudential levels. Practical consequences may dissuade an RBO insurgent, but only an argument acknowledging and critiquing the alternative has the potential to persuade one.

The essence of this assessment is that Russia may actually be more susceptible to assertive, coordinated, liberal-internationalist RBO responses than their current conduct appears to indicate.

International Brigades from Spain. *See, e.g.*, REPORT OF MR. FRANCIS HEMMING ON HIS MISSION TO NATIONAL SPAIN 222 (1938) (on file with U.K. Nat. Archives, Ref. No. ADM 116/6315).

[100] The Nyon Agreement, Sept. 14, 1937, 181 L.N.T.S. 137 (identifying repeated submarine attacks against international shipping in the Mediterranean during the Spanish Civil War and agreeing upon collective measures against submarines committing acts of piracy).

[101] *See, e.g.*, Memorandum from Maurice Pascal Alers Hankey on The Situation in Spain: The Question of Belligerent Rights (Nov. 24, 1936) (on file with U.K. Nat. Archives, Ref. No. CAB/24/265).

[102] *See generally* Butler, *supra* note 89; *see generally* Mälksoo, *supra* note 89.

Perhaps it is arguable that a more robust and disciplined agenda of coordinated and integrated lawfare by defenders of the liberal-internationalist RBO will ultimately produce better results than appeasement, prevarication, or half-measures. This is indeed the hypothesis underpinning some recent developments in legislation for, and enforcement of, more targeted sanctions and exclusions.[103] We must not lose sight of the fact that the liberal-internationalist RBO offers a range of existing mechanisms that can generate significant effects when employed in a robust, coordinated, and collective manner. These existing opportunities remain indispensable, particularly the pressure that can be exerted by targeted use of signature liberal-internationalist RBO mechanisms relating to transnational trade, banking, and investment governance. These mechanisms vest defenders of the orthodox RBO with a significant, albeit, occasionally mercurial, set of lawfare options. While it is vital that principled rhetorical responses to breaches of the non-use of force and human rights components of mainstream RBO compliance continue, it is equally important to recognize that Russia's insurgent attitude toward the orthodox RBO means that its vulnerabilities arguably lay elsewhere.

Second, precisely because Russia asserts an alternative orthodoxy that is internally coherent, there is room for legal and political strategies that exploit fault lines and weaknesses in the Russian imperial-nationalist image of the RBO. However, in order to exploit this opportunity, we must accept that there are alternative images of the RBO that animate certain states' conduct. Consequently, it is necessary to first recognize and understand these alternative images. Doing so will allow liberal-internationalist RBO defenders to better strengthen the orthodox RBO from erosive insurgency and facilitate more effective and targeted exploitation of weaknesses in alternative images of the RBO.

[103] *America's New Economic Sanctions May Hurt Russia's Recovery; But Whether They Will Change Vladimir Putin's Behaviour is Another Matter*, THE ECONOMIST (Aug. 5, 2017), https://www.economist.com/news/europe/21725806-whether-they-will-change-vladimir-putins-behaviour-another-matter-americas-new-economic; FOREIGN AFFAIRS COMM., *supra* note 3, at 27-30.

CONCLUSION

While the very concept of the RBO is disputed, this question is on a different metaphysical plane than the question of what is the (or a) RBO. Assuming at least one RBO exists, then its form and content vary depending upon the priorities if its members. Each state has its vision of an RBO based on its values, whether civilizational or universal, and whether liberal-internationalist, imperial, or nationalist. These are framed to maintain the primacy of sovereignty or to reduce opportunities for destructive sovereign affront through structures and rules of global governance. Arguably, at any given time there is a mainstream, or "orthodox," version of the RBO. The current mainstream RBO is the liberal-internationalist version. If a mainstream RBO does exist, then it is also useful to characterize how states and other entities relate to the mainstream RBO, as this can help determine strategies for dealing with conflict that threatens to destabilize or erode the orthodox RBO. To this end, I have proposed three distinct categories of relationships with the RBO: maintainers, delinquents, and insurgents. This typology of relationships can provide some insight into better anticipating, understanding, and responding to conduct by states such as Russia that attempt to undermine the orthodox RBO.