

EDITORIAL

# The choice before us: International law or a ‘rules-based international order’?

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## 1. Introduction

On 2 June 2022 President Biden published an op-ed in the *New York Times* titled ‘How the US is willing to help Ukraine’ in which he declared that Russia’s action in Ukraine ‘could mark the end of the rules-based international order and open the door to aggression elsewhere, with catastrophic consequences the world over’.<sup>1</sup> There is no mention of international law. Later, in a press conference at the conclusion of the June 2022 NATO Summit Meeting in Madrid, he warned both Russia and China that the democracies of the world would ‘defend the rules-based order’ (RBO).<sup>2</sup> Again, there is no mention of international law. On 12 October 2022 the US President published a National Security Strategy which makes repeated reference to the RBO as the ‘foundation of global peace and prosperity’,<sup>3</sup> with only passing reference to international law.<sup>4</sup> The term ‘rules-based order’ is so frequently used by American political leaders, such as President Biden and Secretary of State Antony Blinken, that, according to Professor Stephen Walt of the Kennedy School of Harvard University, it ‘seems to have become a job requirement for a top position in the US foreign policy apparatus’.<sup>5</sup> The clear inference to be drawn from this is that the failure to invoke international law and instead to appeal on most occasions to a ‘rules-based international order’ on the part of the United States is considered and deliberate.<sup>6</sup>

Other Western leaders have likewise invoked the ‘rules-based international order’ to criticize non-Western states, particularly Russia and China, for their international misconduct,<sup>7</sup> but such

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<sup>1</sup>J. R. Biden Jr., ‘How the US is Willing to Help Ukraine’, *New York Times International Edition*, 2 June 2022, 1, at 11.

<sup>2</sup>The White House Briefing Room, ‘Remarks by President Biden in Press Conference (Madrid, Spain)’, *The White House*, 30 June 2022, available at [www.whitehouse.gov/briefing-room/speeches-remarks/2022/06/30/remarks-by-president-biden-in-press-conference-madrid-spain](http://www.whitehouse.gov/briefing-room/speeches-remarks/2022/06/30/remarks-by-president-biden-in-press-conference-madrid-spain).

<sup>3</sup>The White House, ‘National Security Strategy’, *The White House*, October 2022, at Introduction, 8, 18, 42, available at [www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf](http://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf).

<sup>4</sup>*Ibid.*, at 18, 45.

<sup>5</sup>S. Walt, ‘China Wants a “Rules Based International Order,” Too’, *Foreign Policy*, 31 March 2021, available at [www.belfercenter.org/publication/china-wants-rules-based-international-order-too](http://www.belfercenter.org/publication/china-wants-rules-based-international-order-too). See also A. Tuygan, ‘The Rules-based International Order’, *Diplomatic Opinion*, 10 May 2021, available at [www.diplomaticopinion.com/2021/05/10/the-rules-based-international-order/](http://www.diplomaticopinion.com/2021/05/10/the-rules-based-international-order/).

<sup>6</sup>Further evidence of President Biden’s determination to avoid reference to international law is provided by an article he wrote shortly after becoming president: J. R. Biden, Jr., ‘Rescuing US Foreign Policy after Trump’, (2020) 99 *Foreign Affairs* 64. In this wide-ranging account of his proposed foreign policy, there is no mention of international law or the United Nations. NATO does, however, feature prominently in the article.

<sup>7</sup>See the statement of the German Foreign Minister, Annalena Baerbock after the 2022 G20 meeting of foreign ministers where she referred to a shared commitment to the rules-based international order: Außenministerin Annalena Baerbock [[@Abaerbock](https://twitter.com/Abaerbock)], [@Liebe\\_AyorkorBotchwey](https://twitter.com/Liebe_AyorkorBotchwey), [@DrAlfredMutua](https://twitter.com/DrAlfredMutua) & [@mnsanzabaganwa](https://twitter.com/mnsanzabaganwa), ich freue mich sehr, mit Ihnen drei starke Partner\*innen für die Verteidigung der regelbasierten internationalen Ordnung beim #G7-Treffen in Münster willkommen zu

references have been inconsistent<sup>8</sup> or used interchangeably with international law. A good illustration of this is provided by the Declaration issued by the Heads of State at the conclusion of the 2022 Madrid Summit of NATO which stated that ‘[w]e adhere to international law and to the purposes and principles of the Charter of the United Nations. We are committed to upholding the rules-based international order’.<sup>9</sup> The Prime Minister of the Netherlands has gone even further by blending the two terms into a single phrase in referring to ‘the rules-based international legal order’.<sup>10</sup> This suggests that other Western leaders, particularly of the EU, have an ambivalent attitude towards the rules-based international order. While they are prepared to go along with the United States’ preferred language in joint statements with the United States, they nevertheless insist that international relations are governed by international law. This was made clear in a statement issued by the EU in the United Nations when Russia invaded Ukraine.<sup>11</sup> The United Kingdom, on the other hand, frequently invokes the rules-based international order.<sup>12</sup>

What is this creature, the ‘rules-based international order’, that American political leaders have increasingly invoked since the end of the Cold War instead of international law? Is it a harmless synonym for international law, as suggested by European leaders? Or is it something else, a system meant to replace international law which has governed the behaviour of states for over 500 years?

In this editorial I wish to share some thoughts about this new phenomenon, in an attempt to answer this question.

A search of the indexes of the leading international law textbooks does not help. There is no mention of the ‘rules-based international order’ in a randomly chosen selection of such books.<sup>13</sup> The relative silence of international-law scholars and practitioners on this subject may possibly be explained on the ground that lawyers see the RBO either as the political term for international law

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heißen!’, *Twitter*, 4 November 2022, available at [twitter.com/ABaerbock/status/1588503709440700417](https://twitter.com/ABaerbock/status/1588503709440700417). See further, R. Falk, ‘“Rule-based International-Order”: A New Metaphor for US Geo-Political Primacy’, *Eurasia Review*, 1 June 2021, available at [www.eurasiareview.com](http://www.eurasiareview.com); G. Cross, ‘Rules-based Order: Hypocrisy Masquerading as Principle’, *China Daily*, 3 May 2022, available at [www.chinadailyhk.com/article/269894#Rules-based-order-masquerading-as-principle](http://www.chinadailyhk.com/article/269894#Rules-based-order-masquerading-as-principle).

<sup>8</sup>The statements of Australian leaders are interesting. While the former Prime Minister, Scott Morrison, repeatedly used the term ‘rules-based order’ and not ‘international law’, the present Foreign Minister, Penny Wong, refers to international law. See her statement on the occasion of the 2022 G20 meeting of foreign ministers: Sen. The Hon P. Wong, ‘Doorstop Following G20 Foreign Ministers’ Meeting’, *Minister for Foreign Affairs*, 8 July 2022, available at [www.foreignminister.gov.au](http://www.foreignminister.gov.au).

<sup>9</sup>NATO Heads of State and Government, Madrid Summit Declaration, Press Release 095 (2022), available at [www.nato.int/cps/natohq/official\\_texts\\_196951](http://www.nato.int/cps/natohq/official_texts_196951). For a similar statement see the communique issued after the meeting of foreign ministers of the G7 at St Malo on 6 April 1999: G7 Foreign Ministers, ‘Statement on the Situation in the West of Libya’, *G7 France Biarritz*, 5 April 1999, available at [www.elysee.fr/admin/upload/default/0001/04/fa9bd64d1ab7fc32e4c9508650b83222b0c1a267.pdf](http://www.elysee.fr/admin/upload/default/0001/04/fa9bd64d1ab7fc32e4c9508650b83222b0c1a267.pdf).

<sup>10</sup>Prime Minister M. Rutte, ‘Statement by Prime Minister Rutte for the 80<sup>th</sup> Anniversary of Bilateral Relations between the Netherlands and Australia’, *Government of the Netherlands*, 16 April 2022, available at [www.government.nl/documents/speeches/2022/04/16/statement-prime-minister-rutte-80-year-anniversary-of-bilateral-relations-between-australia-and-the-netherlands](http://www.government.nl/documents/speeches/2022/04/16/statement-prime-minister-rutte-80-year-anniversary-of-bilateral-relations-between-australia-and-the-netherlands).

<sup>11</sup>S. Popan, Statement on behalf of the EU and its Member States at the 76<sup>th</sup> Session of the General Assembly Special Committee on the Charter of the United Nations and the Strengthening of the Role of the Organization, 3 November 2021, available at [www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-united-nations-6th-committee-report-special-committee-un\\_en?s=63](http://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-united-nations-6th-committee-report-special-committee-un_en?s=63).

<sup>12</sup>See, for example, the statements by Jeremy Hunt, Secretary of State for Foreign and Commonwealth Affairs, in Parliament on 2 April 2019 in the debate in Parliament on the Rules-based International Order: J. Hunt (Secretary of State for Foreign and Commonwealth Affairs), ‘Rules-Based International Order: Debate’, *UK Parliament, Hansard, Oral Answers to Questions on Rules-based International order, volume 657*, 2 April 2019, column 916, available at <https://hansard.parliament.uk/2019-04-02/debates>. See also British Embassy of Manila, ‘UK Foreign Office Minister Mark Field Visits Philippines, 15–17 August’, *British Embassy Manila*, 28 August 2018, available at [www.gov.uk/government/news/uk-foreign-office-minister-mark-field-visits-philippines-15-17-august](http://www.gov.uk/government/news/uk-foreign-office-minister-mark-field-visits-philippines-15-17-august).

<sup>13</sup>See, for example, J. Crawford (ed.), *Brownlie’s Principles of Public International Law* (2018); M. Shaw, *International Law* (2021); M. Evans (ed.), *International Law* (2018); J. Crawford, *Chance, Order, Change: The Course of International Law* (2014); A. Roberts, *Is International Law International?* (2017).

or as harmless political rhetoric. This is, however, unfortunate as it has allowed politicians to invoke the RBO without providing an explanation of what they mean.

## 2. Two ways of looking at the 'rules-based order'

On the one hand, it may be seen as a concept developed by political scientists and politicians that is intended to be more or less synonymous with international law.<sup>14</sup> Founded on a liberal international order, it is 'based on principles of democratic governance, the protection of individual rights, economic openness and the rule of law'<sup>15</sup> and is characterized by equality, human rights, freedom, multilateralism, free movement of goods, and collective security.<sup>16</sup> In content, it goes beyond the narrow positivist perception of international law to include soft law, including the standards and recommendations of international standard-setting organizations<sup>17</sup> and conferences and rules made by non-state actors.

According to this view, the RBO is based on principles that constitute the foundations of international law and in addition takes account of the broader sources of contemporary international law advocated by many scholars. In common with international law, it is premised on the values of the international community enshrined in the Charter of the United Nations, in multilateral treaties and customary rules that give effect to these values.

There is, however, another perspective of the RBO which requires consideration.

Political theorists and commentators have taken the lead in the examination of the RBO but, apart from those that have criticized the RBO,<sup>18</sup> they have paid scant attention to the relationship with international law. For instance, while they have heralded the importance of human rights, self-determination, territorial integrity, economic co-operation, and such motherhood principles of international law, they have not considered the content of these principles by reference to multilateral treaties or customary rules or the mechanisms for their enforcement. They are satisfied with the exposition of values that are undefined with no regard to their binding force or enforceability. In short, they are not rules as they are understood by lawyers. To make matters worse, they have not considered the question whether the RBO and international law are compatible with each other or whether one order is superior to the other.

The indeterminate and undefined nature of the 'rules' of the RBO and the failure to consider their relationship with international law has led to the questioning of the reason for the resort to the RBO on the part of the United States. The manner in which the United States has justified apparent violations of international law by its own forces or those of its close friends has inevitably resulted in a cynical, albeit plausible, explanation for the US preference for the RBO.

<sup>14</sup>For an example of a scholarly work that draws no clear distinction between international law and the rules-based order see S. Bashfield and E. Katselli Proukaki, 'The Rules-based Order, International Law and the British Indian Ocean Territory. Do as I Say, Not as I Do', (2022) 23 *German Law Journal* 713.

<sup>15</sup>M. Jorgensen, 'The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with but not Binding under International Law', (2022) 22 *Melbourne Journal of International Law* 221.

<sup>16</sup>D. Lake, L. Martin and T. Rice, 'Challenges to the Liberal Order: Reflections on International Organization', (2021) 75 *International Organization* 225. See also N. Wright, 'The UK and the International Rules-Based-System', *Foreign Policy Centre*, 8 September 2020, available at [www.fpc.org.uk/the-uk-and-the-international-rules-based-system](http://www.fpc.org.uk/the-uk-and-the-international-rules-based-system). The October 2022 National Security Strategy of the United States likewise stresses these values as part of its international strategy and by implication associates them with the RBO: *supra* note 3, particularly at 6, 18.

<sup>17</sup>See the statement by Antony Blinken at the virtual meeting of the Security Council Open Debate on Multilateralism on 7 May 2021, in which he stated that the rules-based order included the commitments of states under international law, the UN Charter and 'the rules and standards agreed to under the auspices of the WTO and numerous standard-setting organizations': A. J. Blinken, 'Secretary Antony J. Blinken Virtual Remarks at the UN Security Council Open Debate on Multilateralism', *U.S. Department of State*, 7 May 2021, available at [www.state.gov/secretary-antony-j-blinken-virtual-remarks-at-the-un-security-council-open-debate-on-multilateralism/](http://www.state.gov/secretary-antony-j-blinken-virtual-remarks-at-the-un-security-council-open-debate-on-multilateralism/).

<sup>18</sup>See Walt and Tuysan, *supra* note 5; see Falk and Cross, *supra* note 7.

According to this view, the rules-based international order may be seen as the United States' alternative to international law, an order that encapsulates international law as interpreted by the United States to accord with its national interests, 'a chimera, meaning whatever the US and its followers want it to mean at any given time'.<sup>19</sup> Premised on 'the United States' own willingness to ignore, evade or rewrite the rules whenever they seem inconvenient',<sup>20</sup> the RBO is seen to be broad, open to political manipulation and double standards. According to Professor Stefan Talmon, the RBO 'seems to allow for special rules in special – *sui generis* – cases'.<sup>21</sup>

### 3. The rationale behind the reference to a 'rules-based international order'

There are several reasons that may explain why the United States prefers to invoke a 'rules-based international order' and not international law.

First, the United States is not a party to a number of important multilateral treaties that constitute an essential feature of international law. It is not a party to the Law of the Sea Convention which means that it is compelled to reprimand China for threatening the 'rules-based international order' in the South China Sea rather than international law.<sup>22</sup> It is not party to a number of fundamental treaties governing international humanitarian law, including the 1977 Protocols to the Geneva Conventions on the Laws of War, the Rome Statute of the International Criminal Court, the Convention on Cluster Munitions, and the Anti-Personnel Mine Ban Convention. Nor is it a party to the Rights of the Child Convention or the Convention of the Rights of Persons with Disabilities. Inevitably this makes it difficult for the United States to hold states accountable for violations of international humanitarian law and human rights law to the extent that these rules are not considered by the United States to be part of customary international law.

Second, the United States has placed interpretations on international law justifying the use of force<sup>23</sup> and the violation of international humanitarian law that are controversial and contested. Its interpretation of the right of self-defence to allow pre-emptive strikes<sup>24</sup> and the use of force against insurgents/militants characterized as terrorists are widely disputed.<sup>25</sup> The resort to the use of force as a species of humanitarian intervention in the 1999 bombing of Belgrade, conducted under the auspices of NATO,<sup>26</sup> is likewise disputed. The interpretations placed on Security

<sup>19</sup>Cross, *supra* note 7. See also R. Mullerson: the rules-based order is 'based on rules of Washington and not related to international law', cited in A. N. Vylegzhanin et al., 'The Term "Rules-Based Order in International Legal Discourse"', (2021) 2 *Moscow Journal of International Law* 35.

<sup>20</sup>See Walt, *supra* note 5.

<sup>21</sup>S. Talmon, 'Rules-based Order v International Law?', *German Practice in International Law*, 20 January 2019, available at [www.gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law](http://www.gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law).

<sup>22</sup>Agence France-Presse, 'Antony Blinken Warns China to Stop "Aggressive Actions" in Asia-Pacific', *Guardian*, 13 December 2021.

<sup>23</sup>According to Richard Falk, '[t]he United States has projected more force outside its borders than has any State in the course of the past 75 years', *supra* note 7.

<sup>24</sup>In 2002, in the wake of 9/11, President George Bush issued a National Security Strategy approving the use of force in pre-emptive self-defence: The White House, *The National Security Strategy of the United States of America*, 41 ILM 1478 (2002). For criticism of this doctrine see W. M. Reisman and A. A. Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defence in International Law', (2006) 100 AJIL 525. See also the decisions of the International Court of Justice that cast serious doubt on the validity of pre-emptive self-defence: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, para. 139; *Case Concerning the Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, paras. 143, 148.

<sup>25</sup>For a full coverage of this argument and the objections to it see D. Tladi and J. Dugard, 'The Use of Force by States', in J. Dugard et al. (eds.), *Dugard's International Law: A South African Perspective* (2018), 730, at 759.

<sup>26</sup>NATO's invocation of the doctrine of humanitarian intervention to justify its action was seriously questioned by scholars. See L. Henkin, 'Editorial Comments: NATO's Humanitarian Intervention', (1999) 93 AJIL 824.

Council resolutions by the United States and the United Kingdom, to authorize the use of force in Iraq in 2003<sup>27</sup> and Libya in 2011<sup>28</sup> have been much criticized as unlawful pretexts for regime change. The denial of prisoner-of-war status to Taliban soldiers detained at Guantanamo Bay following the US invasion of Afghanistan in 2002 has been questioned on the ground that it violates Article 4 of the Convention Relative to the Treatment of Prisoners of War.<sup>29</sup> The use of drones in Afghanistan, Iraq, and Yemen to kill hostile militants/terrorists, which the United States has justified as permissible self-defence, has been criticized as a violation of international humanitarian law and human rights law.<sup>30</sup> It seems that the United States finds it more convenient – and possible – to uphold contested interpretations of international law of this kind under the broad ‘rules’ of the RBO than to justify them under the stricter rules of international law.<sup>31</sup>

Third, the United States is unwilling to hold some states, such as Israel, accountable for violations of international law. They are treated as *sui generis* cases in which the national interest precludes accountability. This exceptionalism in respect of Israel was spelled out by the United States in its joint declaration with Israel on the occasion of President Biden’s visit to Israel in July 2022,<sup>32</sup> which reaffirms ‘the unbreakable bonds between our two countries and the enduring commitment of the United States to Israel’s security’ and the determination of the two states ‘to combat all efforts to boycott or de-legitimize Israel, to deny its right to self-defence, or to single it out in any forum, including at the United Nations or the International Criminal Court’. This commitment explains the consistent refusal of the United States to hold Israel accountable for its repeated violations of humanitarian law, support the prosecution of perpetrators of international crimes before the International Criminal Court, condemn its assaults on Gaza (best portrayed as excessive enforcement of the occupation of Gaza and not self-defence as the United States argues<sup>33</sup>), insist that Israel prosecute killers of a US national (Shireen Abu Akleh), criticize its violation of human rights as established by both the Human Rights Council and the General Assembly, accept that Israel applies a policy of apartheid in the Occupied Palestinian Territory,<sup>34</sup> and oppose its annexation of East Jerusalem.<sup>35</sup> And, of course, there is the refusal of the United States to acknowledge the existence of Israel’s nuclear arsenal or

<sup>27</sup>United Nations Security Council, Resolution 1441, Un Doc. S/RES/ 1441 (2002); United Nations Security Council, Resolution 678, Un Doc. S/RES/ 678 (1990); United Nations Security Council, Resolution 687, Un Doc. S/RES/ 687 (1991) were invoked creatively by the United States and the United Kingdom to justify the invasion of Iraq and regime change. Critics agree that the United States and the United Kingdom acted unlawfully. See V. Lowe, ‘The Iraq Crisis: What Now?’, (2003) 52 ICLQ 859; P. Sands, *Lawless World: America and the Making and Breaking of Global Rules-From FDR’s Atlantic Charter to George Bush’s Illegal War* (2005).

<sup>28</sup>United Nations Security Council, Resolution 1973, Un Doc. S/RES/1973 (2011) imposed a no-fly zone and authorized states to take ‘all necessary measures protect civilians’ but was used as a justification for regime change by NATO. See R. Higgins et al., *Oppenheim’s International Law: United Nations* (2017), 1023, paras. 26, 120.

<sup>29</sup>G. Aldrich, ‘The Taliban, Al Qaeda, and the Determination of Illegal Combatants’, (2002) 96 AJIL 891.

<sup>30</sup>C. Jones, *The War Lawyers. The United States, Israel and Juridical Warfare* (2020), 193–6; United Nations General Assembly, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, UN Doc. A/HRC/14/24/Ad 6 (2010); M. Boyle, *The Legal and Ethical Implications of Drone Warfare* (2017).

<sup>31</sup>According to Ben Scott, ‘Although the US shaped the UN and much of international law, its relationship with these institutions has become increasingly vexed, especially since the 2003 invasion of Iraq. That’s partly why it has fallen back on the rules-based order’: B. Scott, ‘The Trouble with Washington’s Rules-Based Order Gambit’, *The Diplomat*, 3 August 2021, available at [www.thediplomat.com/2021/08/the-trouble-with-washingtons-rules-based-order-gambit](http://www.thediplomat.com/2021/08/the-trouble-with-washingtons-rules-based-order-gambit).

<sup>32</sup>The White House Briefing Room, ‘The Jerusalem US-Israel Strategic Partnership Joint Declaration’, *The White House*, 14 July 2022, available at [www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/the-jerusalem-u-s-israel-strategic-partnership-joint-declaration/](http://www.whitehouse.gov/briefing-room/statements-releases/2022/07/14/the-jerusalem-u-s-israel-strategic-partnership-joint-declaration/). See also Biden’s statement on the ‘need to sustain our ironclad commitment to Israel’s security’ in his 2020 article in *Foreign Affairs*, *supra* note 6, at 73.

<sup>33</sup>See J. Dugard, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’, in E. Bjorge and C. Miles (eds.), *Landmark Cases in Public International Law* (2017), 539, at 556–7.

<sup>34</sup>B. Samuels, ‘The US State Department Rejects Amnesty’s Apartheid Claim against Israel’, *Haaretz*, 1 February 2022.

<sup>35</sup>See Falk, *supra* note 7.

allow any discussion of it in the context of nuclear proliferation in the Middle East.<sup>36</sup> Such measures on the part of Israel are possibly seen as consistent with the ‘rules-based international order’ even if they violate basic rules of international law.

Of course, double standards, exceptionalism, and hypocrisy are a feature of the foreign policies of states that accept international law and do not favour the RBO. Such conduct must be condemned as it undermines the notion of accountability for all states, irrespective of their position and friends in the international community. The amorphous ‘rules’ of the RBO, however, make it easier for a state to provide special treatment to another state and to condone its violations of international law. The United States is able to justify its refusal to hold Israel accountable for its violations of international law by arguing that international law as interpreted by the United States – the RBO – allows assaults on Gaza as self-defence against terrorism, the assassination of militants/terrorists by drones, the application of apartheid, the annexation of territory, and the continuation of an occupation which is widely seen as illegal.

These explanations for the United States’ preferred invocation of the RBO do not apply consistently to other states of the Western alliance. Most are parties to most multilateral treaties. Only the United Kingdom participated in all the controversial military interventions named above, although some were undertaken under the umbrella of NATO. And most Western states have been prepared to hold Israel accountable for its violations of international law, albeit only in word. This probably explains why Western leaders have used the term RBO interchangeably with international law and appear to treat the two orders as synonymous. This means that the RBO is largely an order advocated by the United States.

#### 4. The jurisprudential debate between Russia, China, and the West on the RBO

The RBO has been used by the West to judge Russia, and more recently China. This has led to what might be termed a jurisprudential debate between Russia and the West, with Russia condemning the West for abandoning respect for international law in its assertion of the RBO, and the United States sticking to its assessment of Russia’s misconduct in terms of the RBO.

Sergey Lavrov, the Russian Foreign Minister, has been consistently critical of the West for its resort to a rules-based international order. In 2020 he declared that the West advocated a ‘West-centric rules-based order as an alternative to international law’<sup>37</sup> with the purpose of replacing international law with non-consensual methods for resolving international disputes by bypassing international law.<sup>38</sup> He explained that ‘[t]his term was recently coined to camouflage a striving to invent rules depending on changes in the political situation so as to be able to put pressure on disagreeable States and even on allies’.<sup>39</sup>

President Putin has echoed this view. On 25 May 2022, Foreign Minister Sergey Lavrov, on the occasion of Africa Day, read out a statement by President Putin in which he declared in the context of Russia’s action in Ukraine that:

The main problem is that a small group of US-led Western countries keeps trying to impose the concept of a rules-based world order on the international community. They use this banner to promote, without any hesitation, a unipolar model of the world order where there are “exceptional” countries and everyone else who must obey the “club of the chosen”.<sup>40</sup>

<sup>36</sup>V. Gilinsky and H. Sokolski, ‘Biden Should End US Hypocrisy on Israeli Nukes’, *Foreign Policy*, 19 February 2022.

<sup>37</sup>Cited in Vylegzhanin et al., *supra* note 19, at 39.

<sup>38</sup>*Ibid.*, at 51.

<sup>39</sup>*Ibid.*, at 39.

<sup>40</sup>K. K. Klomegah, ‘Russia Renews its Support to Mark Africa Day’, *Modern Diplomacy*, 27 May 2022, available at [www.moderndiplomacy.eu/2022/05/27/russia-renews-its-support-to-mark-africa-day/](http://www.moderndiplomacy.eu/2022/05/27/russia-renews-its-support-to-mark-africa-day/). See also the statement by President Putin cited by A. Roberts, *Is International Law International?* (2017), 297.

In 2019 a group of Russian scholars produced an academic paper in which they conclude that:

Thus, there are sufficient reasons to think that the modern concept “rules-based order” has a political connotation, first and foremost an anti-Russian one, it is added to the current political weapons of the West . . . In a nutshell the concept presents a tool to universalize a “one sided Western project” of the world order.<sup>41</sup>

The war of words between the West and Russia over the RBO has now entered the rhetoric of the invasion of Ukraine.

Russia has violated the most fundamental principles of international law and the law of the UN Charter in its brutal assault on Ukraine and its similarly brutal occupation of the country. It has violated the prohibition on the use of force, the obligation to respect the territorial integrity of another sovereign state and the rules of human rights law and international humanitarian law. Despite this, the United States has preferred to condemn Russia for violating the undefined RBO whose rules have yet to be enunciated.<sup>42</sup>

For its part, Russia has criticized the West for acting in accordance with the RBO. As shown above President Putin complained about the West’s reliance on the RBO in his statement on Africa Day, 25 May 2022.<sup>43</sup> The precedents set by the West’s generous interpretation of its obligations under the RBO were also apparent in President Putin’s declaration of a special military operation (that is, war) on Ukraine on 24 February 2022.<sup>44</sup> In this statement he referred to the 1999 NATO bombing of Belgrade, the 2003 invasion of Iraq, the 2011 intervention in Libya, and the US action in Syria, all of which were premised on dubious and disputed interpretations of international law and the UN Charter.<sup>45</sup> The clear implication was that the US/West/NATO had purported to act in accordance with the rules-based international order and not international law on these occasions.<sup>46</sup>

*Tu quoque* or ‘whataboutism’ is frequently used by states in order to deflect criticism of their own conduct. The Soviet Union and now the Russian Federation have used this defence against the United States for many years. For example, it has accused the United States of lynching Afro-Americans, practising racial discrimination and supporting the Contras in Nicaragua in response to criticism of its own human rights record. Although *tu quoque* may be a useful political strategy it is not an accepted defence in international law. On the other hand, there is no doubt that precedents of illegal conduct will be invoked as a licence for legality by a delinquent state, particularly when they are justified on contested interpretations of the law belonging to the rules-based international order. According to Chatham House, America’s recent violations of international law have ‘cast a long shadow over America’s claim to be the principal defender of a rules-based international system’.<sup>47</sup>

<sup>41</sup>See Vylegzhanin et al., *supra* note 19, at 51.

<sup>42</sup>See note 1, *supra*. As early as 2021 the G7 complained that Russia’s behaviour threatened the RBO: see Vylegzhanin et al., *ibid.*, at 39.

<sup>43</sup>See note 40, *supra*.

<sup>44</sup>See the text of President Putin’s speech: ‘Full text: Putin’s Declaration of War on Ukraine’, *The Spectator*, 24 February 2022, available at [www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/](http://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine/).

<sup>45</sup>For an analysis of President Putin’s legal justifications for the Ukraine war see M. Milanovic, ‘What Is Russia’s Legal Justification for Using Force against Ukraine?’, *EJIL:Talk!*, 24 February 2022, available at [www.ejiltalk.org](http://www.ejiltalk.org).

<sup>46</sup>See further, Roberts, *supra* note 13, at 282.

<sup>47</sup>The London Conference, ‘Challenges to the Rules-Based International Order’, *Chatham House: The Royal Institute of International Affairs*, 2015, available at [www.chathamhouse.org/sites/default/files/London%20Conference%202015%20-%20Background%20Papers.pdf](http://www.chathamhouse.org/sites/default/files/London%20Conference%202015%20-%20Background%20Papers.pdf).

China too has asserted its opposition to a rules-based order. In May 2021 at a virtual debate of the Security Council on multilateralism, Foreign Minister Wang Yi declared that:

International rules must be based on international law and must be written by all. They are not a patent or privilege of a few. They must be applicable to all countries and there should be no room for exceptionalism or double standards.<sup>48</sup>

In similar vein in 2021 Yang Jiechi, Director of the Office of the Central Commission for Foreign Affairs, stated that China upholds the United Nations-centred system and the international order underpinned by international law and not the ‘so-called rules-based international order’ advocated by a small number of countries.<sup>49</sup>

## 5. The rules comprising the RBO

In the light of the charge by both scholars of the West and the political leaders of Russia and China that the rules-based international order has been advanced by the West as an alternative to international law it cannot be accepted without examination that the RBO is identical with international law and that this is simply a name for international law preferred by political theorists and practitioners.

The rules comprising the ‘rules-based international order’ have still to be spelled out. As yet there is no indication that they will take the form of general or particular international conventions as understood by Article 38(1)(a) of the Statute of the International Court of Justice. Furthermore, we do not know what the nature of these rules is. It has been suggested that ‘they do not have a positive quality. Rather their worth depends on the extent to which they serve the interests and values of States which sustain them’.<sup>50</sup> If there are rules, the method for their creation remains a mystery.<sup>51</sup> We do not know ‘who ultimately lays down these rules and determines their content’<sup>52</sup> we do not know whether states must consent to these rules, and if so, which states. Certainly, the International Law Commission and the UN Sixth Committee are not involved in this process. Charitably, it seems that the rules are tacit agreements between a handful of Western states to which there has been no clear consent. But consent is the basis of international law. According to Stefan Talmon, the rules-based order has been used to call upon certain states to comply with existing international legal rules which these states actually have not consented to, and thus are not bound. The term ‘rules-based order’ blurs the distinction between binding and non-binding rules, giving the impression that all states and international actors are subject to this order, irrespective of whether or not they have consented to these rules.<sup>53</sup>

Judicial settlement does not feature in the language of the RBO.<sup>54</sup> The International Court of Justice would probably have no competence to hear a dispute based on a ‘rule’ of the RBO under Article 38(1) as such ‘rules’ lack content and cannot be identified as belonging to any recognized

<sup>48</sup>State Councilor and Foreign Minister W. Yi, ‘Remarks by State Councilor and Foreign Minister Wang Yi at the United Nations Security Council High-level Meeting on the Theme “Maintenance of International Peace and Security: Upholding Multilateralism and the United Nations-centered International System”’, *Ministry of Foreign Affairs of the People’s Republic of China*, 8 May 2021, available at [www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/zyjh\\_665391/202105/t20210508\\_9170544.html](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/202105/t20210508_9170544.html).

<sup>49</sup>See Scott, *supra* note 31.

<sup>50</sup>M. Chalmers, ‘Which Rules, Why there is No Single Rules-based International System’, Occasional Paper, *Royal United Services Institute*, April 2019.

<sup>51</sup>The October 2022 US National Security Strategy declares that the RBO ‘provides all nations that sign up to the principles an opportunity to participate in and have a role in shaping the rules’, *supra* note 3. Unfortunately, there is no indication of how this ‘signing up’ may be done.

<sup>52</sup>See Talmon, *supra* note 21.

<sup>53</sup>See Talmon, *ibid*.

<sup>54</sup>The US National Security Strategy of October 2022 makes no mention of the International Court of Justice, *supra* note 3.

source, but it might be able to do so under Article 38(2) if states were to refer a dispute to the Court to decide a case *ex aequo et bono*.

Criticism of the RBO on the ground that it fails to qualify as a formal source of international law under Article 38 of the ICJ Statute may be questioned on the ground that it does not take account of methods of law-making that have expanded the sources of international law. In the result it adopts a highly formalistic approach to contemporary international law. There is substance in this criticism. The manner in which states invoke non-binding resolutions of the United Nations and other inter-governmental institutions, the decisions of international conferences and other standard-setting bodies and what is today known as 'soft law' makes it clear that states view international law as a fluid and flexible order as much concerned with standards giving rise to expectations as with rules and principles recognized by Article 38. If this is accepted, it may be argued, the RBO simply recognizes the existence of a contemporary legal order freed from legal formalism.

The difficulty with the above criticism is that it presupposes that the 'rules' of the 'rules-based order' have a known content and go beyond the assertion of broad values. Respect for human rights, self-determination, territorial integrity, freedom of navigation, democratic governance, free movement of goods, economic openness etc. are important values that may be invoked by a court to assist it in the interpretation of legal rules but they are not rules of law as commonly understood. They lack any definition or content. There is no indication that these rules are binding or enforceable (and if so, how), whether they may be curtailed or whether they are enjoyed by all nations and peoples. In short, the RBO makes no attempt to proclaim a legal order with defined rules and law-making and dispute settlement procedures.

The RBO is something other than international law. It is an alternative regime outside the discipline of international law which inevitably challenges and threatens international law. Charitably it may be seen as an order comprising values of a liberal order. Less charitably it may be seen as a competing order advocated by some Western states, particularly the United States, which seeks to impose the interpretation of international law that best advances the interests of the West, particularly those of the United States. Unlike international law it does not seem to be a universal order. Instead, it is an order employed by the West, again particularly the United States, to ensure its dominance.

## 6. Concluding observations

To return to the war in Ukraine. In its invasion of Ukraine, the Russian Federation has violated fundamental principles of international law, ranging from the unlawful use of force and the violation of the territorial integrity of another sovereign state to brutal violations of international humanitarian law and human rights law. These violations of international law are best judged by a legal order accepted and understood by all nations of the world rather than by an amorphous regime advocated by one of parties to the conflict. The statement issued by the EU condemning Russia's invasion of Ukraine as a violation of Article 2(4) of the UN Charter, a crime of aggression under the Rome Statute of the International Criminal Court and a violation of peremptory norms of international law<sup>55</sup> carries more weight than President Biden's assertion that the invasion violates the rules-based international order.<sup>56</sup>

A final reason for discarding the rules-based international order as a means for judging the behaviour of states is that it is an unnecessary and harmful obstacle to attempts to agree on international law as a universal order governing all states. All states have their own idiosyncrasies when it comes to the application of international law but they seldom threaten the universality of

<sup>55</sup>See note 11, *supra*.

<sup>56</sup>See note 1, *supra*.

international law. At present there are, however, several major divisions between states over the cardinal features and principles of international law.

The most notable of these is that between the West on the one hand and Russia and China on the other. While the West emphasizes democratic governance, human rights, environmentalism, and globalization, Russia and China emphasize the sovereign equality of states, non-intervention in the internal affairs of states, the settlement of disputes by mechanism to which states have consented, the immunity of states and their officials, and the condemnation of double standards in the treatment of states. This Sino-Russian approach to international law was spelled out in 2016 in the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law.<sup>57</sup>

The West's adherence to both a rules-based international order and international law undermines efforts to agree upon a universal system of international law premised on the same fundamental rules, principles and values. An international order founded on the UN Charter and international law as it has evolved since the end of the Second World War is a sounder recipe for peace than the amorphous and discriminatory rules-based international order.

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<sup>57</sup>Ministry of Foreign Affairs of the Russian Federation, 'The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law', 25 June 2016, available at [www.fmprc.gov.cn/201608](http://www.fmprc.gov.cn/201608). For a detailed analysis of this Declaration see Roberts, *supra* note 13, at 290–9.