Kevin Jon Heller

THE GREAT POWERS AND THE FORMATION OF INTERNATIONAL LAW

IMPLICATIONS FOR DENMARK

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Editor's preface

The publications of this series present new research on defence and security policy of relevance to Danish and international decision-makers. This series is a continuation of the studies previously published as CMS Reports. It is a central dimension of the research-based services that the Centre for Military Studies provides for the Danish Ministry of Defence and the political parties behind the Danish defence agreement. The Centre for Military Studies and its partners are subject to the University of Copenhagen's guidelines for research-based services, including academic freedom and the arm's length principle. As they are the result of independent research, the studies do not express the views of the Danish Government, the Danish Armed Forces, or other authorities. Our studies aim to provide new knowledge that is both academically sound and practically actionable. All studies in the series have undergone external peer review. And all studies conclude with recommendations to Danish decision-makers. It is our hope that these publications will both inform and strengthen Danish and international policy formulation as well as the democratic debate on defence and security policy, in particular in Denmark.

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Copenhagen, August 2025
Katja Lindskov Jacobsen

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Abstract and Recommendations

The US, Russia, and China – the current "Great Powers" – often disagree over the primary rules of international law, such as the scope of self-defence in response to an armed attack. Such disagreements over primary rules can often be explained in traditional realist fashion, because powerful States generally interpret international law in a manner that reflects and advances their interests. But that is not always the case. In some situations, Great Power disagreements over primary rules are driven less by *realpolitik* than by very different understandings of the formal sources of international law: the sources that determine what qualifies as a primary rule.

Most comparative international law scholarship has focused on how the Great Powers view primary rules, ignoring how the US, Russia, and China disagree over the formal sources of international law. This report focuses on disagreements in the latter category. Section 1 explains how the US, Russia, and China perceive the formal sources of internal law *in abstracto* – which they privilege and why, methodological inconsistencies in how they understand and apply a particular source, and so on. Section 2 examines four areas of international law in which different perceptions of the formal sources have a significant effect on how the US, Russia, and China perceive the primary rules: *jus ad bellum, jus in bello*, arms control, and cyberspace. Section 3 discusses what Denmark can learn from studying how disagreements over the primary rules of international law can sometimes be traced to different views of the formal sources.

This report focuses on situations in which a Great Power genuinely believes its interpretation of international law to be the correct one. Insofar as Denmark wants to achieve a deeper understanding of why a Great Power acted as it did and believed as it did, it must consider precisely what this report explores; namely, the specific view of the formal sources of international law – treaty and custom – that produced the

Great Power's belief that its actions were lawful. Such a deeper understanding is practically important for Denmark in two ways. **First, it is essential to Denmark's effective participation in multilateral discussions concerning the specific areas of international law that affect it**, where the Great Powers' views tend to have outsized (if often unjustified) influence – the UN Sixth Committee, the Open-ended Working Group (OEWG) on cyber, the autonomous-weapons Group of Government Experts (GGE), even the International Law Commission. These are not simply fora in which states can express their own views on international law; more importantly, they are fora in which states can attempt to persuade other states to adopt similar ones. A small state like Denmark will find it much easier to impact such discussions if they approach them with a deep understanding of the formal source that a Great Power favours and what kinds of arguments concerning the interpretation and application of the formal sources a Great Power tends to accept. Given American hostility to any kind of "hard" regulation of autonomous weapons, for example, Denmark would be better off trying to persuade the US to endorse a meaningful voluntary code of conduct for autonomous weapons systems (AWS) than lobbying the US to support a treaty that would prohibit them. Similarly, Denmark would find it very difficult to have a productive discussion with the US over which provisions in the First Additional Protocol (AP I) are customary without at least acknowledging the US insistence (however implausible) that it qualifies as specially-affected regarding each and every rule of international humanitarian law (IHL).

To be sure, this kind of "thick" knowledge of how the Great Powers view the formal sources of international law will be most useful for Denmark in the context of bilateral discussions with the US, its ally. While Denmark is unlikely to be able to affect how Russia and China view international law, that does not negate the importance of understanding the Russian and Chinese views on the formal sources. On the contrary, such understanding remains absolutely necessary in multilateral discussions and negotiations. Although the Great Powers invoke the same principles and rules of international law when promoting their interests in fora like the GGE and OEWG, they do not always share the same understanding of those principles and rules. The best example is sovereignty: although including a reference to sovereignty in a multilateral treaty may seem innocuous – all states value their sovereignty – when such a

reference is included at the request (or insistence) of Russia or China, it is highly likely that they (and their allies) are referring to sovereignty in its Eastphalian form, where "sovereignty" means the power of the state to ignore individual rights guaranteed by international law. Not recognizing that fact can lead to bad diplomatic outcomes.

There is a second reason why a small state like Denmark should pay attention to how the Great Powers understand the relationship between the formal sources and the primary rules of international law: **doing so will foreground the importance of Denmark having a clear, well-demarcated position concerning its own understanding of that relationship.** Although well-trained government international lawyers are normally aware of how their state generally approaches treaty and custom, few are trained to pay attention to subtle methodological differences between how Denmark and other states approach the formal sources. Recognising how those differences can lead to good-faith disagreements over primary rules of international law – even between allies – can help a small state like Denmark to clarify its position on various methodological issues: whether to emphasise treaty or custom or soft law in a particular legal area; what theory of treaty interpretation to endorse; how the role of silence in the creation of custom should be understood; and so forth. With clear positions on such methodological issues, Denmark will find it much easier to advocate for its legal interests – and for the legal interests of its allies – on the various issues covered by this report.

Resumé og anbefalinger

De tre stormagter – USA, Rusland og Kina – er ofte uenige om folkerettens primære regler, såsom omfanget af selvforsvar som svar på et væbnet angreb. Sådanne uenigheder om primære regler kan ofte forklares på traditionel realistisk vis, fordi magtfulde stater generelt fortolker folkeretten på en måde, der afspejler og fremmer deres interesser. Men det er ikke altid tilfældet. I nogle situationer er stormagternes uenigheder om primære regler mindre drevet af *realpolitik* end af meget forskellige forståelser af folkerettens formelle kilder - de kilder, der afgør, hvad en primær regel er.

De fleste studier i komparativ folkeret har fokuseret på, hvordan stormagterne ser på primære regler, og har således ignoreret, at USA, Rusland og Kina også er uenige om de formelle kilder til folkeretten. Denne rapport fokuserer på uenigheder i sidstnævnte kategori. Det første kapitel forklarer, hvordan USA, Rusland og Kina opfatter de formelle kilder til intern ret *in abstracto* – hvilke kilder de prioriterer og hvorfor, metodologiske uoverensstemmelser om, hvordan de forstår og anvender en bestemt kilde med videre. Det andet kapitel undersøger fire områder af folkeretten, hvor forskellige opfattelser af de formelle kilder har en betydelig effekt på, hvordan USA, Rusland og Kina opfatter de primære regler: *jus ad bellum, jus in bello*, våbenkontrol og cyberspace. Det tredje kapitel diskuterer, hvad Danmark kan lære af at studere, hvordan uenighed om folkerettens primære regler nogle gange kan spores til forskellige syn på de formelle kilder.

Denne rapport fokuserer på situationer, hvor en stormagt oprigtigt mener, at dens fortolkning af folkeretten er den rigtige.

I det omfang Danmark ønsker at opnå en dybere forståelse af, hvorfor en stormagt handlede, som den gjorde, og mente det, den gjorde, er det nødvendigt at overveje netop det, som denne rapport undersøger: nemlig det specifikke syn på folkerettens formelle kilder - traktater og sædvane - der skabte stormagtens opfattelse af, at dens handlinger var

lovlige. En sådan dybere forståelse er praktisk vigtig for Danmark på to måder. **For det første er det afgørende for Danmarks effektive deltagelse i multilaterale diskussioner om specifikke områder af folkeretten, som berører Danmark**, hvor stormagternes synspunkter ofte har overordentlig stor, men ofte uberettiget, indflydelse - FN's Sjette Komité, OEWG om cyber, GGE om autonome våben, selv Folkeretskommissionen. Det er ikke bare fora, hvor stater kan udtrykke deres egne synspunkter om international lov; det er også fora, hvor stater kan forsøge at overtale andre stater til at indtage lignende synspunkter. En lille stat som Danmark vil have meget lettere ved at påvirke sådanne diskussioner, hvis man har en dyb forståelse af, hvilken formel kilde en stormagt foretrækker, og hvilke slags argumenter vedrørende fortolkning og anvendelse af de formelle kilder en stormagt har tendens til at acceptere. I betragtning af USA's modvilje mod enhver form for "hård" regulering af autonome våben ville Danmark f.eks. være bedre stillet ved at forsøge at overtale USA til at støtte et frivilligt adfærdskodeks for AWS end ved at lobbye USA til at støtte en traktat, der ville forbyde dem. På samme måde ville Danmark finde det meget vanskeligt at have en produktiv diskussion med USA om, hvilke bestemmelser i den første ændringsprotokol (AP I) der er sædvane, uden i det mindste at anerkende USA's insisteren på, at landet er særligt berørt med hensyn til hver eneste regel i den humanitære folkeret, uanset hvor uplausibel denne position ellers måtte anses for at være.

Denne form for "tyk" viden om, hvordan stormagterne ser på de formelle kilder til international ret, vil helt sikkert være mest nyttig for Danmark i forbindelse med bilaterale diskussioner med USA, som er Danmarks allierede. Det er usandsynligt, at Danmark kan påvirke hvordan Rusland og Kina ser på folkeretten. Men det betyder ikke, at det ikke har noget formål at forstå Ruslands og Kinas syn på de formelle kilder. Tværtimod er en sådan forståelse stadig helt nødvendig i multilaterale diskussioner og forhandlinger. Som vi har set, påberåber stormagterne sig ganske vist de samme folkeretlige principper og regler, når de fremmer deres interesser i fora som GGE og OEWG, men de forstår ikke altid disse principper og regler på samme måde. Det bedste eksempel er suverænitet: Selvom det kan virke harmløst at inkludere en henvisning til suverænitet i en multilateral traktat – alle stater værdsætter deres suverænitet – er det meget sandsynligt, at de (og deres allierede) henviser til suverænitet i sin *østfaliske* form, hvor "suverænitet" betyder statens magt

til at ignorere individuelle rettigheder, der er garanteret af international lov, når en sådan henvisning er inkluderet på anmodning (eller insisteren) fra Rusland eller Kina. Hvis man ikke anerkender dette faktum, kan det føre til dårlige diplomatiske resultater.

Der er en anden grund til, at en lille stat som Danmark bør være opmærksom på, hvordan stormagterne forstår forholdet mellem de formelle kilder og de primære regler i folkeretten: **Det vil understrege vigtigheden af, at Danmark har en klar og velafgrænset holdning til sin egen forståelse af dette forhold.** Selvom veluddannede statslige folkeretsjurister normalt er opmærksomme på, hvordan deres stat generelt forholder sig til traktater og sædvane, er kun få uddannet til at være opmærksomme på subtile metodologiske forskelle mellem, hvordan Danmark forholder sig til de formelle kilder, og hvordan andre stater gør. At erkende, hvordan disse forskelle kan føre til uenighed i god tro om primære folkeretlige regler – selv mellem allierede – kan hjælpe en lille stat som Danmark med at afklare sin holdning til forskellige metodologiske spørgsmål: om man skal lægge vægt på traktat, sædvane eller blød ret på et bestemt retsområde; hvilken teori om traktatfortolkning man skal støtte; hvordan tavshedens rolle i skabelsen af sædvane skal forstås; og så videre. Med klare holdninger til sådanne metodologiske spørgsmål vil Danmark finde det meget lettere at forsvare sine juridiske interesser – og sine allieredes juridiske interesser – i de forskellige spørgsmål, der er omfattet af denne rapport.

1

Introduction

On 6 April 2017, the United States (US) fired 59 Tomahawk missiles at the Al Shayrat Airbase in western Syria.[1] The incident was the first direct American attack on Syrian government forces during the Syrian civil war and took place two days after Assad used chemical weapons against civilians at Khan Shaykhun. The US government nevertheless offered no formal legal justification for the attack, leaving it to scholars to speculate why international law permitted the US to use force against Syria in a situation that was difficult to fit into traditional categories of self-defence.[2]

The American silence concerning the Al Shayrat attack was unusual, because the US almost always publicly defends the lawfulness of its uses of force. Indeed, nearly all states, large and small alike, are careful to explain why they believe international law permits them to engage in actions that affect the sovereignty or interests of other states. As Kotova and Tzouvala have written, "[w]ith the idiom of international law having become factually – if not morally – universal, non-engagement is not an option for states, even in instances where the plausibility of the advanced arguments is questionable."[3]

1. Michael R. Gordon et al., *Dozens of US Missiles Hit Air Base in Syria*, The New York Times (6 April 2017), https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html.
2. *See generally* Michael N. Schmitt & Christopher M. Ford, *Assessing U.S. Justifications for Using Force in Response to Syria's Chemical Attacks: An International Law Perspective*, 9 Journal of National Security Law & Policy (2017): 283-303. The only potential justification was humanitarian intervention, a doctrine that the US has expressly disavowed.
3. Anastasiya Kotova & Ntina Tzouvala, *In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law*, 116 American Journal of International Law (2022): 712.

That said, although even the three most important Great Powers – the US, Russia, and China[4] – feel the need to invoke international law to justify their actions, they clearly view international law very differently. Disagreements usually focus on *primary rules* of international law: the specific rights and obligations that bind states and other entities with international legal personality, such as individuals. The US and China, for example, adopt nearly diametrically opposed interpretations of the right of self-defence in Art. 51 of the UN Charter.

Great Power disagreements over primary rules can often be explained in traditional realist fashion, because "powerful nations characteristically advance interpretations of international law that reflect their values and advance their interests."[5] But that is not always the case. In some situations, disagreement over a primary rule is driven less by *realpolitik* than by deep-seated disagreement over the formal sources of international law – the sources that determine what qualifies as a primary rule. The US, Russia, and China agree that, as reflected in Art. 38 of the Statute of the International Court of Justice (ICJ), there are three formal sources of international law: treaties, custom, and general principles. They often disagree, however, concerning the importance or interpretation of those formal sources – particularly the two most important, treaties and custom.[6] Russia and China, for example, are traditionally more sceptical of customary international law than the US. In the context of *jus ad bellum*, this makes them much more likely to judge the legality of an ostensibly defensive use of force by reference to Art. 51 in the UN Charter, a treaty, than by reference to the customary "inherent" right of self-defence.

To successfully navigate Great Power disputes that turn on international law – at least in part – it is thus not enough for Denmark to understand substantive disagreements between the US, Russia, and China. It must also be aware of when and how these states disagree over the

4. Which states count as "Great Powers" is, of course, historically contingent. It is nevertheless widely accepted that the US, Russia, and China are the three central actors in today's great-power competition. *See, e.g.*, Graham Allison, *The New Spheres of Influence: Sharing the Globe with Other Great Powers*, Foreign Affairs (March/April 2020).
5. Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 Harvard International Law Journal (2011): 5.
6. The three states have said very little about general principles, and such principles have played no role in creating the primary rules examined in this report. The report thus does not discuss them.

formal sources of international law.[7] In other words, Denmark must understand both what the Great Powers believe international law *says* and how the Great Powers believe international law is *constructed*. Without such knowledge, Denmark will struggle to engage productively with the Great Powers and their allies, whether bilaterally or in various multilateral fora dedicated to the specific areas of international law discussed in this report.

Most comparative international law scholarship focuses on Great Power disagreements over the primary rules of international law. Few scholars have examined how these disagreements reflect diverging American, Russian, and Chinese views of how the formal sources of international law produce the primary rules. This report falls squarely in the latter category. Section 1 explains how the US, Russia, and China perceive the formal sources of internal law *in abstracto* – which they privilege and why, methodological inconsistencies in how they understand and apply a particular source, and so on. Section 2 then examines four areas of international law in which different perceptions of the formal sources have a significant effect on how the US, Russia, and China perceive the primary rules: *jus ad bellum, jus in bello*, arms control, and cyberspace.[8] Finally, Section 3 discusses how a small state like Denmark can benefit from understanding how the Great Powers understand the formation of international law.

Three limitations of the report are worth noting. First, it is not intended to be comprehensive. It would be impossible to examine all of the primary-rule disagreements that are created by diverging views of the formal sources in even one area of international law. Instead, the report focuses on a few particularly illuminating disagreements within each of the four areas. Second, although the report sometimes notes when one

7. A Great Power sometimes explicitly acknowledges that it disagrees with one of its rivals because it takes a different position on a formal source. As discussed below, for example, China's rejection of the "unwilling or unable" test for self-defence against non-state actors is explicitly based on its view that the test cannot be reconciled with a textualist interpretation of the UN Charter. More often, however, a Great Power makes no attempt to explain the source of a disagreement. In such cases, it is left to the observer to trace the disagreement back to contrasting perspectives on the formal sources.
8. These areas of international law are obviously interrelated. It is important to acknowledge the possibility that differences in how the US, Russia, and China perceive the formal sources may have either a different or less important impact in other, less cognate areas of law, such as international trade and investment law or the law of international organisations.

of the Great Powers has taken a particularly idiosyncratic position on a specific issue, it does not attempt to adjudicate in any systematic way between competing claims. In other words, the report is more interested in understanding *why* the US, Russia, and China disagree than in determining which is right. Third, and finally, the report is limited to scholarship on Russia and China and statements by those states that are available in English.

2

General Understandings of the Formal Sources

This section examines how the US, Russia, and China perceive the two most important formal sources of international law: treaty and custom. When appropriate, it also discusses how those Great Powers perceive what Art. 38 of the ICJ Statute refers to as "subsidiary means for the determination of rules of law," judicial decisions and the writings of "the most highly qualified publicists." As we will see, although all three states profess fidelity to Art. 38, there are significant differences between them concerning the importance, function, and operation of both the formal sources and subsidiary means.

2.1. United States

The United States has traditionally viewed Art. 38 as providing a definitive list of the formal sources of international law.[9] Moreover, unlike Russia and China, the US has made numerous public statements regarding its understanding of treaties and custom.

9. *Submission from the United States to the International Law Commission on "the Use of Subsidiary Means for the Determination of Rules of International Law, in the Sense of Article 38, Paragraph 1(d), of the Statute of the International Court of Justice"* (12 January 2023): 1, https://legal.un.org/ilc/sessions/74/pdfs/english/sm_us.pdf.

2.1.1. Treaties

According to US law, a treaty is "an agreement negotiated and signed by a member of the executive branch that enters into force if it is approved by a two-thirds majority of the Senate and is subsequently ratified by the President."[10] Like all states, the US accepts that treaties establish binding rules of law for states that are party to them and that state parties are obligated to comply with treaties in good faith – *pacta sunt servanda*. In terms of domestic law, however, US practice distinguishes between self-executing and non-self-executing treaty provisions. A self-executing treaty provision automatically has the force of domestic law, which means that US agencies have the legal authority to give effect to the provision and that litigants can enforce the provision's rights and obligations in court.[11] A non-self-executing treaty provision, by contrast, does not have the force of domestic law – and thus cannot displace contrary existing law – unless or until Congress passes implementation legislation.[12]

Although the US generally complies with the treaties it ratifies,[13] scholars have nevertheless criticised US treaty practice on a variety of grounds, with one noting "bewilderment at the inconsistency and unreliability that seem to characterize the United States' attitude and actions towards international agreements."[14] The most common criticism is that the US engages in "multilateralism *a la carte*"[15]: ratifying only those treaties that explicitly serve its perceived interests. The list of treaties the US has refused to ratify that almost all other Western and democratic states have ratified or acceded to is long: the First Additional Protocol (AP I – 174 parties) and Second Additional Protocol (AP II – 169 parties); the Anti-Personnel Mine Ban Treaty (APMBT – 164 parties), the Comprehensive Nuclear-Test-Ban Treaty (CTBT – 177 parties), and the Arms Trade Treaty (ATT – 114 parties); the UN Convention on the Law of

10. Congressional Research Service, *International Law and Agreements: Their Effect upon U.S. Law* (19 Sept. 2018): 3, https://crsreports.congress.gov/product/pdf/RL/RL32528/17.
11. *Id*. at 15.
12. *Id*.
13. Antonia Chayes, *How American Treaty Behavior Threatens National Security*, 33 International Security (2008): 48.
14. *Id*. at 45.
15. Richard Haass, quoted in Carnegie Endowment for International Peace, *Multilateralism a la Carte* (6 August 2001), https://carnegieendowment.org/2001/08/06/multilateralism-la-carte-pub-10227.

the Sea (UNCLOS – 169 parties); the Convention on the Rights of the Child (CRC – 196 parties), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – 189 parties), the Convention on the Rights of People with Disabilities (CRPD – 191 parties); the International Covenant on Economic, Social, and Cultural Rights (ICESCR – 171 parties); even the Vienna Convention on the Law of Treaties (VCLT – 116 parties), which is the treaty that formalises how treaties should be interpreted.

Scholars have also noted that the US is often willing to be a "free rider" on multilateral agreements, obtaining the benefits of a treaty while avoiding the obligations that becoming a party would impose. The Kyoto Treaty, designed to minimise climate change by limiting carbon emissions, is an oft-mentioned example.[16] Another is the CTBT: although not subject to any of the treaty's verification obligations, the US makes use of its International Monitoring System, which can detect even minute fallout from nuclear testing.[17]

A related criticism is that the US often refuses to ratify multilateral treaties it helped to draft, even when other states altered or diluted provisions in them at its insistence. The best example here is the Rome Statute of the International Criminal Court: the US was deeply involved in every stage of drafting the Statute and achieved a number of its most important objectives, yet Congress never ratified the treaty and President Bush eventually unsigned it.[18] The US then played an outsized role in negotiations over the aggression amendments precisely to ensure that, as a non-state party, the US would never be subject to the Court's jurisdiction over aggression.[19]

Even when the US does ratify a treaty, it often – perhaps even usually – excludes itself from disfavoured provisions by attaching reservations, understandings, or declarations (RUDs) to its ratification. Indeed, "[t]he freedom to impose RUDs has become the *sine qua non* for American treaty ratification."[20] RUDs have proven particularly controversial

16. Chayes, *supra* note 13, at 51.
17. *Id*. at 50.
18. *Id*. at 49.
19. *See generally* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 American Journal of International Law (2015): 257-95.
20. Chayes, *supra* note 13, at 51.

in the context of torture: the US has attached reservations to both the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) that insist "cruel, inhuman, and degrading treatment" be defined not by international law but by the US Constitution.

Scholars also call attention to the American habit of inadequately implementing the treaties it ratifies. The Chemical Weapons Convention (CWC) offers a case in point: after ratifying the treaty – with 28 "conditions" the Senate imposed on ratification, despite the treaty not permitting reservations – the US was "especially uncooperative with inspectors, frustrating verification of chemical stockpiles," including (one of the conditions) not permitting CWC officials to remove samples from US territory for testing. US intransigence led other states, including China, to adopt similar restrictions.[21] Another example is the US reluctance to comply with provisions in the Geneva Conventions that require states to criminalise the grave breaches and adopt universal jurisdiction over them. Despite ratifying the Conventions in 1955, the US did not adopt the necessary criminalisation legislation until 1996 and the necessary jurisdictional legislation until 2023.[22]

Finally, the US often withdraws from international agreements when it perceives them to threaten its interests. It withdrew from the Optional Protocol to the Vienna Convention on Consular Relations in 2005, for example, despite having helped draft the Protocol and having relied on it to successfully sue Iran during the Iran Hostage Crisis.[23] More recently, the Trump administration withdrew from a number of agreements to which the US had long been committed, including the Joint Comprehensive Plan of Action (JPCOA), which limited Iran's ability to enrich uranium and had been endorsed by the Security Council; the Paris Climate Agreement; and the Trans-Pacific Partnership.[24]

21. *Id*. at 54.
22. Congressional Research Service, *The First Prosecution Under the War Crimes Act: Overview and International Legal Context* (22 December 2023): 1, https://crsreports.congress.gov/product/pdf/LSB/LSB11091#:~:text=On%20December%206%2C%202023%2C%20the,almost%20three%20decades%20of%20the.
23. Chayes, *supra* note 13, at 65.
24. Tom Ginsburg, Democracies and International Law (CUP, 2021): 241-42.

2.1.2. Custom

The status of customary international law in the US legal system is notoriously uncertain. It would be too strong to say that federal courts have no ability to enforce customary rules; indeed, courts have a constitutional obligation to enforce certain rights that custom allocates to foreign states, such as personal immunity.[25] It is equally clear, however, that customary international law plays a relatively limited role in the US legal system, because federal courts will not enforce a customary rule that is inconsistent with either a ratified treaty or a legislative act.[26]

With regard to when a particular rule qualifies as customary international law, the US endorses the widely-accepted definition of custom as the "general and consistent practice of States followed by them out of a sense of legal obligation."[27] It thus accepts what is referred to as the "two element" theory, which requires a customary rule to be supported by sufficient state practice and *opinio juris*.

In terms of state practice, the US follows the ICJ judgment in *North Sea Continental Shelf*, insisting that "[a]lthough there is no precise formula to indicate how widespread and consistent a practice must be, the State practice must generally be extensive and virtually uniform, including among States particularly involved in the relevant activity (i.e., specially affected States)."[28] The US takes the state practice requirement particularly seriously, often faulting international courts and organisations for deeming rules customary that are not supported by the requisite practice. In its official response to the ICRC's *Customary International Humanitarian Law Study*, for example, the US claims that "for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the 'extensive and vir-

25. *See, e.g.,* William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 Georgetown Law Journal (2018): 1561.
26. Congressional Research Service, *supra* note 10, at 30.
27. *Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading* (5 January 2018): 1, https://www.ejiltalk.org/wp-content/uploads/2019/02/US-Views-on-ILC-Draft-Conclusions-on-CIL.pdf.
28. *Id*. at 1.

tually uniform' standard generally required to demonstrate the existence of a customary rule."[29]

Five aspects of how the US approaches the practice requirement are worth noting. First, the US is sceptical of viewing government statements, particularly military manuals, as both *opinio juris* and state practice. In its view, although such statements can be an indication of a state's practice, "they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations."[30]

Second, the US insists that proper weight be given to negative state practice – practice by states that is inconsistent with a rule qualifying as customary international law. It places particular emphasis on negative practice in the context of determining whether a treaty-based rule has become customary, criticising the ICRC for not giving enough weight to the practice of non-party states, which indicates they do not consider themselves to be legally bound by the rule.[31]

Third, although the US accepts that inaction is capable of qualifying as state practice, it believes that "deliberate abstention may be difficult to demonstrate and should not be presumed to exist."[32] According to the US, inaction is only meaningful when "the State had full knowledge of the facts and deliberately declined to act."[33] To illustrate its position, the US notes that there are so many treaty- and policy-based reasons for a state not to use force that "abstaining from the threat or use of force" will almost never count as state practice in favour of a customary rule requiring abstention.[34]

Fourth, the US claims that, in assessing state practice, "due regard" must be given to the practice of states that are specially affected with regard to a particular rule. That is unobjectionable as a general statement concerning the formation of customary international law, as it simply

29. John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study: Customary International Humanitarian Law*, 89 International Review of the Red Cross (2007): 444-45.
30. *Id*. at 445.
31. Bellinger & Haynes, *supra* note 29, at 445.
32. US Custom, *supra* note 27, at 10.
33. *Id*.
34. *Id*.

echoes what the ICJ held in *North Sea Continental Shelf*.[35] As discussed in greater detail below, however, the US adopts a problematic – and not coincidentally self-interested – understanding of specially affected states, claiming that "[s]tates with a distinctive history of participation in the relevant matter must support [a] purported rule" for it to qualify as customary international law.[36] It thus faults the ICRC for tending "to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience" when considering whether a conventional IHL rule has become customary.[37] Taken literally, the US position essentially rewards particularly belligerent states with a veto over custom formation.[38]

Fifth, and finally, the US rejects the idea that the practice of international organisations (IOs) – as opposed to the practice of their member states – can help establish the state practice necessary for a customary rule. As the US notes, not only is there no support for that idea in the practice or statements of states, a considerable number of states have explicitly rejected the idea in the UN General Assembly's Sixth Committee.[39] The US thus believes the better practice is to "look through the international organization to its member States to see how to value the practice of the international organization."[40]

The US insists that evidence of *opinio juris* should be assessed with similar caution. Four aspects of the cautious US approach are particularly important. First, although the US accepts that the action of a state can be evidence of both state practice and *opinio juris*, it rejects the idea that "*opinio juris* can simply be inferred from practice," insisting that "[b]oth elements instead must be assessed separately in order to determine the presence of a norm of customary international law."[41] According to the US, this is particularly true when considering the practice of states sub-

35. *North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.)*, Judgment, 1969 ICJ Rep. 3, ¶ 73 (February 20).
36. Department of Defense, Law of War Manual (January 2015): 32.
37. Bellinger & Haynes, *supra* note 29, at 445-46.
38. Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 American Journal of International Law (2018): 204.
39. US Custom, *supra* note 27, at 3.
40. *Id*. at 5.
41. Bellinger & Haynes, *supra* note 29, at 446.

ject to a treaty-based rule, because "their actions often are taken pursuant to their treaty obligations, particularly *inter se*, and not in contemplation of independently binding customary international law norms."[42]

Second, the US insists that silence in the face of an assertion that a rule is customary will very rarely count as *opinio juris* in favour of that assertion. According to the US, silence counts when "a reaction to the practice in question would have been called for," which will normally be the case only when the unprotested practice has a significantly negative effect on the state, whether directly or indirectly.[43]

Third, the US rejects the idea that a state's *opinio juris* can be established solely, or even predominately, through military manuals – a very common source in IHL. In its view, military manuals often set out legal obligations imposed by treaties, not by customary international law.[44] Moreover, states "often include guidance in their military manuals for policy, rather than legal, reasons."[45]

Fourth, the US is unusually sceptical of the idea that resolutions adopted by international organisations, such as the UN General Assembly, can help to establish a customary rule. According to the US, "even widely supported resolutions may provide limited or ambiguous insight into the practice and *opinio juris* of the States that support them" and are thus "insufficient on their own to prove the existence of a customary law rule."[46] Overreliance on General Assembly resolutions is one of the central US criticisms of the ICRC's study of customary IHL.[47]

Finally, it is important to note the very strong American views concerning *jus cogens* – "a norm accepted and recognized by the international community of States as a whole,"[48] making it "universally applicable and... hierarchically superior to other rules of international law."[49] The US has three basic concerns, each in response to aspects of the Inter-

42. *Id*.
43. US Custom, *supra* note 27, at 11.
44. Bellinger & Haynes, *supra* note 29, at 447.
45. *Id*.
46. US Custom, *supra* note 27, at 17.
47. Bellinger & Haynes, *supra* note 29, at 445.
48. International Law Commission, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)* (2022), Conclusion 3, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf.
49. *Id*., Conclusion 2.

national Law Commission's 2022 Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law. First, it is not convinced that there is a clear way to determine which norms qualify as so fundamental that they should be considered applicable to all states. Indeed, in its view, the concept of "fundamental values" is so abstract and ambiguous that it "open[s] the door to attempts to derive *jus cogens* norms from vague and contestable natural law principles without regards to their actual acceptance and recognition by states."[50]

Second, insofar as *jus cogens* norms are supposed to be derived via a positivist methodology, the US rejects the ILC's (original) suggestion that "international community of States as a whole" means "a very large majority of states."[51] According to the US, a *jus cogens* norm must have at least the same amount of state support that is required for the creation of a customary rule – practice that is "extensive and virtually uniform."[52] Moreover, although the US accepts that a state cannot be a persistent objector to a norm that qualifies as *jus cogens*, it insists that the existence of persistent objectors to a customary rule "is highly relevant to whether the norm has been accepted and recognized by the international community of States as a whole."[53]

Third, the US objects to the ILC's insistence on providing a "non-exhaustive" list of norms that qualify as *jus cogens*. Although some of the norms clearly qualify – such as aggression, genocide, and slavery – the US is concerned that "the methodology used to compile the list is inconsistent with the recognized standard for determining the existence of a *jus cogens* norm."[54] As an example, it notes that the list includes the "basic rules" of IHL without specifying which rules the ILC considers basic. "Even if one were to accept that some IHL rules are *jus cogens* norms,"

50. Summary Record of the 26th Meeting, Sixth Committee, Seventy-First Session, General Assembly Official Records (A/C.6/71/SR.26), ¶ 126 (2016).
51. *Comments of the United States on the International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens) and Draft Annex, Provisionally Adopted by the Drafting Committee on First Reading* (30 June 2021): 7, https://legal.un.org/ilc/sessions/73/pdfs/english/jc_us.pdf.
52. *Id*. at 6.
53. *Id*. at 12. The final version of Conclusion 7 adopted by the ILC speaks instead of "a very large *and representative* majority of States." That phrasing moves closer to the US position, but the retention of "very large" makes it unlikely the US will support Conclusion 7.
54. *Id*. at 17.

the US points out, "there is considerable uncertainty as to which are peremptory and which are not."[55]

2.1.3. Judgments and Teachings

According to Art. 38(1)(d) of the ICJ Statute, "judicial decisions and the teachings of the most highly qualified publicists of the various nations" qualify as subsidiary means for the determination of rules of law. In other words, although decisions and teachings do not themselves give rise to primary rules of international law – they are not formal sources of international law like treaties and custom – they can be useful for determining what the primary rules are.

The US takes a very traditional approach to decisions and teachings. With regard to the former, it simply notes that the persuasiveness of a judicial decision is determined by the quality of its analysis concerning the existence of primary rules.[56] Similarly, with regard to the latter, it emphasises that "[t]he standard for whose writings should be relied upon is high" and "should only be relied upon to the degree they accurately reflect existing law, rather than the author's views about what the law should be."[57]

2.2. Russia

Although the Russian Federation – like its predecessor[58] – is deeply sceptical of international law, viewing it largely as a tool of Western imperialism,[59] "Russia's strategy in protecting its interests has been deeply legalized, which possibly reflects Putin's lawyerly training."[60] Russia does not, however, "speak international law" in the same manner as Western countries. On the contrary, "while today Russian statesmen use the lan-

55. *Id*. at 18.
56. Law of War Manual, *supra* note 36, at 1.9.1.
57. *Id*., 1.9.2.
58. W.E. Butler, *Foreign Policy Discourses as Part of Understanding Russian and International Law*, in P. Sean Morris (ed.), Russian Discourses in International Law (Routledge, 2019): 192.
59. Anthea Roberts, Is International Law International? (OUP, 2017): 293.
60. Tom Ginsburg, *Article 2(4) and Authoritarian International Law*, 116 AJIL Unbound (2022): 133.

guage of international law extensively... this is not necessarily the same understanding of 'international law' as is predominant in the West."[61]

The most important difference concerns Russia's prioritisation of state sovereignty over all of the other values that international law protects. As Nadibaidze points out, "[t]he Russian view of multipolarity is heavily centred on the importance of non-interference and the possibility of conducting a foreign policy independent from outside influence."[62] All states, of course, care about their sovereignty. Western states, however, at least acknowledge that international law as it exists today focuses on the rights of the individual as much as on the rights of the state. For Russia – and, as discussed below, for China – human rights are of secondary importance: "by defensively invoking 'international law', Russians are in fact defending their own statist vision of international law that is hostile to the West's anthropocentric ideas."[63]

2.2.1. Treaties

This statist vision is reflected in how Russia views the formal sources of international law. Russian legal theory has always emphasised that international law is based on a state's sovereign will: what makes a rule binding is that the state has consented to it.[64] It is thus hardly surprising that Russia views treaties as the "cornerstone" of the primary rules of international law and strongly emphasises the principle *pacta sunt servanda*.[65] Indeed, the 1993 Constitution of the Russian Federation provides in Art. 15(4) that "international treaties of the Russian Federation shall be an integral part of its legal system." Treaties thus automatically become part of the Russian legal system upon ratification; no legislative incorporation is required.[66]

Art. 15(4) also contains a supremacy clause, according to which "[i]f other rules have been established by an international treaty of the Rus-

61. Lauri Mälksoo, Russian Approaches to International Law (OUP, 2015): 192.
62. Anna Nadibaidze, *Great Power Identity in Russia's Position on Autonomous Weapons Systems*, 43 Contemporary Security Policy (2022): 414.
63. Mälksoo, *supra* note 61, at 153.
64. Butler, *supra* note 58, at 193.
65. Phil C.W. Chan, *China's Approaches to International Law since the Opium War*, 27 Leiden Journal of International Law (2014): 883.
66. Michael Riepl, Russian Contributions to International Humanitarian Law (Nomos, 2022): 176.

sian Federation than provided for by a law, the rules of the international treaty shall apply." Consequently, when there is a conflict between an "ordinary" Russian law and a provision in a treaty, the treaty provision prevails. The same is not true, however, for a conflict between the Russian Constitution and an international treaty. In such a situation, the treaty provision in question is invalid.[67] The supremacy of the Constitution explains (though obviously does not justify) Russia's refusal to comply with judgments of the European Court of Human Rights finding that certain provisions in the Constitution are inconsistent with the 1950 European Convention for Human Rights and Fundamental Freedoms.[68]

The Soviet Union and pre-Putin Russia ratified nearly all of the most important humanitarian and human-rights treaties, including – with the exception of the APMBT, CTBT, and ATT – all of the treaties mentioned above that the US has not. Under Putin, however, Russia has become increasingly willing to withdraw from international treaties – it concludes are no longer in its interest. That willingness is most evident in the context of arms control, as discussed below. But it also extends to a variety of other areas, as illustrated by the recent Russian withdrawal from the Open Skies Treaty,[69] which permits states parties to conduct unarmed surveillance flights over the territory of other states parties, and from the Treaty on Conventional Armed Forces in Europe, which promoted "restraint, transparency and the verification of conventional weapons in post-Cold War Europe."[70]

2.2.2. Custom

Russia has been sceptical of customary international law since the Soviet era, largely because of the possibility – endorsed by the West but rejected by key Soviet legal theorists such as Grigory Tunkin – that a customary rule can bind a state against its will.[71] It nevertheless accepts that custom

67. *Id*.
68. Butler, *supra* note 58, at 194-95.
69. Hollis Rammer, *Russia Officially Leaves Open Skies Treaty*, Arms Control Association (July/August 2021), https://www.armscontrol.org/act/2021-07/news/russia-officially-leaves-open-skies-treaty.
70. *Announcement of Russia's Withdrawal from the Conventional Armed Forces in Europe Treaty* (9 June 2023), https://franceintheus.org/IMG/html/briefing/2023/DDB-2023-06-09.html.
71. Chan, *supra* note 65, at 883.

is a formal source of international law capable of producing binding primary rules.[72] Moreover, customary international law is automatically incorporated into Russian law by virtue of Art. 15(4) of the Constitution, which deems not only treaties an integral part of Russia's legal system, but also "[g]enerally-recognized principles and norms of international law." A resolution issued by the Russian Supreme Court in 2004 makes clear that Art. 15(4) applies to all "rules that are accepted and recognised as legally binding by the international community as a whole," which includes customary ones.[73] Unlike treaties, though, "[c]ustomary law finds itself on the same level as ordinary national law, which means that it can be easily derogated, deleted, or pushed aside according to the lex posterior principle."[74]

Given Russia's longstanding emphasis on the importance of sovereign will, it is hardly surprising that it is sceptical of the concept of *jus cogens*. Indeed, its criticisms of the ILC's work on the concept are remarkably similar to those offered by the US – particularly its insistence that "it remains unclear how State recognition of the peremptory status of a norm should be determined."[75] Simply put, Russia is not convinced by any of the formulations the ILC has offered to define "international community of states as a whole" – from "large majority of states" to "overwhelming majority of states" to "virtually all states" – which suggests that it believes the opposition of even a few states can doom the creation of a *jus cogens* norm. To be sure, Russia never explicitly makes that claim. But it comes very close when it says that it "is not in a position to accept the possibility that the formation of the will or position of a group of States could result in the emergence of international legal obligations for States that are not members of that group"[76] and suggests

72. *See, e.g.*, Letter dated 19 June 1995 from the Ambassador of the Russian Federation, together with Written Comments of the Government of the Russian Federation (19 June 1995): 20, https://www.icj-cij.org/sites/default/files/case-related/95/8796.pdf.
73. Riepl, *supra* note 66, at 178.
74. *Id*. at 179-80.
75. *Comments by the Russian Federation on the Topic "Peremptory Norms of General International Law (Jus Cogens)"* (2022): 3, https://legal.un.org/ilc/sessions/73/pdfs/english/jc_russia.pdf.
76. *Id*. at 4.

that "a sufficient number of [persistent] objections by States" is capable of preventing "the emergence/formation of a peremptory norm."[77]

Russia also takes issue with the ILC decision to include a non-exhaustive list of norms that are ostensibly *jus cogens*, describing it as "unwise" and adding "no value."[78] Its rationale for opposing the list again echoes that of the US: "[t]his decision was made despite the fact that the majority of the norms included in the list had not been previously studied by the Commission or analysed with regard to their peremptory nature."[79]

2.2.3. Judgments and Teachings

Russia has said very little about the subsidiary means for determining the primary rules of international law. Its silence concerning judicial decisions is not particularly surprising, because Russian legal scholars have repeatedly criticised what they perceive to be "an exaggeration of the importance of case law in Western – and especially Anglo-Saxon – approaches to international law."[80] More broadly, however, silence reflects the fact that Russia – like its Soviet predecessor – is hostile towards international adjudication itself, viewing it as an "expression of Western dominance in international law" to be avoided or, when not possible, used strategically.[81] Similar anti-Western considerations explain why Russia rarely cites the work of Western legal scholars when taking a position on primary rules of international law; when the Russian government or Russian courts cite legal scholars, they are almost invariably Russian.[82]

It is also worth noting that although Russian courts refer to international law more often than Soviet courts did, they rarely do so in a manner that challenges "the vertical of power" – "a specific Russian notion that the governmental power is (and must be) hierarchical and that all power below must refer to the top of the pyramid, i.e., the Kremlin."[83] In

77. *Id*. at 6.
78. *Id*. at 8.
79. *Id*.
80. Lauri Mälksoo, *Caselaw in Russian Approaches to International Law*, in Anthea Roberts et al. (eds.), Comparative International Law (OUP, 2018): 340.
81. *Id*. at 348.
82. Roberts, *supra* note 59, at 7.
83. Mälksoo, *supra* note 80, at 347.

other words, Russian judges see their role as an extension of the executive and legislative branches, not as a "counterweight" to them.[84]

2.3. China

China has always distrusted international law, the legacy of the unequal treaties that Western states forced it to sign during the 19th century – the "Century of Humiliation."[85] That distrust is reflected in China's thoroughly utilitarian approach to international law, which Cai describes as "selective adaptation": engaging and complying with primary rules when self-interest demands, ignoring or breaching them when it does not.[86] Indeed, heeding Jiang Zemin's 1996 exhortation that China "must be adept at using international law as a weapon," the Chinese Communist Party (CCP) has made "legal warfare" one of China's three approved non-kinetic types of warfare.[87]

Like Russia, China emphasises the sovereignty of the state over all other international-law values. "This has been strikingly evident in assertions of uninterrupted sovereignty over Hong Kong and Taiwan, rejection of Western human rights critiques, and denunciations of military interventions in Iraq and the former Yugoslavia."[88] Scholars thus often refer to China as adopting "Eastphalian sovereignty" – a position that, unlike Westphalian sovereignty, insists that sovereignty is absolute in both its external (foreign relations) and internal (individual rights) dimensions.[89]

In terms of the formal sources of international law, Eastphalian sovereignty expresses itself through China's commitment to "a narrowly

84. *Id*.
85. Congyan Cai, The Rise of China and International Law: Taking Chinese Exceptionalism Seriously (OUP, 2019): 243.
86. *Id*. at 152.
87. Bret Austin White, *Reordering the Law for a China World Order: China's Legal Warfare Strategy in Outer Space and Cyberspace*, 11 Journal of National Security Law & Policy (2021): 444.
88. Jacques DeLisle, *China's Approach to International Law: A Historical Perspective*, ASIL Proceedings (2000): 273.
89. Andrew Coleman & Jackson Nayamuya Maogoto, *"Westphalian" Meets "Eastphalian" Sovereignty: China in a Globalized World*, 3 Asian Journal of International Law (2013): 254-55.

positivist and sovereign-discretion-protecting definition of the sources of international legal rules and obligations."[90]

2.3.1. Treaties

Despite its experience with unequal treaties, China views treaties as the most important formal source of international law[91] and formally adheres to the principle *pacta sunt servanda*. Article 67 of the National Defence Law, for example, provides that "in its military relations with other countries, the PRC should observe the relevant international treaties and agreements that the PRC has concluded, acceded to or accepted."[92]

With the exception of the International Covenant on Civil and Political Rights (ICCPR) and the CTBT, China has become a party to all of the most important humanitarian and human-rights treaties,[93] including many – most notably the Additional Protocols and the ICESCR – that the US has not joined and others – such as the Arms Trade Treaty (ATT) – that neither the US nor Russia has joined. Moreover, unlike the US and Russia, China rarely if ever withdraws from treaties it has ratified.

That said, China still engages in "selective adaptation" concerning treaties. It has often attached reservations to human rights treaties concerning provisions it views as inconsistent with its internal sovereignty. Its reservation limiting the scope of labour rights under the ICESCR is an example. More importantly, China has been willing to conclude regional treaties that explicitly violate its pre-existing treaty obligations. The best example in this regard is the Shanghai Cooperation Organization (SCO), which has relied on the organisation's so-called "Three Evils" doctrine to prosecute and prevent separatism, extremism, and terrorism in ways that directly contradict numerous treaties that China has ratified, including the ICESCR, the Torture Convention, and the Con-

90. DeLisle, *supra* note 88, at 273.
91. Hungdah Chiu, *Chinese Views on the Sources of International Law*, 2 Contemporary Asian Studies (1988): 7.
92. Law of the People's Republic of China on National Defense (1 January 2021), http://en.npc.gov.cn.cdurl.cn/2020-12/26/c_674696.htm.
93. Liu Daqun, *Chinese Humanitarian Law and International Humanitarian Law*, in Larissa van den Herik & Carsten Stahn (eds.), The Diversification and Fragmentation of International Criminal Law (Brill, 2012): 355.

vention Relating to the Status of Refugees (CRSR).[94] Moreover, SCO policies have often run afoul of various Security Council resolutions – such as Res. 1456 (2003), which requires states to adhere to international law when combatting terrorism – that China has a treaty-based obligation to comply with pursuant to Art. 25 of the UN Charter.[95]

China's selective adaptation of treaties is even more evident in its thoroughgoing hostility to non-voluntary international adjudication, which it generally considers "antithetical to state sovereignty."[96] China has neither accepted the compulsory jurisdiction of the ICJ nor ratified the Rome Statute.[97] It opposed vesting compulsory jurisdiction in the International Tribunal for the Law of the Sea (ITLOS) on sovereignty grounds and then rejected the tribunal's jurisdiction after it lost the argument.[98] And it has rejected all optional protocols to key human rights treaties – such as the Genocide Convention and the Torture Convention – that permit UN bodies to adjudicate disputes.[99]

China's hostility to international adjudication would be less problematic if its domestic courts enforced its treaty obligations. But that is rarely the case. Although some treaties are automatically incorporated into domestic law, "China disallows the automatic incorporation of treaties under which executive authority might be seriously challenged."[100] Human rights treaties fall squarely in that category.[101] The need for transformation, in turn, "allows China to deal with treaty commitments on a case-by-case basis and to water down those commitments that may grant rights to individuals vis-à-vis the state."[102]

94. David Ward, *The Shanghai Cooperation Organization's Bid to Transform International Law*, 11 Brigham Young University International Law & Management Review (2015): 168-71.
95. *Id*. at 168.
96. Zhu Dan, *China, the International Criminal Court, and International Adjudication*, LXI Netherlands International Law Review (2014): 52.
97. China is obviously not alone; the US and Russia also abstain from participating in the ICJ's compulsory jurisdiction and the ICC.
98. Chan, *supra* note 65, at 886.
99. Cai, *supra* note 85, at 142.
100. *Id*. at 261.
101. *Id*. at 260.
102. *Id*. at 251.

Even when a treaty has been transformed, Chinese courts generally do not give effect to it if doing so will limit executive power.[103] Sometimes judges use interpretive methods to avoid giving effect to a treaty provision: although the Supreme People's Court (SPC) insists that treaties must be interpreted in good faith and consistent with the VCLT,[104] Chinese judges almost invariably refuse to apply teleological interpretation to a treaty provision even though the VCLT expressly permits it.[105] In other situations, judges simply ignore treaty provisions on the ground that "giving legal domestic effects to international treaties is generally detrimental to Chinese national interests."[106] That has been the case for the Torture Convention, despite repeated statements by the Chinese government that the Convention can be directly applied.[107]

2.3.2. Custom

Although neither the Constitution of the People's Republic of China nor Chinese legislation mention it,[108] China accepts that customary international law is capable of generating primary rules.[109] China nevertheless shares Russia's scepticism towards custom, often criticising claims – usually by Western states or scholars – that a particular rule qualifies as customary. Two examples are illustrative. First, China has criticised the ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity for exaggerating the extent of a state's obligations under customary international law. Specifically, from the Chinese perspective, "provisions relating to the liability of legal persons, extradition and mutual legal assistance, as well as protection of the rights and interests of victims and witnesses are not backed by State practice."[110] Second, China has always rejected claims that customary international law does not provide for the absolute immunity of states before foreign courts, insisting that such immunity "is still a valid rule under international law

103. Björn Ahl, *International Law in Chinese Courts*, in Ignacio de la Rasilla & Congyan Cai, The Cambridge Handbook of China and International Law (CUP, 2024): 130.
104. *Id*. at 117.
105. *See* VCLT, art. 31(1).
106. Ahl, *supra* note 103, at 120-21.
107. Cai, *supra* note 85, at 259.
108. Ahl, *supra* note 103, at 124.
109. Chiu, *supra* note 91, at 4-5.
110. Vishal Sharma et al., *Analysis of State Comments on International Law Commission's Reports on Jus Cogens* (2021): 118, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3874323.

on the basis of the principle of sovereign equality." In its view, "[s]o far there has not been enough evidence to prove that by State practice and opinio juris, this customary international law rule has changed."[111]

Like the US and Russia – and thus illustrating that there are international law issues on which all three Great Powers agree – China is also critical of the ILC's work on *jus cogens*. Its two primary reasons are familiar: namely, that the ILC's methodology for identifying peremptory norms is underdeveloped and not strict enough, and that the ILC's list of *jus cogens* norms is problematic because some of the norms do not satisfy its own methodology and many are unacceptably vague.[112] Interestingly – and revealing of its approach to international law generally – China also faults the ILC for not deeming sovereign equality a peremptory norm.[113]

2.3.3. Judgments and Teachings

Chinese judges rarely cite the judgments of international courts.[114] Their hesitation reflects China's belief, reflected in the writing of Chinese scholars, that Western states and lawyers exaggerate "the role international judicial decisions play in... expressing and proclaiming international law."[115] China criticises the ILC position that crimes against humanity qualify as a *jus cogens* norm, for example, by pointing out – derisively – that most of the evidence the ILC adduces in support of its position comes from judgments of the ICJ, ICTY, and Inter-American Court of Human Rights.[116] Chinese judges also rarely rely on the teachings of the "most highly qualified publicists of the various nations," almost certainly

111. Quoted in Julian G. Ku, *The Significance of China's Views on the Jus Cogens Exception to Foreign Government Official Immunity*, 26 Duke Journal of Comparative & International Law (2016): 510. Indeed, illustrating the importance China assigns to state sovereign will, the Standing Committee of the National People's Congress recently adopted legislation replacing absolute immunity with precisely the relative immunity that many Western states and scholars insist to be required by customary international law. *See* Changhao Wei, *China to Allow Some Suits Against Foreign States: A Summary of the Foreign State Immunity Law*, NPC Observer (11 September 2023), https://npcobserver.com/2023/09/china-foreign-state-immunity-law/.
112. *Statement by Jia Guide at the Sixth Committee of the 74th Session of the UN General Assembly* (28 October 2019): 4-5, https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/china_1e.pdf.
113. *Id*. at 5.
114. Ahl, *supra* note 103, at 125.
115. Chiu, *supra* note 91, at 14.
116. *Id*. at 4-5.

because Chinese scholars insist that the views of Western scholars reflect "the bourgeois and imperialistic nature of international law."[117]

Interestingly, China considers resolutions adopted by universal international organisations, such as the General Assembly, to qualify as subsidiary sources of international law, despite Art. 38(1) limiting that category to judgments and teachings.[118] That is an idiosyncratic understanding of resolutions adopted by IOs; the traditional view, adopted by both the US and Russia (albeit reluctantly), is that such resolutions are capable, at least in principle, of expressing the *opinio juris* of states regarding whether a primary rule qualifies as customary.

2.4. Summary

As this section indicates, the US, Russia, and China agree on certain aspects of how international law is constructed. All three agree that Art. 38 of the ICJ Statute provides a definitive list of the formal sources of international law. All three affirm the importance of the principle *pacta sunt servanda* while making it difficult for treaties to have domestic effect. And all three are hostile to the concept of *jus cogens* as a species of custom.

There are also important disagreements between the Great Powers that help to explain the different positions they take in the areas of international law discussed in the next section. The US is slower to ratify treaties than Russia and China, and Russia and the US are much more willing than China to withdraw treaties they do not like. Although all three are hostile to the concept of *jus cogens*, Russia and China are much less willing to rely on "ordinary" custom than the US. And unlike the US, which accepts that the judgments of international courts and the writings of the most qualified publicists can be useful for identifying primary rules of international law, Russia and China almost completely dismiss such subsidiary means, insisting that they are invariably biased towards the interests of Western states.

117. Chan, *supra* note 65, at 885.
118. *Id*. at 883.

3

Specific Illustrations of Legal Differences

This section of the report examines a number of specific disagreements between the US, Russia, and China concerning primary rules of international law. At least in part, each disagreement reflects differences between the Great Powers in terms of how they view or interpret the two most important formal sources of international law: treaties and custom.

3.1. Use of Force

3.1.1. General Approach

In general, the Great Powers have very different views on *jus ad bellum*, the rules governing the use of interstate force. China and Russia have traditionally taken a restrictivist approach, one based on two central and interrelated claims: (1) that the use of force is strictly regulated by treaty, the UN Charter, with customary international law playing at best a minor role;[119] and (2) that the UN Charter, particularly Art. 2(4) and

119. *See, e.g.*, Mälksoo, *supra* note 61, at 173 (noting that Russia has traditionally been committed to the idea that, in light of the Charter, "no military intervention could be legal without UNSC authorization or beyond self-defence against armed attack"); Julian Ku, *How China's Views on the Law of Jus ad Bellum Will Shape Its Legal Approach to Cyberwarfare*, Hoover Institution, Aegis Series Paper No. 1707 (2017): 6 (quoting the Chinese statement that it is "of the view that Article 51 of the Charter should neither be amended nor reinterpreted. The Charter lays down explicit provisions on the use of force").

Art. 51, must be interpreted in a narrow and strictly textualist manner.[120] These claims reflect Russia and China's shared assumption that the fundamental purpose of the *jus ad bellum* is to protect state sovereignty.[121]

The US rejects each of these assumptions – and traditional restrictivism in general – in favour of an expansionist approach to *jus ad bellum*.[122] Most importantly, the US puts far less emphasis on the UN Charter: although "the Charter serves as a starting point for *jus ad bellum* analysis... other sources are primarily responsible for supplying the robust framework of legal principles that regulate the use of force, including customary international law, general principles of law accepted by states, and basic principles of legality that are constitutive of international legal order."[123] Similarly, the US does not interpret the UN Charter narrowly concerning the use of force – particularly Art. 51, concerning the right of self-defence.[124]

These diametrically opposed conceptions of the *jus ad bellum*, which are based on very different understandings of the role treaty and custom play in regulating the use of force, lead to a number of more specific disagreements over primary rules of international law.

3.1.2. Definition of Armed Attack

Although Art. 51 of the UN Charter permits states to act in self-defence if "an armed attack occurs," it does not provide a definition of which uses of force qualify as an armed attack. The ICJ addressed this issue in the *Nicaragua* case, holding that states must "distinguish the most grave

120. *See, e.g.*, Liina Lumiste, *Russian Approaches to Regulating Use of Force in Cyberspace*, Baltic Yearbook of International Law Online (2022): 124 ("[S]ince the fall of the Soviet Union, Russia has promoted a certain legal formalism and strict interpretation of the UN Charter"); Ku, Cyber, *supra* note 119, at 5 ("In general, China has hewed consistently to the 'positivist' methodology and restrictivist interpretation of the UN Charter.").
121. *See, e.g.*, Mälksoo, *supra* note 61, at 174 ("In official Russia's understanding the Charter restricts the use of military force to a minimum and favours the principle of state sovereignty."); Ku, Cyber, *supra* note 119, at 8 (noting that, for China, "Article 2's language prohibiting force for any reason inconsistent with the UN Charter should be conceptualized as a broad protection of a state's sovereignty beyond territory and independence.").
122. William C. Banks & Evan J. Criddle, *Customary Constraints on the Use of Force: Article 51 with an American Accent*, 29 Leiden Journal of International Law (2016): 72.
123. *Id*. at 76.
124. *Id*. at 68.

forms of the use of force (those constituting an armed attack) from other less grave forms" on the basis of their "scale and effects."[125]

Like almost all states, Russia and China each accept that, in the ICJ's words, there is a "gap" between a use of force that violates Art. 2(4) and an armed attack that triggers the right of self-defence.[126] The US, however, disagrees: as stated in the Department of Defense Law of War Manual, "[t]he United States has long taken the position that the inherent right of self-defence potentially applies against any illegal use of force."[127] The disagreement turns on the formal sources: in keeping with their restrictivist approach to *jus ad bellum*, Russia and China focus on the UN Charter itself, insisting that the text of Art. 51 should be interpreted narrowly; in keeping with its expansionist approach, the US focuses on customary international law, arguing that Art. 51 does not "impose any limitations on the pre-existing customary right of self-defence,"[128] which it believes permits self-defence in response to any use of force, not only those that are particularly grave.

This disagreement over the scope of self-defence, it is important to note, extends to the cyber domain. The US does not accept that a cyberattack must cause injury or damage to qualify as an "armed attack" for purposes of Art. 51. In its view, "under some circumstances," even "a disruptive activity in cyberspace could constitute an armed attack," as long as the disruption was illegal.[129] China and Russia, by contrast, take much narrower positions. China is sceptical that *any* cyberattack can give rise to the right of self-defence. Not only is its 2021 national statement on international law and cyberspace silent on *jus ad bellum*,[130] the Deputy Director-General of the Department of Treaty and Law of the Chinese Foreign Ministry stated in 2016 that "to consider this issue within the context of the 'use of force' or 'armed attacks', and to apply to them *jus*

125. Tom Ruys, Armed Attack and Article 51 of the UN Charter (CUP, 2010): 140.
126. *Id*. at 151 ("The Soviet representative, for example, stressed that it was 'essential to introduce the concept of "intensity" of the act, so that a distinction could be drawn between acts of aggression and other forms of the use of force.'"; Ku, Cyber, *supra* note 119, at 11 (noting that China "has advocated a narrow definition of 'armed attack'").
127. Law of War Manual, *supra* note 36, at ¶ 1.11.5.2.
128. Ruys, *supra* note 125, at 59.
129. U.N. Secretary-General, *Developments in the Field of Information and Telecommunications in the Context of International Security*, U.N. Doc. A/66/152 (15 July 2011): 18-19.
130. National Position of the People's Republic of China (2021), https://cyberlaw.ccdcoe.org/wiki/National_position_of_the_People%27s_Republic_of_China_(2021)

ad bellum... is a 'military paradigm' that 'intensifies [the] arms race in and militarisation of ... cyberspace."[131] That restrictive view of *jus ad bellum*, according to a leading Chinese scholar, is motivated precisely by the "fear that more powerful States like the United States could invoke the right of self-defence against cyber-attacks."[132]

For its part, Russia has repeatedly emphasised that the prohibition of the use of force in the UN Charter must be restrictively applied, even in cyberspace.[133] Indeed, like China, it has expressed scepticism that a cyberattack can ever rise to the level of an armed attack, arguing that ICT means "are not weapons and therefore it is not possible to substantiate 'armed attack... in or through the ICT environment" and that, in any case, the required level of damage for an armed cyberattack is uncertain because cyber-force is not observable.[134] As Lumiste notes, "this is a vivid example of the argumentation logic that, because the positivist approach sets strict restrictions on interpretation of the existing rule, there is a need for a new rule" – implying "that applicable international law could only be treaty law."[135]

3.1.3. Anticipatory Self-Defence

Art. 51 permits a state to act in self-defence "if an armed attack occurs." Most states insist that Art. 51 should be read literally, to prohibit any kind of self-defence prior to the initiation of an armed attack.[136] Other states take a broader position, claiming that anticipatory self-defence is lawful as long as an armed attack is "imminent" – when the need to act is, to quote the famous *Caroline* case, "instant, overwhelming, leaving no choice of means, and no moment of deliberation."[137]

At least on paper, Russia and China are in the restrictivist camp. The Soviet Union consistently rejected anticipatory self-defence during the

131. Binxin Zhang, *Cyberspace and International Humanitarian Law: The Chinese Approach*, in Suzannah Linton et al. (eds.), Asia-Pacific Perspectives on International Humanitarian Law (CUP, 2019): 331.
132. *Id*. at 332.
133. Lumiste, *supra* note 120, at 121.
134. *Id*. at 126.
135. *Id*. at 126-27.
136. *See, e.g.*, Christine Gray, International Law and the Use of Force (OUP, 2018): 160.
137. Quoted in Robert Jennings, *The Caroline and McLeod Cases*, 32 American Journal of International Law (1938): 92.

Cold War – noting during the drafting of the UN Definition of Aggression, for example, that the UN Charter "in no way countenanced such a possibility"[138] – and Russia has reaffirmed the Soviet position on multiple occasions.[139] Similarly, China has explicitly stated that "[n]o state should interfere in other's internal affairs... in the name of 'preventive self-defence."[140] In its view, because self-defence is available only in response to an actual armed attack, "[a]ny 'imminent threat' should be carefully judged and handled by the Security Council."[141]

The US, by contrast, is squarely in the expansionist camp. Indeed, it has gone well beyond the traditional *Caroline* standard and endorsed an extremely broad definition of imminence:

> *The test for determining whether a threat is sufficiently "imminent" to render the use of force necessary at a particular point has become more nuanced than Secretary Webster's nineteenth-century formulation. Factors to be considered include: the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a window of opportunity; whether diplomatic alternatives are practical; and the magnitude of the harm that could result from the threat.*[142]

Like debate over the meaning of "armed attack," debate over the temporal boundaries of self-defence turns on competing understandings of the formal sources of international law. The American position is based on the idea that anticipatory self-defence is part of the "inherent" customary right of self-defence in Art. 51. The Russian/Chinese position, by contrast, assumes that "even if anticipatory self-defence was permitted

138. UN Doc. A/AC.134/SR.79–91, at 35.
139. *See, e.g.*, UN Doc. A/59/PV.87, at 6.
140. *Statement by Ambassador Geng Shuang at the Open Arria Formula Meeting, Upholding the Collective Security System of the UN Charter: The Use of Force in International Law, Non-State Actors and Legitimate Self-Defense* (24 February 2021), http://chnun.chinamission.org.cn/eng/hyyfy/t1856424.htm; see also Ku, *supra* note 111, at 11.
141. *Statement of China, Informal Thematic Consultations on Cluster-II of 'In Larger Freedom'* (22 April 2005).
142. Jay Bybee, *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq (*23 October 2002): 194, https://www.justice.gov/d9/olc/opinions/2002/10/31/op-olc-v026-p0143_0.pdf.

in the years prior to the adoption of the Charter, pre-existing custom was nonetheless modified by Article 51."[143]

It is important to note that China and Russia's actions have not always lived up to their restrictivist claims. For example, despite China invoking self-defence in each case, there was no armed attack that justified its intervention in the Korean War in 1950[144] or its invasion of Vietnam in 1979.[145] Similarly – and more obviously – even though Russia claims that its invasion of Georgia in 2008,[146] its annexation of Crimea in 2014, and its invasion of Ukraine in 2022[147] were each legitimate acts of self-defence, none of those uses of force responded to an actual or even imminent armed attack. Indeed, Lumiste notes that the annexation of Crimea initiated a general shift in Russia's approach to *jus ad bellum*, one in which "the approach of strict positivism... crumbled" as Russia began to present "questionable arguments on the right to use force."[148]

3.1.4. Protection of Nationals

The US also disagrees with Russia and China over whether *jus ad bellum* permits a state to use force to protect its nationals abroad. According to the US, such force is consistent with a state's inherent right of self-defence under customary international law.[149] The US has formally invoked the protection of nationals numerous times, including to justify its interventions in Lebanon (1958), Grenada (1983), and Panama (1989),[150] and the Law of War Manual explicitly endorses doing so.[151]

By contrast, in keeping with their emphasis on a restrictive approach to *jus ad bellum* that focuses on the text of Art. 51, Russia and China

143. Ruys, *supra* note 125, at 259.
144. Jamieson L. Greer, *China and the Laws of War: Patterns of Compliance and Disregard*, 46 Virginia Journal of International Law (2006): 724.
145. *Id*. at 733.
146. Roy Allison, *The Russian Case for Military Intervention in Georgia: International Law, Norms and Political Calculation*, 18 European Security (2009): 176-77.
147. Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, Journal of Genocide Research (2022): 2.
148. Lumiste, *supra* note 120, at 124.
149. Andrew W.R. Thompson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 Washington University Global Studies Law Review (2012): 650.
150. *Id*. at 632, 650.
151. Law of War Manual, *supra* note 36, at 1.11.5.3.

reject a customary exception for protection of nationals. China has thus declared that "[i]n order to prevent power politics... the use or threat of force in exercising the right should be prohibited"[152] and has consistently condemned the use of force to protect nationals as a violation of international law, including with regard to Israel's infamous 1976 raid at Entebbe[153] and the failed American attempt in 1980 to rescue American hostages in Tehran.[154] Similarly, Russia has consistently condemned the use of force to protect nationals as a violation of Art. 2(4) of the UN Charter – not only the Tehran rescue attempt,[155] but also Belgium's use of force in Congo in 1960 and Israel's raid at Entebbe.[156]

Unlike with anticipatory self-defence, China's actions have matched its words. It has never formally invoked the protection of nationals. The same cannot be said, however, of Russia. On the contrary, evidencing its increasingly expansionist approach to *jus ad bellum*, Russia has relied on the doctrine to justify *all* of its recent uses of force: its invasion of Georgia, its annexation of Crimea, and its invasion of Ukraine.[157]

3.1.5. Humanitarian Intervention

At first glance, all three Great Powers appear to adopt the restrictivist position that there is no customary exception to Art. 2(4) for humanitarian intervention. The Law of War Manual explicitly states that the US has never formally invoked humanitarian intervention to justify a use of force – not even in Kosovo, which is often considered an example of such intervention.[158] Similarly, the joint Chinese-Russian declaration on the promotion of international law "reaffirm[s] the principle that States shall refrain from the threat or use of force in violation of the Charter of the United Nations and therefore condemn unilateral military interventions."[159] Both states have also independently stated that, when faced

152. UN Doc. A/C.6/55/SR.19 (2004), ¶ 30.
153. UNSC Doc. S/PV.1939 (9 July 1976), ¶ 226.
154. Tom Ruys, *The Protection of Nationals Revisited*, 13 Journal of Conflict & Security Law (2008): 248.
155. *Id*.
156. Thompson, *supra* note 149, at 659.
157. *See, e.g.*, *id*.
158. Law of War Manual, *supra* note 36, at 1.11.4.4.
159. *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law* (12 July 2016), ¶ 3, https://www.mfa.gov.cn/mfa_eng/wjdt_665385/2649_665393/201608/t20160801_679466.html.

with a serious humanitarian crisis, a military response requires Security Council approval.[160]

Once again, however, Russia's crumbling positivism is evident. Despite consistently denouncing humanitarian intervention – most notably regarding Kosovo – Russia has explicitly invoked the doctrine to justify the invasion of Georgia, the annexation of Crimea, and the invasion of Ukraine.[161] In each case, Russia's underlying factual claims concerning human rights abuses against ethnic Russians were without merit. But there is no denying the "creative reworking of humanitarian intervention" reflected in, for example, the Russian claim to be "denazifying" Ukraine.[162]

3.1.6. Non-State Actors

One of the most difficult and contentious *jus ad bellum* issues is when a state has a right of self-defence against an armed attack launched by a non-state actor (NSA) like ISIL. The traditional restrictivist view, which held sway until 9/11 and is still endorsed by the vast majority of states,[163] was that self-defence was available against an NSA's armed attack only insofar as the attack was attributable to a state.[164] Nearly all states took that position, as did the ICJ in the *Nicaragua* and *Armed Activities* cases.[165] At a minimum, therefore, a "defending" state had to show that the territorial state was "tolerating" or "acquiescing" in the armed NSA attack.[166]

Since 9/11, a small but growing number of states have rejected the attribution requirement, endorsing instead an expansionist position that

160. Cai, *supra* note, at 116 (China); Sergei Yu. Marochkin, *On the Recent Development of International Law: Some Russian Perspectives*, 8 Chinese Journal of International Law (2009): 712 (Russia).
161. Kotova & Tzouvala, *supra* note 3, at 714.
162. *Id*.
163. *See, e.g.*, *Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace, and All Associated Communiqués Adopted by the Peace and Security Council of the African Union* (29 January 2024), ¶ 43, https://papsrepository.africa-union.org/handle/123456789/2022.
164. *See, e.g.*, Christian J. Tams, *The Use of Force Against Terrorists*, 20 European Journal of International Law (2009): 368-69.
165. *Id*.
166. Olivier Corten, *The 'Unwilling or Unable' Test: Has It Been, and Could It Be, Accepted?* 29 Leiden Journal of International Law (2016): 795.

has come to be known as the "unwilling or unable" test. According to this test, a state has a right to act in self-defence against an NSA as long as the territorial state cannot or will not prevent the NSA from using its territory to launch armed attacks.[167]

The US is the leading proponent of the "unwilling or unable" test, once again viewing it as a custom-based aspect of the inherent right of self-defence in Art. 51 of the UN Charter. In 2014, for example, the US submitted an Art. 51 letter to the UN Secretary-General that invoked the test to justify attacking ISIL in Syria without the Syrian government's consent:

> *ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.*[168]

China, by contrast, rejects the "unwilling or unable" test as inconsistent with "an orthodox, wide reading of the UN Charter's Art. 2(4) prohibition on the use of force."[169] In its view, "[t]he use of force against non-state actors in the territory of another state, which is for the purpose of self-defence, shall be subject to the consent of the state concerned."[170] China thus responded to the US's invocation of the test in Syria by starting that it is "imperative to consistently comply with the purposes and principles of the Charter of the United Nations as well as the basic norms governing international relations, while maintaining the sovereignty, independence, unity and territorial integrity of Syria."[171]

167. *Id*. at 779.
168. UNSC Doc. S/2014/695 (23 September 2014), https://www.documentcloud.org/documents/3125705-US-SYRIA-ISIL-9-23-2014.html.
169. Jefferi Hamzah Sendut, *The Unwilling and Unable Doctrine and Syria*, Cambridge University Law Society (Undated), https://www.culs.org.uk/per-incuriam/the-unwilling-and-unable-doctrine-and-syria.
170. Statement by Ambassador Geng Shuang, *supra* note 140.
171. Sendut, *supra* note 169.

For its part, Russia has never taken a consistent position on "unwilling or unable." In 2002, Russia invoked the test to justify attacking Chechen rebels on Georgian territory, insisting that it had a right of self-defence against the group insofar as "the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border... and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation."[172] Twelve years later, however, Russia joined China and many other states in condemning the American invocation of "unwilling or unable" in Syria, arguing that "any action aimed at combating the threat of ISIL and groups like it must be carried out in accordance with the principles of the Charter of the United Nations," which requires anti-terrorist operations to be "conducted either with the consent of the sovereign Governments or sanctioned by the Security Council."[173] Russia has never tried to reconcile these two positions.

3.2. International Humanitarian Law

Great Power disagreements over primary rules are less common in *jus in bello* than in *jus ad bellum*, likely because the vast majority of IHL rules are contained in treaties binding the US, Russia, and China, rendering custom a less important source of law. That is particularly true for international armed conflicts (IAC): the US, Russia, and China are parties to the four Geneva Conventions; Russia and China are parties to AP I, while the US has signed AP I and is thus prohibited from frustrating its object and purpose. This section thus begins by discussing the Great Powers' general approach to the creation of primary rules of IHL. It then turns to one specific area of IHL in which the US has taken a particularly idiosyncratic view of rule creation: non-international armed conflict.

172. Sergey Lavrov, *Letter Dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, UN Doc. S/2002/1012 (12 September 2002).
173. UNSC Doc. S/PV.7271 (19 September 2014).

3.2.1. General Approach

3.2.1.1. United States

As noted above, the US has been deeply critical of the ICRC *Customary International Humanitarian Law* study, insisting that it takes a flawed approach to both elements of custom: state practice and *opinio juris*. More specifically, the US claims that the ICRC has made a "general error" by asserting that "a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all States, including with respect to a significant number of States... that have declined to become a party to those Protocols."[174] In their official response to the ICRC on behalf of the US, John Bellinger and William Haynes provide four "illustrative" examples of supposedly customary rules whose very existence – as opposed to their applicability in non-international armed conflict (NIAC), discussed below – it believes are not adequately supported by state practice and *opinio juris*: Rule 31, which provides that states are required to "respect and protect" humanitarian relief personnel even if those personnel are present on the state's territory without its consent;[175] Rule 45, which prohibits states from using convention or nuclear weapons that are expected to "cause widespread, long-term and severe damage to the natural environment";[176] Rule 78, which says states are prohibited from using all bullets that explode in the body, including those that are not designed to do so;[177] and Rule 157, which provides that states are entitled to exercise universal jurisdiction over all war crimes.[178]

Some American objections to the ICRC's conclusions are well-founded, such as for Rule 157. But the US is not above criticism for its methodological approach to custom formation. To begin with, although it does not hesitate to claim that many of the ICRC's assertions concerning the customary status of provisions in AP I and II are flawed, the US is infamously vague about which provisions it *does* consider customary. That is particularly true of the Law of War Manual, which is the most

174. Bellinger & Haynes, *supra* note 29, at 448.
175. *Id*. at 450.
176. *Id*. at 455.
177. *Id*. at 460.
178. *Id*. at 466.

detailed statement of the US's understanding of IHL. As Boothby notes, "[t]he reader of the Manual will find that sometimes an assertion is made as to the customary status of a particular rule or of a treaty provision, but that frequently no such assertion is made. The effect is that the reader is often left in doubt as to whether the DoD does or does not consider a particular rule to be customary."[179]

Moreover, US assertions about various IHL rules are often no less methodologically problematic than the ICRC's assertions.[180] This is the case both when the US rejects the existence of a particular rule under customary international law and when it accepts that a particular rule exists – either in treaty or in custom – but adopts a contestable interpretation of it. In terms of the former, for example, the Law of War Manual rejects the ICRC's claim that custom prohibits an attacker from using lethal force against a lawful target (such as a member of a state's regular armed forces) if it is possible to neutralise the target with non-lethal force.[181] Although the US position is almost certainly correct, the Manual provides not even one example of another state that takes the same position. Indeed, the only source it provides for its position is a memo written by a former high-ranking US Army JAG.[182]

Similar problems undermine US interpretations of various IHL rules. Two examples are illustrative. First, the Law of War Manual claims that "[f]or an offer of surrender to render a person *hors de combat*, it must be feasible for the opposing party to accept the offer."[183] Art. 41 of AP I, however, does not condition *hors de combat* status on the feasibility of surrender: a combatant is protected from attack as soon as he manifests an intention to surrender, regardless of whether he can feasibly be captured. In defence of its position, which explicitly contradicts the text of AP I, the US cites no state practice and provides only two citations: a memo written by a former US State Department Legal Adviser asserting

179. William H. Boothby & Wolff Heintschel von Heinegg, The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual (CUP, 2018): 7.
180. *See, e.g.*, *id*. at 116 ("It is indeed difficult to see how so many elements of an authoritative treatise on international law can be properly based on so relatively few references to its recognised sources.").
181. Law of War Manual, *supra* note 36, at 2.2.3.1.
182. *Id*. at n. 45.
183. *Id*., 5.9.3.3.

the feasibility requirement[184] and a report on the Iraq War written by a DoD Under-Secretary that makes the same claim.[185] Such self-referentiality proves nothing other than that the US believes the US position is correct.

Second, the Law of War Manual claims that it is lawful to target objects that make an "effective contribution to the war-fighting or war-sustaining capability of an opposing force," such as natural resources that can be used for military purposes.[186] That position goes well beyond Art. 52(2) of AP I, which deems targetable only objects that make "an effective contribution to military action."[187] And once again the US defends its interpretation of AP I solely by reference to American sources: another memo by a former State Department Legal Advisor; a chapter in a book written by the former high-ranking JAG mentioned above; and an article written by an American scholar published in a US Air Force Academy legal journal.[188] Moreover, the Manual's lone example of a targetable natural resource, cotton, is based on the US's own practice – Union forces destroying the crop in the South during the Civil War.[189]

3.2.1.2. Russia

Russia's military law broadly incorporates the primary rules of IHL. The most important legislation is the "Law on the Status of Military Service Personnel," which was adopted in 1998. Art. 26 of the Law provides that all Russian soldiers must observe "universally recognised principles and norms of international law and the international treaties of the Russian Federation." That language is identical to Art. 15(4) of the Russian Constitution, which scholars interpret to mean that military law encompasses both treaties and customary international law.[190]

184. *Id*. at n. 322.
185. *Id*. at n. 326.
186. *Id*. at 5.6.6.2.
187. Boothby & Heintschel von Heinegg, *supra* note 179, at 119 ("The reader may wonder why a definition in the main text that is limited to objects that contribute effectively to military action is being supported in the footnote by a reference that widens the notion by reference to objects that are war-sustaining.").
188. *Id*. at 222 n. 224.
189. *Id*. at 296.
190. Riepl, *supra* note 66, at 190.

War crimes, however, are a different story. The new Russian Criminal Code, which was adopted in 1996, contains only one provision relating to war crimes, Art. 356, and that provision is one sentence long: "Cruel treatment of prisoners of war or civilians, deportation of civilian populations, pillage of national property in occupied territories, and use in a military conflict of means and methods of warfare prohibited by an international treaty of the Russian Federation, shall be punishable by deprivation of liberty for a term of up to 20 years." Art. 356 has two significant problems. The first is that, because the provision is so short, it excludes not only some of the grave breaches that Russia has a treaty obligation under the Geneva Conventions to criminalise (such as taking hostages or unnecessary destruction of property), but also nearly all of the non-grave breaches that are widely considered to be criminal (such as the 26 war crimes listed in Art. 8(2)(b) of the Rome Statute).[191]

The second problem is that Art. 356 explicitly fails to criminalise war crimes that apply to Russia via customary international law, because the provision refers only to "means and methods of warfare prohibited by *treaties* of the Russian Federation." As a result, Russia cannot prosecute any violation of IHL in NIAC as a war crime, because Russia has not ratified AP II, or the prohibitions in Common Article 3 of the Geneva Conventions, which apply to Russia as a matter of conventional IHL, fall outside of Art. 356.[192]

It is worth noting that Russia rarely defends IHL violations by arguing either that a particular primary rule of international law does not exist or that the West is misinterpreting the rule. Instead, it tends to rely on what Riepl calls a "toolbox of evasion tactics."[193] This toolbox contains three basic tools: (1) claiming that IHL does not apply to the actions of its soldiers – discussed below; (2) arguing that the violation was committed by a group (such as the Little Green Men) whose actions were not attributable to Russia; and (3) crudely denying the facts underlying the allegation, "thereby creat[ing] an alternative narrative that makes any discussion about the law superfluous, because Moscow has already undermined the factual grounds needed for any legal conclusion."[194]

191. *Id*. at 186-87.
192. *Id*. at 188.
193. *Id*. at 211.
194. *Id*. at 368.

3.2.1.3. China

Treaties concerning IHL are not automatically transformed into domestic Chinese law. They nevertheless apply to the People's Liberation Army (PLA), because Art. 67 of China's National Defence Law, adopted in 1997, explicitly states that "in its military relations with other countries, the P. R. China observes the relevant treaties and agreements that it has concluded, acceded to or accepted." That means the PLA is required to observe all of the provisions in both AP I and AP II, which China has ratified – a greater obligation than for American and Russian soldiers, given that the US has ratified neither Protocol, Russia has not ratified AP II, and many of the provisions in both Protocols are not considered customary.[195] That said, China's criminal law does not contain a specific provision concerning war crimes, not even for the grave breaches it is obligated to criminalise under the Geneva Conventions and AP I.[196]

3.2.2. Non-International Armed Conflict

Few IHL rules that apply in NIAC bind the Great Powers as a matter of treaty law: although China has acceded to AP II, neither the US nor Russia has signed or ratified it. It is not surprising, therefore, that disagreements over primary rules tend to focus on the law governing NIAC, where customary international law continues to play a critical role.

As noted earlier, instead of contesting which primary rules of IHL in AP II apply in NIAC as a matter of custom, Russia prefers to deny that the hostilities it engages in with NSAs qualify as non-international armed conflicts in the first place, thereby rendering the custom issue irrelevant. Most notably, Russia described both Chechen Wars as "law-enforcement operations" to which IHL did not apply,[197] despite each involving hostilities between Russian forces and organised armed groups that were sufficiently intense to satisfy the *Tadic* test for NIAC. Indeed, the Russian claim was so obviously misleading in the First Chechen War that the Russian Constitutional Court, normally deferential to the executive, classified the situation as a NIAC and held that the rules of IHL

195. Greer, *supra* note 144, at 723.
196. Binxin Zhang, *China and International Humanitarian Law*, in de la Rasilla & Cai, *supra* note 103, at 309.
197. Riepl, *supra* note 66, at 288.

were "binding on both parties to the armed conflict" – a ruling the Russian government completely ignored.[198]

For its part, China has said very little about which IHL rules apply in NIAC as a matter of customary international law, likely because it is the only one of the three Great Powers that is bound by AP II. Instead, it has simply insisted that because IAC and NIAC are different, "rules of international law that apply to international armed conflicts, unless supported by State practice, cannot be copy-pasted to non-international armed conflicts."[199]

The Chinese comment is likely directed at the US, because the US relies precisely on a problematic "cut-and-paste" model when determining whether a particular primary rule applies in NIAC. On the one hand, it consistently criticises the ICRC for lacking methodological rigor when it concludes that an IAC-based rule applies in NIAC as a matter of custom. That is the case for three of the four rules discussed above: Rule 31 (humanitarian relief),[200] Rule 45 (natural environment),[201] and Rule 78 (exploding bullets).[202] On the other hand, the US has consistently claimed that "analogy" justifies applying a number of rules in NIAC that apply as a matter of treaty law only in IAC. It has argued, for example, that a "declaration of war" by al-Qaeda is sufficient to trigger a NIAC;[203] that it has the right to target and detain members of any organised armed group that is a "co-belligerent" with al-Qaeda;[204] that GC IV provides the standard of detention for civilians in a NIAC;[205] and that it can detain any individual who "substantially supports" al-Qaeda.[206]

198. *Id*. at 289.
199. Statement by Jia Guide, *supra* note 112, at 124.
200. Bellinger & Haynes, *supra* note 29, at 454.
201. *Id*. at 460.
202. *Id*. at 465.
203. U.S. v. Al-Qosi, *Government Response to Defense Motion to Dismiss the Charges for Lack of Subject Matter Jurisdiction to the Extent They Related to the Period Prior to 11 September 2001*, D-013 (7 November 2008), 1.
204. Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al Qa'ida or an Associated Force*, at 27 (Undated), http://msnbcmedia.msn.com/i/msnbc/sections/news/ 020413_DOJ_White_Paper.pdf.
205. Department of Defense Directive 2310.01E (19 August 2014): Appendix, at ¶ 3(m)(5).
206. *See* Kevin Jon Heller, *The Use and Abuse of Analogy in IHL*, in Jens David Ohlin (ed.), Theoretical Boundaries of Armed Conflict and Human Rights (CUP, 2016): 233.

These are remarkable claims from a methodological perspective. The US has never taken the position that these IAC-based rules apply in NIAC as a matter of customary international law.[207] Nor has the US ever explained why international law permits it to analogise between IAC and NIAC concerning IAC-based rules that it likes – while prohibiting analogy for rules that it does not, such as the rules on humanitarian relief, the natural environment, and exploding bullets. Worse still, on the rare occasions when an American court has asked the US to justify relying on analogy to expand its NIAC targeting and detention power, Washington has been completely unable to do so. To quote the judge in the *Hamlily* case, for example, "[a]fter repeated attempts by the Court to elicit a more definitive justification for the 'substantial support' concept in the law of war, it became clear that the government has none."[208]

A comprehensive analysis of the US's reliance on analogy is beyond the scope of this report – and the author has provided one elsewhere.[209] Suffice it to say that the US's inability to explain why it can use analogy to apply rules of IHL in NIAC that do not apply in such conflicts either by treaty or by custom undermines – to put it mildly – its repeated insistence that the ICRC's analysis of customary IHL lacks methodological rigour. Indeed, the US approach to analogy seems little more than a legal fig-leaf for the raw expression of military power.

3.3. Arms Control

Arms control is the one area where the Great Powers agree more than they disagree. That is true in two respects. First, the US, Russia, and China are much less willing to support limitations on the development and use of weapons than other states – almost certainly because, as technologically powerful states, they tend to be the leading players in the kinds of weapons that arms control seeks to prohibit or regulate. Second, insofar as the US, Russia, and China are willing to support arms

207. *See id*. at 235.
208. Quoted in *id*.
209. *See generally id*.

control, they all have a strong preference for doing so by treaty instead of by custom.

3.3.1. Nuclear Weapons

The Great Powers have been generally willing to use treaties to limit nuclear weapons. All three are party to the Nuclear Non-Proliferation Treaty (NPT), the Convention on the Physical Protection of Nuclear Material (CPPM), and the International Convention for the Suppression of Acts of Nuclear Terrorism, while the US and Russia are party to the Limited Test Ban Treaty (LTBT). By contrast, none of the Great Powers are party to the Comprehensive Test Ban Treaty (CTBT)[210] or the Treaty on the Prohibition of Nuclear Weapons (TPNW). As signatories to the CTBT, however, the US, Russia, and China have issued a joint statement acknowledging that testing a nuclear weapon would violate international law because it would "defeat the object and purpose" of the treaty.[211]

China has generally complied with its nuclear treaty obligations, although experts have claimed that the rapid expansion of its nuclear arsenal violates at least the spirit of Art. VI of the NPT, which requires states parties to "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race."[212] The US has a similar record, although it is widely accepted that the Reagan administration's pursuit of the "Star Wars" missile-defence system violated the bilateral US-Soviet Anti-Ballistic Missile (ABM) treaty.[213] Instead of withdrawing from the ABM treaty, as the Bush administration ultimately did in 2001, the Reagan administration attempted to reinterpret its terms, insisting that the treaty did not apply to missile systems that were based on different physical principles than those contemplated at the time of ratification. The argument was so weak that the Senate Foreign Relations Committee concluded in a damning report that "the Reagan Administration's

210. Russia revoked its ratification of the CTBT in 2000.

211. S.C. Res. 2310 (23 September 2016), ¶ 4; *Joint Statement on the Comprehensive Nuclear Test-Ban Treaty by China, France, the Russian Federation, the United Kingdom, and the United States* (15 September 2016).

212. *See, e.g.*, Thomas D. Grant, *China's Nuclear Buildup Violates the NPT,* National Interest (14 June 2022), https://nationalinterest.org/feature/china%E2%80%99s-nuclear-buildup-violates-npt-202922.

213. Chayes, *supra* note 13, at 69.

'reinterpretation' of the ABM Treaty constitutes the most flagrant abuse of the Constitution's treaty power in 200 years of American history."[214]

Russia has more openly violated the terms of various nuclear-weapons treaties. Because Russia fielded "multiple battalions" of a new missile that violated the bilateral Intermediate-Range Nuclear Forces (INF) Treaty, the US withdrew from the INF in 2019. Russia eventually acknowledged the existence of the missile but continued to falsely insist that it was INF-compliant.[215] Similarly, Russia consistently violated various procedural requirements of the New START treaty (such as allowing inspections) prior to suspending its participation in the treaty in March 2023.[216] The US rejects the suspension as unlawful given Russia's violations.[217]

All three of the Great Powers are sceptical of the idea that customary international law imposes any meaningful limits on the development, deployment, or even use of nuclear weapons. For example, during the *Nuclear Weapons Advisory Opinion* litigation at the ICJ, Russia vociferously rejected the idea that custom prohibited the use of nuclear weapons.[218] The US has gone even further. It not only agrees with Russia that there is no customary prohibition on the use of nuclear weapons, it also denies that key rules of IHL apply to the use of nuclear weapons via custom, most notably Arts. 35(3) and 55 of AP I, which protect the environment from widespread, long-term, and severe damage.[219]

The US view of the doctrine of specially affected states, mentioned above, is key to its insistence that Arts. 35(3) and 55 do not apply to nuclear weapons under customary international law:

214. Quoted in *id*. at 70.
215. *Statement of Michael R. Pompeo, Secretary of State, U.S. Withdrawal from the INF Treaty on August 2, 2019*, https://2017-2021.state.gov/u-s-withdrawal-from-the-inf-treaty-on-august-2-2019/#:~:text=On%20February%202%2C%202019%2C%20the,continuing%20violation%20of%20the%20treaty.
216. Shannon Bugos, *Russia Suspends New Start*, Arms Control Association (March 2023), https://www.armscontrol.org/act/2023-03/news/russia-suspends-new-start.
217. U.S. Department of State Fact Sheet, *Russian Noncompliance with and Invalid Suspension of the New START Treaty* (1 June 2023), https://www.state.gov/russian-noncompliance-with-and-invalid-suspension-of-the-new-start-treaty/#:~:text=Russia's%20noncompliance%20threatens%20the%20viability,to%20assess%20Russian%20nuclear%20deployments.
218. Letter dated 19 June 1995, *supra* note 72, at 14.
219. Bellinger & Haynes, *supra* note 29, at 456.

> *The weight of the evidence – including the fact that ICRC statements prior to and upon conclusion of the Diplomatic Conference acknowledged this as a limiting condition for promulgation of new rules at the Conference; that specially affected States lodged these objections from the time the rule first was articulated; and that these States have made them consistently since then – clearly indicates that these three States [the US, UK, and France] are not simply persistent objectors, but rather that the rule has not formed into a customary rule at all.*[220]

The US also relied on the specially-affected states doctrine in the *Nuclear Weapons Advisory Opinion*, arguing that custom does not prohibit the use of nuclear weapons because "customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected."[221] This statement encapsulates the fundamental American assumption concerning the doctrine: namely that a state qualifies as specially affected only by engaging in the practice whose customary status is at issue – here, the possession of nuclear weapons, the necessary precondition of their use.

Although an adequate critique of this assumption is beyond the scope of this report – and has been offered by the author elsewhere[222] – it is worth noting that nothing in the ICJ's jurisprudence supports the idea that a state should be considered specially affected only if it engages in a particular practice. On the contrary, the Court has implied in two cases, *Fisheries Jurisdiction* and *Marshall Islands*, that a state should also be considered specially affected if it has felt the *effects* of a practice in a way that other states have not.[223] In the latter case, for example, the Marshall Islands accused the United Kingdom, India, and Pakistan of failing to live up to their international obligations to pursue nuclear disarmament. The narrowly divided Court ultimately dismissed the case for lack of a legal dispute between the parties, but it suggested in its Preliminary Objections judgment that it considered the Marshall Islands specially affected with regard to customary issues concerning nuclear weapons: "[t]he Court notes that the Marshall Islands, by virtue of the suffering

220. *Id*. at 457.
221. Quoted in Heller, Specially-Affected States, *supra* note 38, at 203.
222. *See generally id*.
223. *Id*. at 207.

which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament."[224]

Considering both states that engage in a practice and states that are affected by a practice in a distinctive way to be "specially-affected" democratises the doctrine, preventing states like the US from claiming a "veto" over custom if they do not want to prohibit a particular practice. No other state has adopted such a restrictive understanding of what qualifies a state as specially-affected – and China has explicitly rejected it, insisting that "big or small, rich or poor, strong or weak... [a]s long as a state has specific interests and real influence in these fields, its practice must be given full importance."[225]

3.3.2. Autonomous Weapons

A UN-created Group of Governmental Experts (GGE) has been debating the regulation of lethal autonomous weapons systems (AWS) for the past decade. While these negotiations have yet to produce any kind of consensus, "[a] substantial group of states has argued for an instrument banning AWS, for example in the form of a legally binding treaty or an additional protocol to the CCW... another smaller group of states has been categorically against such measures."[226]

That "smaller group" is led by the US and Russia. The US has argued for voluntary commitments instead of a binding treaty, proposing to the GGE in 2021 multilateral talks to produce a "code of conduct" concerning AWS development and use.[227] The proposal failed because the US approach to AWS, reflected in its Directive 3000.09, "Autonomy in Weapons Systems," has little in common with the preferences of states that are critical of the weapons: not only does the US not support prohibition or regulation of AWS, it replaces the requirement of "meaningful human control," which most states support, with the more expan-

224. Quoted in *id*. at 198.
225. *Statement by the Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China*, quoted in *id*. at 208.
226. Ingvild Bode et al., *Prospects for the Global Governance of Autonomous Weapons: Comparing Chinese, Russian, and US Practices*, 25 Ethics and Information Technology (2023): 2.
227. Human Rights Watch and IHRC, *Review of the 2023 US Policy on Autonomy in Weapons Systems* (February 2023): 8.

sive requirement of "appropriate levels of human judgment."[228] As Bode notes, the US's promotion of the latter requirement "provides a window into Washington's efforts to shape the global regulatory debate on AWS without binding its own practices of weapons development."[229]

Russia's position is even more anti-regulation. It has not only opposed efforts to limit the development and use of AWS through "hard" law, such as a treaty or an additional protocol to the Convention on Certain Conventional Weapons (CCW), it has even opposed "soft" law regulations, such as political declarations or the US's preferred code of conduct.[230] The Russian rationale for opposing all such regulatory methods is a familiar one: "[w]hile stating its commitment to human control over AWS, Russia has been advocating for a sovereignty-based approach where specific forms and methods' of control 'should be left to the discretion of states'."[231] Some experts explicitly attribute Russia's emphasis on sovereignty in the context of AWS to its "self-perception as a great power."[232]

American and Russian opposition to binding regulation that would prohibit or even substantially regulate AWS is not surprising, because both are leaders in AWS development. China's position is more complicated but consistent with its national self-interest. Although China is rapidly developing AWS and has committed to joining the US and Russia as world leaders in the technology by 2030,[233] it is "still not capable of conquering or dominating this new weapon system due to restricted access to core technologies."[234] It has thus claimed at the GGE that although AWS *use* should be prohibited by treaty, prohibiting their *development* is undesirable.[235] That convenient position allows China to appear committed to avoiding the supposed dangers of AWS (it participates in the Campaign to Stop Killer Robots) while leaving it free to develop a technology it views as essential to its strategic interests.

228. *Id*. at 9.
229. Bode et al., *supra* note 226, at 8.
230. Nadibaidze, *supra* note 62, at 418.
231. Bode et al., *supra* note 226, at 6.
232. Nadibaidze, *supra* note 62, at 409.
233. Putu Shangrina Pramudia, *China's Strategic Ambiguity on the Issue of Autonomous Weapons Systems*, 24 Global: Jurnal Politik Internasional (2022): 15.
234. *Id*. at 25.
235. *Id*. at 14.

3.3.3. Space-Based Weapons

A similar dynamic is at work in the context of efforts to prohibit space-based weapons. The US, Russia, and China are each party to the four key UN space treaties: the Outer Space Treaty (OST), the Return of Astronauts Treaty, the Liability Convention, and the Registration Convention. None, however, has ratified the Moon Agreement. Of the four key space treaties, only the OST imposes restrictions on the militarisation of space – and those restrictions are generally limited to weapons of mass destruction. In 2008, however, Russia and China introduced in the Conference on Disarmament (CD) a draft treaty entitled Prevention on the Placement of Weapons in Outer Space (PPWT). The treaty included provisions that would have prohibited states from "plac[ing] in orbit around the Earth any objects carrying any kinds of weapon" and "resort[ing] to the threat or use of force against outer space objects."[236] The draft PPWT also defined for the first time in space negotiations key terms like "outer space," "weapon," and "use of force."[237]

Russia and China asserted the need for the PPWT by claiming that "[o]nly a treaty-based prohibition of the deployment of weapons in outer space and the prevention of the threat or use of force against outer space objects can eliminate the emerging threat of an arms race in outer space and ensure the security for outer space assets of all countries which is an essential condition for the maintenance of world peace."[238] The draft PPWT, however, also reflected their traditional emphases on sovereignty, providing that "[e]ach State Party to the Treaty shall carry out activities in outer space in accordance with the general principles of international law and shall not violate the sovereignty and security of other States."[239] That provision was particularly unsurprising for China, because it had earlier attempted to take advantage of the OST's failure to define "outer space" by claiming "absolute vertical sovereignty" – the

236. *See* Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (2014), https://reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2014/documents/PPWT2014.pdf.

237. *Id.*

238. *Joint Russia/China Statement on Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects* (28 June 2002): 2, https://digitallibrary.un.org/record/473291/files/CD_1679-EN.pdf.

239. *Id.* at 3.

idea that "China's terrestrial borders extend indefinitely upward through outer space and that all the space within those perimeters is China's sovereign territory."[240] That idea was not endorsed by any other state, including Russia, and China ultimately abandoned it when it joined with Russia to support the PPWT.

Although a serious effort, the draft PPWT did not obtain widespread support. Led by the US, several space-faring states took issue with the treaty's definition of outer space and argued that it would be impossible to effectively verify a prohibition of space-based weapons or ground-based ASAT systems. Russia and China responded by introducing a new draft of the PPWT in 2014 that did not attempt to define outer space, but verification concerns have led states opposed to the original draft to maintain their opposition.[241]

US opposition to the draft PPWT is indicative of its general lack of interest in regulating space-based activities (military or otherwise). After the failure of the PPWT, the European Union offered a series of drafts of an International Code of Conduct for Outer Space Activities that would have provided "rules of the road" for space operations. Despite the Code not being intended to be legally binding, the US expressed only "lukewarm" support for it.[242] Moreover, it has been decades since the US has pursued any comprehensive initiative to regulate space activities, arms control or otherwise, with the Obama administration actually adopting a formal policy not to do so.[243]

3.4. Cyberspace

All three of the Great Powers accept that the basic principles of international law apply in cyberspace no less than in the physical realm. According to China, for example, "[t]he UN Charter and the principles

240. White, *supra* note 87, at 458.
241. Benjamin Silverstein et al., *Alternative Approaches and Indicators for the Prevention of an Arms Race in Outer Space* (May 2020): 12, https://unidir.org/publication/alternative-approaches-and-indicators-for-the-prevention-of-an-arms-race-in-outer-space/.
242. David A. Koplow, *Deterrence as the MacGuffin: The Case for Arms Control in Outer Space*, 10 Journal of National Security Law & Policy (2019): 352.
243. *Id*. at 353.

enshrined in it, including sovereign equality, refraining from the use or threat of force, settlement of international disputes by peaceful means and non-intervention in the internal affairs of other States, apply in cyberspace."[244] The US[245] and Russia[246] have made equivalent statements.

Their agreement, however, does not run particularly deep. To begin with, the three states take different positions concerning one particularly important area of international law: IHL. The US claims that "the law of war... is [p]articularly relevant for military operations" conducted in cyberspace.[247] China and Russia, however, have hesitated to endorse that position, each insisting at the UN Open-Ended Working Group (OEWG) on cyberspace – with little explanation of why – that IHL "neither applies fully nor automatically."[248]

Moreover, and more importantly, China and Russia have taken a similar position on the basic principles of international law such as the prohibition of the use of force and the principle of non-intervention, questioning whether those principles can be mechanically or straightforwardly applied in cyberspace. As Russia said at the GGE, "given the specific legal nature of the information environment, notably, the fact that activities therein can be anonymous, the application of international law to the use of information and communications technologies (ICTs) should not be automatic and should not be carried out by simple extrapolation."[249]

244. National Position of China, *supra* note 130.
245. Brian J. Egan, *Remarks on International Law and Stability in Cyberspace* (10 November 2016): 9, https://2009-2017.state.gov/s/l/releases/remarks/264303.htm ("It continues to be the view of the United States that existing international law applies to State conduct in cyberspace.").
246. National Position of Russia, https://cyberlaw.ccdcoe.org/wiki/National_position_of_the_Russian_Federation_(2021) ("Russia assumes that, for the present, the international community has reached consensus on the applicability of the universally accepted principles and norms of international law.").
247. Egan Remarks, *supra* note 245, at 9.
248. Aleksi Kajander, *Unnecessary Repetition: Russia's Latest Attempt at a New UN Convention on Cyberspace*, National Cooperative Cyber Defence Centre of Excellence (Undated): 1, https://ccdcoe.org/news/2023/unnecessary-repetition-russias-latest-attempt-at-a-new-un-convention-on-cyberspace/.
249. National Position of Russia, *supra* note 246.

3.4.1. Treaty

This scepticism explains why Russia and China claim that states should negotiate and adopt, under UN auspices, a new treaty concerning how international law applies in cyberspace. China has thus stated that "[t]o maintain long-lasting peace and stability in cyberspace, new international legal instruments tailored to the attributes of ICTs and evolving realities should be developed based on broad participation of all States,"[250] while Russia has argued that the legal regulation of cyberspace "should be carried out by means of developing and adopting a binding universal convention on international information security at the UN level."[251]

The US, by contrast, opposes negotiating a multilateral cyber-treaty. It would prefer "to develop soft law norms through a multistakeholder process that includes nongovernmental organizations, the private sector, civil society, academia, and individuals."[252] US resistance to a new treaty is due in large part to fear that Russia and China-led multinational negotiations will result in treaty text that overemphasises – true to their traditional hostility towards individual rights – the right of national governments to limit their citizens' access to information:

> *Some States invoke the concept of State sovereignty as a justification for excessive regulation of online content, including censorship and access restrictions, often undertaken in the name of counterterrorism or "countering violent extremism." And sometimes, States also deploy the concept of State sovereignty in an attempt to shield themselves from outside criticism... Any regulation by a State of matters within its territory, including use of and access to the Internet, must comply with that State's applicable obligations under international human rights law.*[253]

US opposition to a cyber-treaty is justified in light of a resolution adopted by a United Nations Office on Drugs and Crime committee in 2019 that was sponsored by Russia, China, Belarus, Cambodia, Iran, Myanmar, Nicaragua, Syria, and Venezuela. The resolution, which is en-

250. National Position of China, *supra* note 130.
251. National Position of Russia, *supra* note 246.
252. Roberts, *supra* note 59, at 313.
253. Egan Remarks, *supra* note 245.

titled "Countering the Use of Information and Communications Technologies for Criminal Purposes," creates an expert group that is tasked with determining the terms of reference for a cyber-treaty. The intent of the treaty is precisely to inscribe "digital authoritarianism" into international law, as illustrated by the resolution's rejection of the Budapest Convention on Cybercrime, which was drafted to strike an acceptable balance between national regulation and individual rights.[254] States that support an open internet, such as the US, thus find themselves in a no-win situation:

> *If they join the drafting group, they undermine their own principled opposition to the resolution creating it, advancing the Russian and Chinese agenda. But if the United States and other champions of an open Internet boycott the process, authoritarian regimes will be free to shape the treaty's terms of reference in ways that advance digital authoritarianism even more.*[255]

Russia and China's successful promotion of the resolution, with the catch-22 it has created for the US, indicates that "Moscow and Beijing are becoming far more skilled in using procedural rules and practices to advance their agendas."[256] That ability bodes ill for the traditional assumption that multinational institutions like the UN function primarily as vehicles to expand the reach of individual rights.

3.4.2. Custom

Of the three Great Powers, the US alone has publicly commented on the role customary international law plays in creating primary rules in cyberspace. And it has done so specifically to emphasise that custom does not prohibit one of the key American cyber-capabilities, espionage, arguing that "[t]here is no anti-espionage treaty, and there are many concrete

254. Justin Sherman & Mark Raymond, *The U.N. assed a Russia-Backed Cybercrime Resolution. That's Not Good News for Internet Freedom*, Washington Post (4 December 2019), https://www.washingtonpost.com/politics/2019/12/04/un-passed-russia-backed-cybercrime-resolution-thats-not-good-news-internet-freedom/.
255. *Id.*
256. *Id.*

examples of States practicing it, indicating the absence of a customary international law norm against it."[257]

Despite its view of cyber-espionage, the US does not completely rule out the possibility that "[i]n certain circumstances, one State's non-consensual cyber operation in another State's territory could violate international law, even if it falls below the threshold of a use of force."[258] Unlike many states, however, it has not identified what those specific circumstances might be. Instead, the US simply suggests – unhelpfully – that this "challenging area of the law... is one that ultimately will be resolved through the practice and *opinio juris* of States."[259]

The issue of when cyber-espionage or a low-intensity cyber-operation (LICO) violates customary international law – particularly the principle of sovereignty – is addressed extensively in the Tallinn Manual 2.0. Although the expert group adopted a restrictive position on those questions, denying that international law prohibits cyber-espionage and claiming that a LICO violates sovereignty only insofar as it causes physical damage or an equivalent loss of cyber-infrastructure functionality,[260] the US has emphasised that the Tallinn Manual 2.0 does not count as either state practice or *opinio juris* because "it is neither State-led nor an official NATO project."[261] Indeed, the US has criticised the outsized role that academics and civil society have played in the cyber realm more generally, insisting that "[i]nterpretations or applications of international law proposed by non-governmental groups may not reflect the practice or legal views of many or most States" and that "States' relative silence could lead to unpredictability in the cyber realm, where States may be left guessing about each other's views on the applicable legal framework."[262] Of course, the US seems reluctant to find out what precisely those views are, as indicated by its opposition to multilateral negotiations on a new cyber-treaty.

257. Egan Remarks, *supra* note 245.
258. *Id*.
259. *Id*.
260. Michael N. Schmitt (ed.), Tallinn Manual 2.0: On the International Law Applicable to Cyber Operations (2017): 20.
261. Egan Remarks, *supra* note 245.
262. *Id*.

Interestingly, China is equally sceptical of the Tallinn Manual 2.0, but for a very different reason – it views it as a form of US and Western lawfare. That is why China is focusing on treaty-based regulation of cyberspace:

> *There is a concern in China that Western States are at an advantage in this process and are already taking advantage of their power in leading the practices and shaping the discourse on cyberspace. The argument is that Western countries, while disfavouring the development of new rules in the form of treaties, are consciously trying to shape the formation of customary rules through both State practice and even more subtle discourses. On this point, the Tallinn Manual 2.0 is often cited as an example of such attempts by the West, and as proof of China's disadvantage in such discourses. As China seeks to more actively participate in the process of the formation of new rules and to exercise more influence in these processes, it is little wonder that it insists on a forum and approach that it considers more to its advantage.*[263]

To this end, China is leaving little doubt about its *opinio juris*, issuing countless public statements on cyber issues.[264] As Linton notes, China thus represents "an interesting example of an Asia-Pacific State deliberately shaping the legal trajectory with practice."[265]

263. Zhang, China and IHL, *supra* note 196, at 326.
264. Suzannah Linton, *Deciphering the Landscape of International Humanitarian Law in the Asia-Pacific*, 101 International Review of the Red Cross (2019): 763.
265. *Id*.

4

Lessons for Denmark

One of the most striking features of the current international order is that even the most powerful states almost always justify their actions by invoking international law. Such international-law justifications are sometimes merely cynical, as when Russia argues that it was entitled to invade Ukraine to protect its nationals from genocide. At other times, however, those justifications appear to be made in good faith, even when the underlying legal argument is deeply problematic. Such is likely the case, for example, when the US claims the right as a specially-affected state to prevent the formation of a customary rule applying environmental concerns to nuclear weapons.

Except in the most extreme situations – Russia claiming that the Ukrainian government is the second coming of the Third Reich – it can be difficult to determine whether a Great Power actually believes its legal claims or is simply invoking international law as a fig leaf to minimise blowback from other states. Moreover, even when it seems clear that a state like the US, Russia, or China actually believes one of its legal claims, *why* they do so is often challenging to determine.

This report has focused on situations in the latter category, where a Great Power genuinely believes its interpretation of international law is the correct one. In such situations, a small state like Denmark is obviously free to ignore the "why" question and simply decide whether it agrees with the act in question as a matter of policy and/or law. Insofar as Denmark wants to achieve a deeper understanding of why a Great Power acted as it did and believed as it did, however, it must consider precisely what this report has explored; namely, the specific view of the formal sources of international law – treaty and custom – that produced the Great Power's belief that its actions were lawful.

Such a deeper understanding is practically important for Denmark in two ways. First, it is essential to Denmark's effective participation in multilateral discussions concerning specific areas of international law that affect it, where the views of the Great Powers tend to have outsized, if often unjustified, influence – the UN Sixth Committee, the OEWG on cyber, the autonomous-weapons GGE, even the International Law Commission. These are not simply fora in which states can express their own views on international law; more importantly, they are fora in which states can attempt to persuade other states to adopt similar ones. A small state like Denmark will find it much easier to impact such discussions if they come to them with a deep understanding of which formal source a Great Power favours and what kinds of arguments concerning the interpretation and application of the formal sources a Great Power tends to accept. Given American hostility to any kind of "hard" regulation of autonomous weapons, for example, Denmark would be better off trying to persuade the US to endorse a meaningful voluntary code of conduct for AWS than lobbying the US to support a treaty that would prohibit them. Similarly, Denmark would find it very difficult to have a productive discussion with the US over which provisions in AP I are customary without at least acknowledging the US's insistence (however implausible) that it qualifies as specially affected with regard to each and every rule of IHL.

To be sure, this kind of "thick" knowledge of how the Great Powers view the formal sources of international law will be most useful for Denmark in the context of bilateral discussions with the US, its ally. Denmark is unlikely to be able to affect how Russia and China view international law. But that does not mean understanding Russia and China's views on the formal sources has no purpose. On the contrary, such understanding remains absolutely necessary in multilateral discussions and negotiations. As we have seen, although the Great Powers invoke the same international law principles and rules when promoting their interests in fora like the GGE and OEWG, they do not always share the same understanding of those principles and rules. The best example is sovereignty: although including a reference to sovereignty in a multilateral treaty may seem innocuous – all states value their sovereignty – when such a reference is included at the request (or insistence) of Russia or China, it is highly likely that they (and their allies) are referring to sovereignty in its Eastphalian form, where "sovereignty" means the power

of the state to ignore individual rights guaranteed by international law. Not recognising that fact can lead to poor diplomatic outcomes, as early negotiations over regulating cyberspace demonstrated:

> *China and Russia argued for the negotiation of a new treaty on information security on the basis that current laws either did not apply to cyber activities or were not suited to the task of regulating this new technology. By contrast, the United Kingdom took the position that a new multilateral treaty governing cybersecurity was unnecessary because the existing law of armed conflict, specifically the principles of necessity and proportionality, governed the use of such technologies. Likewise, the United States claimed that "[t]he same laws that apply to the use of kinetic weapons should apply to state behavior in cyberspace." Neither the first nor the second Group of Governmental Experts was able to reach agreement on this issue. It was only when the 2013 report of the third Group of Governmental Experts was submitted that the parties agreed that "[i]nternational law, and in particular the Charter of the United Nations, is applicable" to information security and cybersecurity, which was viewed as a win for the Western camp. But the report also recognized the principles of "[s]tate sovereignty and international norms and principles that flow from sovereignty," including that states have jurisdiction over information and communications technology infrastructure within their territory, which was viewed as a win for China and Russia.*[266]

There is a second reason why a small state like Denmark should pay attention to how the Great Powers understand the relationship between the formal sources and the primary rules of international law: doing so will foreground the importance of Denmark having a clear, well-demarcated position concerning *its own* understanding of that relationship. Although well-trained government international lawyers are normally aware of how their state generally approaches treaty and custom, few are trained to pay attention to subtle methodological differences between how Denmark approaches the formal sources and how other states do. Recognising how those differences can lead to good-faith disagreements over primary rules of international law – even between allies – can help

266. Roberts, *supra* note 59, at 310.

a small state like Denmark clarify its position on various methodological issues: whether to emphasise treaty or custom or soft law in a particular legal area; what theory of treaty interpretation to endorse; how the role of silence in the creation of custom should be understood; and so on. Clear positions on such methodological issues will enable Denmark to advocate more effectively for its legal interests – and for the legal interests of its allies – on the various issues covered by this report.

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