Introduction

For the average layperson, the Permanent Members of the United Nations Security Council – the United States, the United Kingdom, France, China, and Russia – are in a class of their own when it comes to compliance with international law, and they will do whatever is in their national interests, even when it means breaking the law. Although the Permanent Members of the Security Council do violate international law, there is no evidence they do so more often than other member states of the United Nations. Nor is there any evidence to support the notion that the Permanent Members do not respect international law most of the time. Like all states, the Permanent Members see norm compliance as a fundamental aspect of international relations, and they know the repercussions of non-compliance. Retaliation is too dangerous, or small states, which make up the majority of states in the United Nations system, cannot muster the support to punish them. Hence, the Permanent Members of the Security Council do act with impunity. Therefore, great powers can get away with violating international law even though they seldom admit to doing so. A Permanent Member will violate international law if it can get away with it and knows that other states do not have the means to retaliate against it. However, great powers always pretend they are acting consistently with international law, or they are acting unilaterally to upload international law. They usually invoke international law to justify their actions, even though they know their justification is not persuasive. Both the US/UK's justifications for invading Iraq in 2003 and Russia's justifications for invading Ukraine were not convincing. However, they crafted their reasoning in international legal language, despite the dubious nature of their arguments. International law should be applied equally within all state's domestic constitutional order. However, how states implement international law in their domestic legal systems determines how they interpret international law. States interpret international law differently based on their constitutional order and the constraints their constitutions impose on them. States also interpret international law based on their political experiences, historical legacies, legal traditions, and their power and standing in international relations.

The Permanent Members of the UN Security Council (P5) have always carved out exceptions to international law for themselves. Beginning with the Peace of Westphalia in 1648 and continuing with the Charter of the United Nations in

1945, the P5 included exemptions for themselves in the norms to avoid complying with the rules when it was in their interest to do so. The Peace of Westphalia created a balance of power that placed the responsibility for preserving the international legal order with the great powers. That responsibility was invoked during the Napoleonic Wars (1813–1815) and later institutionalized in the Concert of Europe (1815–1913). The Concert recognized a special responsibility for the great powers to manage the international system. Collectively, they could use military force to prevent a hegemon from dominating the system. The Concert system preserved peace in Europe for almost a century. The Concert called for diplomacy to settle great power disputes but allowed great power rivalries in overseas territories. Colonial rivalries were not viewed as a breach of Concert norms. In fact, two great powers during that period, France and Russia, intervened in the Ottoman Empire in 1860 to protect the Christian minority who were being persecuted by the majority Muslim population. The great powers were responsible for preserving the Covenant of the League of Nations, but some of them nonetheless violated the Covenant and were expelled from the organization. The League was an imperfect organization, as the US never joined, and the UK and France bore the burden of enforcing the Covenant. Russia did not join the League of Nations until 1934 but was expelled in 1939 following its invasion of Finland. Japan was expelled for invading Manchuria, and Italy was expelled for invading Ethiopia. The failure of the US to join the League had devastating consequences for international peace and security. The League of Nations had a collective security system that relied exclusively on the great powers to implement. But most great powers at the time abdicated their responsibility. The League's ability to expel recalcitrant great powers contributed to its downfall, as they made exceptions to their privileged positions in the international legal order.

The United Nations' Charter framers were careful not to repeat the mistake of the League of Nations. They took a different approach from the drafters of the League of Nations Covenant. They made sure that all states seeking membership in the United Nations would delegate the responsibility for maintaining international peace and security to the Security Council (Art. 24), and all resolutions adopted under Chapter VII for maintaining international peace and security would be binding on all states. The Great Powers at the time, the US, the UK, France, China, and the USSR, were granted Permanent Members status and given a veto over all substantive issues. The veto insulated their actions from Security Council condemnation and sanctions. Although the veto prevented the United Nations from going down the path of the League of Nations, it is a flaw in the United Nations' legal order which has allowed the great powers to violate their Charter obligations with impunity. The P5 also has the discretion to determine when to intervene in any situation that threatens international peace and secu-

rity. The invocation of the veto by any one great power can paralyze the United Nations. The United States and the USSR/Russia have used their veto to block the Security Council from scrutinizing their actions and imposing punitive sanctions against them or their allies. The P5 can also use the Security Council to legitimize measures against weaker states, even in situations where the Security Council may be acting *ultra vires* (measures against Libya, SC Res. 741; sanctions regime against the Taliban, SC Res. 1268). Other controversial resolutions include those authorizing intervention in Haiti (SC Res. 940), membership for former Yugoslavia (Serbia/Montenegro) (SC Res. 777), in response to Iraq's offensive against the Kurds (SR Res. 688), and authorizing a US-led intervention in Somalia (SC Res. 794).

The United Nations ban on the use of force in Article 2 (4) is the most explicit article of the Charter. It prohibits the threat or use of force in international relations against the territorial integrity or political independence of member states, or in any other manner inconsistent with the purposes of the United Nations. The Charter ban on the use of force allows for two exceptions, Article 51, which recognizes a state's right to individual and collective self-defense if an armed attack occurs, and up until the Security Council has taken the measures necessary for maintaining international peace and security. Article 51 does not define an "armed attack," nor does it specify the measures the Security Council should take in order to suspend a state's right to self-defense. Hence, the right to self-defense is temporary and can be curtailed at any time by the Security Council. The second exception to Article 2 (4) is Chapter VII of the Charter, which grants the Security Council the authority to determine a threat to the peace, a breach of the peace, or an act of aggression. Articles 39, 40, 41, and 42 allow the Security Council to take the necessary measures for restoring international peace and security. However, the Charter leaves it to the discretion of the Security Council on what types of measures it can take to restore international peace and security. Therefore, the Security Council can make a recommendation to the parties to a conflict to comply with the Charter obligations, or it can take more punitive measures if the parties fail to adhere to their Charter obligations and cease fighting. The Security Council does not identify the specific article it is acting under, and it can invoke Chapter VII for whatever situation it deems poses a threat to international peace and security. The Charter gives the Security Council broad discretionary authority to implement its mandate.

The Security Council has not always acted consistently when implementing its Charter mandate. The responsibility of the Security Council is ambiguous and broad, and it lacks any standards by which it determines what constitutes a threat or breach of international peace and security. While the Security Council has identified several situations as a threat to international peace, it has seldom con-

demned a state for a breach of the peace or an act of aggression. There is also no limit in terms of the measures the Security Council can take to restore or maintain international peace and security. The Security Council acts at its discretion, provided there is a consensus among the Permanent Members.

The Permanent Members of the Security Council were the great powers after World War II. Their power was defined by their military capabilities. The United States had detonated the atomic bomb and was in the process of acquiring nuclear weapons. The Soviet Union also had such military capabilities and would soon acquire nuclear weapons. The United Kingdom and France were not far behind in acquiring the technology to manufacture a nuclear weapon. China was still a background underdeveloped country, but it was developing its nuclear weapons with the aid of the Soviet Union. In the early 1960s, the Permanent Member of the Security Council negotiated the Nuclear Non-Proliferation Treaty (NPT) to stop the proliferation of nuclear weapons. The Permanent Members of the Security Council, who were the nuclear weapons states at the time, made an exception in the treaty that allowed them to retain their nuclear weapons while requiring all other states to refrain from acquiring the technology. In exchange, they promised to protect the non-nuclear states. The NPT calls for intrusive inspection of nuclear facilities of states that did not possess nuclear weapons at the time of signing of the NPT. However, it does not require nuclear states, China, France, Russia, the UK, and the US to open their facilities for onsite inspection. Article 5 of the NPT calls on the nuclear states to make a good-faith effort at nuclear disarmament, but they have failed to do so. The nuclear powers have selectively allowed some states to possess nuclear weapons capabilities, such as Israel, India, and Pakistan, but have vehemently opposed Iran, North Korea, Libya, Syria, and Iraq from possessing nuclear weapon technology.

During the first four decades of the United Nations, the Security Council was unable to fulfill its mandate under Chapter VII due to the Cold War and the inability of the Permanent Members to agree on what constitutes a threat to international peace and security. The Permanent Members were usually the culprits and would exercise their veto to block scrutiny or condemnation by the Security Council. This happened in Guatemala in 1954, Cuba in 1961, Hungary in 1956, Egypt in 1956, Czechoslovakia in 1968, the Dominican Republic in 1965, Afghanistan in 1979, Grenada in 1983, and Panama in 1989. In 1999, the United States, Britain, and France, as part of a NATO invasion force, intervened in Serbia, albeit, to protect ethnic Albanians from possible genocide by Serbian forces. Notwithstanding the objective of the Permanent Members, the invasion of Serbia violated Articles 2

(4) and 51, and Chapter VII of the United Nations Charter.[1] The Permanent Members have also used their veto to shield their allies, such as the US protecting Israel and Russia and China protecting Syria, North Korea, Serbia, and Venezuela.[2]

For the Permanent Members, international law can serve as a rationale or an excuse to skirt the rules. In 2003, the United States and the United Kingdom invaded Iraq and overthrew its government without a legitimate legal justification to do so. However, both the UK and the US claimed they were acting in "preventive self-defense," as they feared Iraq had weapons of mass destruction (WMD) that could fall into the hands of terrorists and be used against the United States. Both states also claimed they acted under existing Security Council resolution 678 (1990) which authorized the first Gulf War in 1990. The US also said Security Council resolution 1441 (2003) had promised Iraq it would face dire consequences if it failed to implement all previous Security Council resolutions. The UK and the US also floated the idea of bringing democracy to Iraq and protecting the human rights of the Iraqi people.[3]

The United States, the United Kingdom, France, and Russia also intervened in Syria against the Islamic State of Iraq and Syria (ISIS) following its declaration of an Islamic caliphate. None of these states were authorized by the Security Council to use force in Iraq and Syria, nor were they acting in self-defense. They acted out of concern that the declaration by ISIS of a state on the territory of two existing states, which could be used to carry out terrorist attacks, posed a threat to their security.[4] ISIS was eventually defeated, and the caliphate ceased to exist. The United States, the UK, and France have continued to launch airstrikes against suspected terrorists in Iraq and Syria and support rebel groups fighting both the Syrian government and ISIS. The US also conducted airstrikes against the Syrian regime in retaliation for its use of chemical weapons against civilians. Russia also launched airstrikes against ISIS and Syrian rebels on behalf of the Assad regime.

Russia's 2022 invasion of Ukraine is a continuation of its 2014 military invasion and annexation of the Ukrainian territory of Crimea. Russia also intervened in the Donbas region of eastern Ukraine in support of separatist groups. The breakaway republics of Luhansk and Donetsk later agreed to join the Russian Federa-

[1]See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 European Journal of International Law (1999), p. 1

[2]Security Council Report, *The Security Council Veto*, at https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php

[3]Andru E. Wall, *Was the 2003 Invasion of Iraq Legal*? 86 International Law Studies, US Naval War College (2010), p. 72; Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 Georgetown Law Journal (2004), p. 173

[4]BBC, *Islamic State and the crisis in Iraq and Syria in maps*, at https://www.bbc.com/news/world-middle-east-27838034

tion.[5] In 2008, Russia invaded Georgia and annexed the breakaway republics of Abkhazia and South Ossetia.[6] Russia further carried out assassinations of its opponents in the United Kingdom and cyberattacks on the territories of the US, Estonia, and Ukraine.[7] In addition, Russia and China have engaged in gross human rights violations against their nationals. The UN Human Rights Council (UNHRC) issued a damming report on China's treatment of the Uighurs, which it says amounted to a crime against humanity.[8]

Russia has denied all these allegations and placed blame on the US or its allies. Russia has refused to acknowledge that its agents carried out these attacks. Russian private military contractor, Wagner Group, has been involved in training and fighting on behalf of the governments in Burkina Faso, the Central African Republic (CAR), Libya, Mali, Niger, Syria, and Sudan. The Wagner Group has been accused of carrying out extrajudicial killings and burying opponents of the regimes in mass graves. Wagner is also responsible for serious human rights abuse in the territories where it operates.[9] Given the nature of Russian politics under Vladimir Putin, it would be impossible for the Wagner Group to operate as a private security contractor without the blessing of the Kremlin. The Wagner Group is fighting Vladimir Putin's proxy wars while providing a degree of "plausible deniability" by claiming the group is a private security contractor.

Not only is Russia in violation of Ukraine's territorial integrity and political independence, but Russian troops are also in breach of international humanitarian law. They have executed this war with brutality, barbarism, and savagery. Hundreds of thousands of civilians have been killed, displaced, and fled their homes to seek refuge in neighboring countries, and thousands have been captured and forcibly repatriated to detention camps in Russia. Russia's deliberate shelling of civilian homes and civilian targets clearly violates the prohibition on deliberate attacks against civilians or civilian objects. Russian forces have also used banned weapons, such as white phosphorous, cluster ammunition, and chemical and bac-

[5]Editor's Note, *Vladimir Putin orders troops to two breakaway "republics" in Ukraine*, at https://www.economist.com/europe/2022/02/21/vladimir-putin-orders-troops-to-two-breakaway-republics-in-ukraine

[6]Natia Seskuria, *Russia's "Hybrid Aggression" against Georgia: The Use of Local and External Tools*, at https://www.csis.org/analysis/russias-hybrid-aggression-against-georgia-use-local-and-external-tools

[7]Jody R. Westby, *Russia Has Carried Out 20-Years of Cyber Attacks That Call For International Response*, at https://www.forbes.com/sites/jodywestby/2020/12/20/russia-has-carried-out-20-years-of-cyber-attacks-that-call-for-international-response/

[8]https://ohchr.org/en/press-releases/2022/09/xinjing-report-china-must-address-grave-human-rights-violations-and-the-world-must-not-turn-a-blind-eye-say-un-experts/

[9]Amy Mackinnon, *New Report Exposes Brutal Methods of Russia's Wagner Group*, Foreign Policy (June 11, 2020) at https://foreignpolicy.com/2020/06/11/russia-wagner-group-methods-brutal-killing-report/

teriological weapons. These weapons cannot discriminate between their targets. Russian troops are also occupying Ukraine's nuclear plant and are using it as a base to launch attacks against Ukrainian targets to provoke Ukraine to respond. This is nuclear terrorism and a clear violation of international humanitarian law and International Atomic Energy Agency (IAEA) rules. Russia's navy has attacked ships in the Black Sea to stop ships from carrying Ukrainian wheat to countries in the Middle East and Africa, where the world's most vulnerable populations depend on Ukrainian wheat and grain for survival. Although Russia agreed to allow grain export to resume, Putin has refused to sign an agreement with the UN to make the suspension permanent. Putin is notorious for signing international agreements and not complying with them. He shows no willingness to negotiate a ceasefire or an end to his war in Ukraine. All indications are he would rather face defeat than capitulate.

The above section is illustrative of Permanent Members' conduct toward international law and the United Nations Charter. Russia and the United States have been most egregious in their disregard for international norms. Although the Permanent Members are expected to comply with international law and have a due to do so given their responsibility under the Charter for maintaining international peace and security, they have not lived up to their legal obligations. For them, the law applies to every other state but not to themselves and their allies. Some small states have adopted a similar approach as the Permanent Members by disregarding international law whenever it is in their national interest to do so. India, Iran, Israel, North Korea, and Pakistan are examples of states that have pursued the development of nuclear weapons in violation of the NPT. They have done so because the Permanent Members have not implemented their obligation under Article 5. These states also view the NPT as discriminatory.

The Permanent Members of the United Nations Security Council have remained the same since the creation of the United Nations. Although there has been tremendous pressure from developing countries to increase the number of Permanent Members on the Security Council to make that body more democratic, the current Permanent Members seem in no rush to either increase that number or abolish the veto. The current Security Council is a reflection of the distribution of power in the immediate aftermath of World War II. The distribution of power today is very different; it is more dispersed, more regionally distributed, and less concentrated among Western nations. More importantly, the nations that were considered major powers after World War II are not necessarily major powers today. Britain, France, and Russia have lost their glory, except for the fact they still possess superior military capabilities. Brazil, India, Indonesia, Nigeria, Mexico, and Egypt all have larger populations than Britain, France, and Russia. Their economies have also surpassed those of the three Permanent Members. Indeed,

for the UN to be more democratic, inclusive, and representative of the "people" of the world, it needs urgent reform. However, the likelihood of that happening any time in the new future is rare.

The book therefore examines the application of international law in the foreign relations of the Security Council's current Permanent Members. Although the Security Council is given the most important mandate in the UN system, to maintain international peace and security, the Permanent Members have not always adhered to the norms of the Charter or international law. They have not acted by example and have left many to call for reforming the Security Council to end the abuse of the Power of the Council, which is held by the Permanent Members. In the following chapters, I seek to demonstrate how the five Permanent Members of the Security Council, the United States, Britain, France, China, and Russia, have used and misused international law to their advantage. As the principal law enforcement organ of the United Nations, the Permanent Members of the Security Council have not acted in good faith in upholding the ideals of the Charter or international law.

1 The United States and International Law

The Status of International Law in the United States

The status of international law in the United States is rather ambiguous. Unlike in Europe where international law takes precedence over domestic law, in the United States, international law is subordinate to the Constitution and Congressional statute. Moreover, international law is not automatically incorporated into domestic law but requires congressional implementing legislation to be considered law in the United States. Although Article VI of the US Constitution classifies treaties as law of the land and supreme to State laws, it leaves the status of customary international law, peremptory norms of general international law (jus cogens), and other informal agreements or soft law undefined. To become law, a treaty must be ratified by the Senate with a two-thirds majority of those Senators present. Through its instrument of ratification, the Senate normally attaches a series of Reservations, Understandings, and Declarations (RUDs) to treaties, which can make them meaningless and unenforceable in domestic law.[1] Human rights treaties are considered non-self-executing, leaving it to Congress to pass the necessary implementing legislation to make them law in the United States. However, it has been the practice of successive administrations to not seek legislation from Congress, leaving the status of the treaty in domestic law in limbo.[2]

The status of international law in US law is further complicated by the system of Federalism in the United States. The Tenth Amendment to the Constitution gives states a great deal of power in regulating issues not delegated to the Federal Government. The purpose of the Constitutional Convention was to create "a more perfect union." The Federal Government was granted exclusive power in foreign affairs; however, states retain "all powers not delegated to the Federal Government" and that can be problematic. Increasingly, state laws are coming into conflict with US foreign relations law, and similarly, foreign relations laws are coming into conflict with state laws. The Supreme Court must then decide

[1] Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 American Journal of International Law, (1995), p. 346

[2] See Supreme Court Decisions in *Sanchez-Llama v. Oregon*, 548 U.S. 331 (2006), and *Medellin v. Texas*, 552 U.S. 491 (2008)

which law should take precedence.[3] As the United States became more internationally engaged and the world became more independent, issues that were once within the exclusive domestic jurisdiction of states are now regulated by international law. Hence, states had to defer to international institutional and international laws to manage global problems. This created a problem for the United States government and the principles of the Separation of Power and Checks and Balances, which are fundamental to the proper functioning of the Federal Government. The three branches, Congress, the Executive Branch, and the Supreme Court, are co-equal branches and exercise their powers independently from each other. This can complicate the ability of the president to negotiate international agreements and implement international law in domestic law.

The president's foreign affairs powers are not precisely articulated in the Constitution. Hence, some of the president's foreign affairs powers are considered extra-constitutional.[4] Article 2 Section 2 grants the president "Executive Authority." It also grants him the power of commander-in-chief, to send and receive ambassadors, and to negotiate treaties, but requires a two-thirds vote in the Senate for a treaty to become law in the United States. Additionally, the president takes an oath of office that requires him to make sure the laws are faithfully executed: these can be both domestic and international law. The powers of the president in foreign affairs can be expansive depending on who is occupying the White House. International law is subject to change from one administration to the next; hence, we find a lack of consistency in the attitude of the United States toward international law. The composition of the Supreme Court will also determine the attitude of the US toward international law, as a more conservative Supreme Court will interpret international law narrowly or will rely on the Constitution or Congressional statutes to interpret international law.[5] In most cases, the majority will defer to constitutional law over international law to decide a case. The Supreme Court will also give weight to the Executive Branch's interpretation of international law when deciding international law cases.[6]

In the past, the Supreme Court has followed the *Charming Betsy Canon* to decide international law disputes. In his majority opinion in *Murray v. The Schooner Charming Betsy*, Justice Marshall stated: "An act of Congress should never be

[3]Ibid

[4]See Supreme Court Decision in *Curtiss-Wright Export Corp., v United States*, 299 U.S. 304 (1936)

[5]David Sloss, *Engagement of United States Courts with International Law*, in André Nollkaemper, Yuval Shany & Antonios Tzanakopoulos (eds), The Engagement of Domestic Courts with International Law, NY: Oxford University Press (2024), p. 167–168

[6]Curtis A. Bradley, International Law in the U.S. Legal System, NY: Oxford University Press (2021), p. 19