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Strategic & Defence Studies Centre
ANU College of Asia & the Pacific

June 2017



Prospects for the Rules-Based Global Order

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Strategic & Defence
Studies Centre

The Centre of Gravity series

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Centre of Gravity series paper #34

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CRICOS#00120C

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Fragile and Fracturing or Evolving and Adaptive? Prospects for the Rules–Based Global Order

Greg Raymond

Executive Summary

- ✦ The argument we are seeing the crumbling of the post-1945 order does not stand critical scrutiny.
- ✦ The rise of new non-Western powers is more likely to see an evolution than a degradation of the current rules-based global order. The RBGO has many stakeholders beyond the United States invested in current global institutions, giving it considerable resilience.
- ✦ All Great Powers are periodically transgressors of international law, and some who currently are seen as revisionist are actually strongly supportive of norms such as non-interference and territorial integrity.
- ✦ While welcoming continued United States leadership, policymakers should not see continued United States dominance as indispensable for order and justice in global affairs.

Policy Recommendations

- ✦ Policymakers should avoid assuming that the continuance of the rules-based global order requires the continued primacy of United States. Seeing the rules-based global order as primarily an American creation is historically correct. But this order now has many stakeholders and beneficiaries, and assuming that US dominance must continue in order to preserve these rules and institutions is misconceived and could foster a dangerous resistance and inflexibility to change.

Is the rules-based order deteriorating?

The two-decade period of US post-Cold War predominance is now over, and an era of greater multipolarity has begun. Many fear that the rise of China and a resurgent Russia will bring marked decline in respect for rules and international law. As China nears the United States in economic size, Hugh White believes it is set on challenging US predominance in East Asia. Similarly, Paul Dibb argues that Russia's actions in East Ukraine and more recently, Syria, are evidence of a "independent great power resuming its geopolitical position on its own terms".¹

Western policymakers are responding by placing greater value on the 'rules-based global order'.² In 2016 Australia's Defence White Paper warned that "the rules-based global order is under increasing pressure and has shown signs of fragility".³ Robert Kagan and others including Australia's Foreign Minister Julie Bishop warn that the US rules –based global order introduced in 1945 is now under threat, placing the world at a dangerous 'inflection point'.⁴ Will the rise of non-Western Great Powers see an acceleration of global law-breaking?

It is not hard to find reasons for these concerns. In 2016 China rejected the Hague ruling that their nine-dash line claim had no basis in international law. It has continued to block Filipinos accessing fishing grounds within the Philippines EEZ, sent its own fishing boats into Indonesia's EEZ, and regularly harassed US navy vessels passing its artificial islands. Meanwhile, Russia's annexation of Crimea and recent military actions in Eastern Ukraine contravened the US Charter's prohibitions on use of force.



These actions are concerning and warrant criticism. Nonetheless, if we take a broader perspective it would seem that there are at least three serious problems with the argument that we are now seeing the 1945 order crumble. The first problem is that it distorts history, implying that the arrival of US dominance ushered in peace and order. In fact the period from 1945 to 1990 were years of great turbulence, conflict and danger. The Cold War fostered a highly contested international order where breaches of international law were frequent. Locked in existential struggle, the two superpowers regularly ignored the UN Charter's principles of state sovereignty and non-interference.⁵ They used force against incumbent governments and sought their overthrow by manipulating foreign actors.⁶ The other major powers were similarly disposed to use force to pursue their interests.⁷

There are at least three serious problems with the argument that we are now seeing the 1945 order crumble.

The second problem is that it exaggerates the extent to which China and Russia wish to overthrow or revamp the fundamental underpinnings of the current order. Unlike the Soviet Union during the Cold War, China supports global capitalism and doesn't see itself in a "twilight conflict" against democracy around the globe.⁸ It understands and appreciates the rules-based international order founded by the United States "more than is commonly realized."⁹ In its South China Sea disputes, China has been notably reluctant to use lethal military force, compared with 1974 and 1988 when it used military force against Vietnam.¹⁰ China and Russia continue to work with other UN Security Council members in many security-related institutions and legal regimes. Although cooperation amongst major powers in Northeast Asia is less than it was in the early 2000s, Russia and China continue to participate in UN sanctions on North Korea for its recent missile and nuclear tests.¹¹ In 2013 both signed a treaty restraining Iran's nuclear aspirations. China has become the world's second biggest funder of

United Nations peacekeeping operations. In fact China and Russia have both supported continued development of international law as it applies to use of force. In 2005, although suspicious of liberal doctrines that override sovereignty and the principle of non-interference, both agreed to the doctrine of Responsibility to Protect.¹²

The third problem is that picking on China and Russia's errant actions is selective. Objective assessment suggests that all Great Powers intermittently junk adherence to international law when unsuited to their perceived interests. In 1972 France ignored the International Court of Justice (ICJ) and proceeded with its tests in the South Pacific.¹³ In 1986 the United States ignored the ICJ order that it cease military actions against Nicaragua, including mining its harbor and supporting paramilitary operations against the Nicaraguan government.¹⁴ In 2003 both the United States and the United Kingdom ignored the UN Charter requirement for a United Nations Security Council resolution when they invaded Iraq.¹⁵ No P5 member has ever complied with a Hague ruling involving the Law of the Sea.¹⁶

Will the rules-based global order evolve in new directions?

It can't be denied that rising powers will want to - and will be able to - influence the development of new rules. Power matters in this respect. The emergence of the United States as the biggest and least damaged Great Power after World War II allowed it to lead in establishing the United Nations and the Bretton Woods institutions. Hence Henry Kissinger's comment that each dominant power "shapes the entire international system according to its own values".¹⁷ Great Powers get their way more often than small powers, even in consensus decision-making. For example the WTO operates by consensus, yet behind the scenes the US and EU set agendas, dominate secretariats, and threaten or actually set up new forums to get their preferred outcomes.¹⁸

Nonetheless, it would be simplistic to see rules and norms as purely a reflection of Great Power interests and hierarchies. International rules need consent and legitimacy if they are to be durable. And it's not only power shifts that can change international law. Groups of like-minded states seeking more humane, effective and consistent rules can also achieve reform. Middle-power "norm entrepreneurs" like Canada and Australia led the banning of landmines and cluster-munitions. The emergence of the Stimson Doctrine, that no territory can be legitimately gained by use of force, is an earlier example.¹⁹

Inevitably the rise of new Asian powers such as China and India will bring pressure to change some rules and their interpretation. China, for example, has a different view to the United States about the legality of foreign states conducting military intelligence activities in the EEZ of a coastal state.²⁰ However rising states are more likely to seek changes around the margins rather than entirely new systems of rules. This is partly because none of the new powers will have the unparalleled dominance that the United States held following World War II and following the Cold War. It is also because the rules put in place since 1945 have tended to have widespread support amongst states. China, for example, is a strong supporter of the norm of territorial integrity.²¹ Hence US scholar G. John Ikenberry argues that "the power transition today is not triggering a fundamental struggle over the deep principles of order, even as it diffuses power and authority away from the West. China and other non-Western developing states are rising up within rather than seeking to work around the rules and institutions over the last sixty years."²² While rising states may be less inclined to accept the leadership or hegemony of the United States, there is no sign that they wish to invent an entirely new system of order or a correspondingly new set of rules.

Conclusion

History suggests that all Great Powers periodically exercise a perceived right to act outside of international legal regimes. This can be for a variety of reasons, often with domestic political bases. China views the South China Sea as important to its recovery from its century of humiliation. Russia, as a continental power with a long history of being invaded, seeks to maintain a buffer between its core and what it perceives to be a hostile West. The United States, following the 9/11 attacks believed that Iraq's intermittent attempts to acquire nuclear weapons and the rise of Islamist terrorism together posed an unacceptable security risk. Great Powers are more militarily and economically able to accept the international costs of transgressing global rules than are middle and small powers.



It would be simplistic to see rules and norms as purely a reflection of Great Power interests and hierarchies.



Do not focus exclusively on instances of rules transgressions at the cost of missing larger trends.

But policymakers need to ensure they do not focus exclusively on instances of rules transgressions at the cost of missing larger trends. The ever-thickening web of global governance rules and institutions is a unique historical phenomenon that has brought great benefits. One of the clearest of these has been a gradual shift downward in the long term frequency of interstate war. Although the advent of nuclear weapons has been a factor in reducing major powers conflict, it cannot explain the marked decline in conflict between non-nuclear states, the vast majority of members in the state system.²³ The advent of global security governance laws and institutions is a better explanation. Even if we are now passing through a significant shift in the international order, there seems to be no reason yet to assume that a ratcheting up to Cold War levels of contest is inevitable, bringing widespread non-compliance with rules. Calibrating responses to rules transgressions so that they reinforce existing norms and laws without fuelling insecurity spirals will be part of avoiding the calamity of war.

Policymakers should also avoid assuming that the continuance of the rules-based global order requires the continued primacy of the United States. Seeing the rules-based global order as primarily an American creation is historically correct. But this order now has many stakeholders and beneficiaries, the vast majority of whom value the order's Wilsonian emphasis on respect for territorial integrity, protection of the weak from the strong, and its free-market policies. Assuming that the US-dominance must continue in order to preserve these rules and institutions is misconceived and could foster a dangerous resistance and inflexibility to change.

Policy Recommendations

- ✦ Policymakers should avoid assuming that the continuance of the rules-based global order requires the continued primacy of United States. Seeing the rules-based global order as primarily an American creation is historically correct. But this order now has many stakeholders and beneficiaries, and assuming that US dominance must continue in order to preserve these rules and institutions is misconceived and could foster a dangerous resistance and inflexibility to change.

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A Rules-Based Order in the Asia-Pacific

Hitoshi Nasu & See Seng Tan

Executive Summary

- ✦ While many Asian nations advocate the need for a rules-based regional order, there are different visions of the rules-based regional order within or beyond the existing framework of international law.
- ✦ The advocacy for a rules-based regional order means very little when the rules themselves are the very reason why states are in dispute.
- ✦ The success to the development of a rules-based order in the Asia-Pacific depends on the extent to which regional states can find a common ground to negotiate between China and the US through the shifting balance of power politics.

Policy Recommendations

- ✦ Australia must remain mindful of the regional sensitivity to a rules-based order when it invokes existing rules of international law in managing its diplomatic relations within the region.
- ✦ Australia should seek to create a neutral space where regional states can engage in a dialogue to develop a special legal regime that regional states are prepared to accept in managing and settling their disputes in the South China Sea.
- ✦ Australia should more closely engage with China and other Asian countries to find common ground for the development of a rules-based order in the Asia-Pacific through capacity-building, including the provision of legal and financial resources.

Asian leaders have often advocated for a rules-based order in the region, using the term ‘rule of law’. Former Japanese Prime Minister Yoshihiko Noda, for example, called for establishing ‘the “rule of law” as a basis for global peace, stability, and prosperity’ in his remarks at the UN General Assembly in 2012.¹ The ‘rule of law’ was characterised as an ‘important infrastructure that brings order and prosperity to a network of states centring on the Asia-Pacific region’.² This foreign policy has remained unchanged after the change of government under the leadership of Shinzo Abe.

Asian leaders have often advocated for a rules-based order in the region.

The persistent advocacy of and strong support for international law has been a consistent feature of Singapore’s foreign policy since it gained independence in 1965.³ The Philippines is another country that has frequently been making explicit reference to the ‘rule of law’ in its official statements at international forums in recent years. The Association of Southeast Asian Nations (ASEAN) also pledges to create a ‘rules-based, people-oriented, people-centred community’.⁴ But what does this rules-based order mean for the region stifled by political instability, mutual distrust, territorial and maritime disputes and the shifting balance of power with the rise of China?

What does a rules-based order mean?

While nations may all agree on the need for a rules-based regional order, the critical question is whether they envisage the same ‘rules’ for a regional order. In its simplest form, a rules-based regional order can be equated to compliance with existing rules of international law. This is reflected in the three principles of a rules-based order that Prime Minister Shinzo Abe set out in his remarks at the 2014 Shangri-La Dialogue:

1. That states shall make their claims based on international law;
2. That states shall not use force or coercion in advancing their claims;
3. That states shall seek to settle disputes by peaceful means.⁵

As Shirley Scott observes, however, existing rules of international law ‘to some extent reflect the norms and preferences of those most influential’ when those rules were created.⁶ Strict enforcement of the existing rules of international law could mean the imposition of the prevailing power balance by established great powers against the rise of new powers that challenge the balance.

Alternatively, the ‘rules’ for a regional order can be qualified or interpreted in accordance with certain common values shared by regional states. The Philippines, for example, considers the ‘rule of law’ as ‘an instrument of justice and development’,⁷ which ‘only works in a sustainable manner if the rules themselves are created based on principles of justice and equity’.⁸ For the Philippines, the rules are not fixed obligations that powerful states create and enforce against small states, but are rather an equaliser enabling small states to stand on an equal footing with more powerful states and to ensure that their disputes are settled peacefully without fear of intimidation or coercion.⁹

For the region that has historically been receptive to the international legal order created by great power politics,¹⁰ the primary challenge is whether a shared vision on the rules-based regional order can be formed within or beyond the existing framework of international law. Some of the existing legal concepts and rules of international law – such as the notion of state sovereignty and the principle of non-intervention – may contribute to an orderly relation between regional states, whereas others – such as the notion of territorial title and sovereign rights over the Exclusive Economic Zone and Continental Shelf – may create or exacerbate tensions with the potential to disrupt orderly relations.

The rules themselves are the very reason why states are in dispute.



The advocacy for a rules-based regional order means very little when the rules themselves are the very reason why states are in dispute, primarily due to the fact that those rules are quite often vague and open to different interpretations. Australia must remain mindful of this regional sensitivity to a rules-based order when it invokes existing rules of international law in managing its diplomatic relations within the region.

A rules-based regional order and the South China Sea dispute

Even though direct reference to a rules-based regional order in any specific territorial or maritime dispute involving regional states has been largely avoided, the linkage between the two is clear in the geopolitical tensions that prevail in the Asia Pacific – and specifically in the East China Sea between Japan and China, and in the South China Sea between China, Taiwan, the Philippines, Vietnam, Malaysia and Brunei Darussalam.

The Philippines' advocacy for a rules-based regional order was evident by bringing a case against China regarding various disputes in the South China Sea under Annex VII of the Law of the Sea Convention. The Arbitral Award was handed down on 12 July 2016, which unanimously found for the Philippines in relation to numerous aspects of the dispute in the face of categorical rejection of the entire proceedings by China.

Following the ruling over the South China Sea dispute between China and the Philippines, Singapore's foreign ministry noted that as a non-claimant state, Singapore supports the peaceful resolution of disputes among claimants in accordance with international law (including the Law of the Sea Convention) without resorting to the threat or use of force. 'As a small state', the foreign ministry concluded, 'we strongly support the maintenance of a rules-based order that upholds and protects the rights and privileges of all states'.¹¹ Likewise, at his visit to the White House in August 2016 – where President Barack Obama described Singapore and his country as 'solid-rock partners' and Singapore as an 'anchor' for the US presence in the Asia-Pacific region¹² – Prime Minister Lee Hsien Loong noted that Singapore hoped all countries would respect international law and the outcome of arbitration.

Not unexpectedly, China did not take kindly to all of this and made its displeasure known.¹³ What presumably upset the Chinese was not simply Singapore's express support for a rules-based order but also its strategic proximity to the US as evidenced by the strength of their security partnership.¹⁴ Fair or otherwise, these developments are taken by the Chinese to mean that rather than the neutral and balance-seeking state it has long portrayed itself as, Singapore has in fact chosen to bandwagon with the US and the West against China, and thereby is deserving of 'retaliation' by Beijing, not least in the view of an influential Chinese defence advisor.¹⁵



China's apprehension of advocacies for a rules-based regional order is clearly expressed in its 2017 White Paper on Asia-Pacific Security Cooperation, in which China urges regional states to 'reject the Cold War mentality' and 'respect other's legitimate interests and concerns'.¹⁶ In particular, it calls upon small and medium-sized countries that they 'need not and should not take sides among big countries'.¹⁷ China's promise to 'practice the rule of law', rather than using the 'rule of law' as a pretext for violating the rights and interests of other nations, can be seen as an invitation for regional states to break free from their military ties with the US. The question of what rules-based order regional states are prepared to subscribe to may become a key to an early conclusion of the Code of Conduct in the South China Sea. Australia should seek to create a neutral space where regional states can engage in a dialogue to develop a special legal regime that regional states are prepared to accept in managing and settling their disputes in the South China Sea.

Australia should seek to create a neutral space where regional states can engage in a dialogue.

China and a rules-based regional order

That being said, it is not difficult to see why the Chinese see protestations about the need to preserve a rules-based order in the Asia-Pacific as directed at China in order to curb its power and influence. The flurry of recent speeches and comments about the importance of a rules-based order by Singaporean leaders – at the 2015 Shangri-La Dialogue, at the 2016 Xiangshan Forum, and even before the Singapore Parliament in 2016¹⁸ – could have fuelled Chinese suspicions concerning the 'true' aim behind those pronouncements.¹⁹ Moreover, the fact that ASEAN member countries pledged their commitment to a rules-based regional order together with the US at their 2016 Sunnylands Summit – the first since ASEAN and the US elevated ties to a 'strategic partnership' in November 2015²⁰ – likely added to the perception that the rules-based order concept is far from neutral.

Nevertheless, China has expressed its willingness in its 2017 White Paper to 'promote the rule-setting and improve the institutional safeguards for peace and stability in the Asia-Pacific region', while cautioning that '[i]nternational and regional rules should be discussed, formulated and observed by all countries concerned, rather than dictated by any particular country'.²¹ This implies China's intention to challenge the heavily Western influenced international law orthodoxy and the maintenance of the regional order on that basis. The success to the development of a rules-based order in the Asia-Pacific depends on the extent to which regional states can find a common ground to negotiate between China and the US through the shifting balance of power politics. Australia should more closely engage with China and other Asian countries to find a common ground for the development of a rules-based order in the Asia-Pacific through capacity-building, including the provision of legal and financial resources.

Policy Recommendations

- ✦ Australia must remain mindful of the regional sensitivity to a rules-based order when it invokes existing rules of international law in managing its diplomatic relations within the region.
- ✦ Australia should seek to create a neutral space where regional states can engage in a dialogue to develop a special legal regime that regional states are prepared to accept in managing and settling their disputes in the South China Sea.
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Russia, Crimea, and the Rules Based Order?

Rob McLaughlin¹

Executive Summary

- ✦ Russian actions in Crimea are a clear threat to the stability and certainty of the liberal-internationalist Rules Based Order (RBO).
- ✦ Russia's actions are not based solely in anti-RBO opportunism, but rather indicate that Russia is also acting in accordance with a different conception of the RBO – one that prioritises national interests in a different way, and responds to different emphases in interpreting fundamental concepts such as 'self determination'.

Policy Recommendations

- ✦ Recognise that arguments that assume a common commitment to the liberal-internationalist RBO will continue to be relatively ineffective.
- ✦ Recognise that Russia marches to the drum beat of a different version of the RBO and seek to exploit fault-lines in the Russian conception of the RBO.

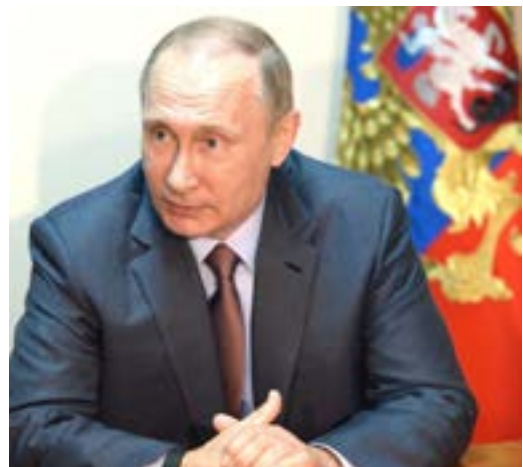
Introduction

On some readings, Russia is a completely self-interested participant in the Rules Based Order (RBO). Russia engages with the orthodox or mainstream RBO (such as UNSC procedures and vetoes in respect of Syria)² where this serves its purposes. However, Moscow asserts a different right or rule where its interests are better served by dissent or exceptionalism, such as by not participating in a forum. To some extent, and in differing degrees, all powerful (and other) states behave this way. In 1986, the United States refused to participate in the merits stage of the Nicaragua case in the International Court of Justice.³

To say that states sometimes do instrumental, self-interested things that are at odds with aspects of the RBO is nothing new. However, when dealing with a state that appears to have a different vision of the RBO – where non-compliance with the orthodox or mainstream RBO is manifested, for example, in different interpretations of fundamental rules – and where such non-compliance becomes to some extent serial, appearing to indicate internal coherence, then a deeper query is provoked -- why? The question then must be asked; do Russia's actions in Crimea say something about Russia's perspective on the RBO?

Which RBO?

The 'Russian-nationalist' view of the RBO does not in all respects sit easily alongside the version that enjoys current dominance in diplomatic and international legal discourse – the 'liberal-internationalist' RBO. This is most evident in the key issue of sovereignty, and most particularly in relation to two aspects of sovereignty: limitations on the permissible scope of sovereignty, most particularly in relation to human rights; and the legitimacy of use of force to defend a broader category of national interests. It is this second manifestation that is the focus of this piece.





Furthermore, the 'Russian-nationalist' RBO is neither ahistorical nor historically unique. Indeed, it is deeply rooted in Russian and imperialist history – a close copy of the outlook of expansionist states (including Tsarist Russia) of the 19th century, and the first decades of the 20th century. It is clearly opportunistic and instrumental, but it is also arguably underpinned by an imperialist mindset that will be very familiar to scholars of British, US, French, Russian, Austrian, and other 19th and 20th century empires. As Benjamin Coates writes:

It would be tempting to chalk up this behaviour to hypocrisy and cynicism... It risks falling into a trap that imagines law mattering only when it constrains by forcing them to do something that they would not otherwise do... But law just as often enables aggressive behaviour, and not just by creating "exceptions" to be exploited by the powerful.⁴

This reads like it was written about Russia now; it was actually written about the United States in the early 20th century:

'In the early twentieth century, empire was itself an international norm that was part of, not external to, the law, and many of the "norm entrepreneurs" of that era worked to convince Americans of the benefits and moral necessity of empire.'⁵

The Russian-nationalist RBO is neither ahistorical nor historically unique.

Finally, it would be inaccurate to describe the Russian image of the RBO as uniquely exceptionalist, for there are other states – including very powerful states such as China, and occasionally the United States – that share a similar discomfort with the (in their view) proscriptive, sovereignty-degrading, overly individualistic, and Western dominated liberal-internationalist version of the RBO. Thus while Russia's actions in Crimea – to an orthodox Western international lawyer committed to the liberal-internationalist image of the RBO -- appear to be a clear and serious breach of that order, Russia is employing a different reference point from history -- the nationalist-imperial RBO. Russia employs, consequently, a different set of 'purpose' indicators when interpreting some of the rules that are fundamental to the liberal-internationalist RBO, but which echo differently in other RBOs. The rules on non-intervention and use of force provide the most illustrative example.

Crimea and the RBO

In the Western orthodox approach to international law and the RBO, Crimea is a blatant violation of Article 2(4) of the UN Charter, and a clear example of illegal use of force, aggression, and territorial annexation.⁶ However in Russia, the discourse appears to be about reunification of a part of Greater Russia. Crimea had been 'transferred' from the Russian SSR to the Ukraine SSR by Stalin in 1954, in part to

commemorate the 300th anniversary of the 'reunification of Ukraine with Russia' (a reference to the Treaty of Pereyaslav signed in 1654 by representatives of the Ukrainian Cossack Hetmanate and Tsar Aleksei I of Muscovy)...⁷

While 'the West' saw the 2014 annexation as a blatant irredentist breach of Ukraine's territorial integrity, Russia saw it as the restitution of its own territorial integrity – indeed, the Russian Prosecutor-General in 2015 provided advice that the original 1954 transfer had been illegal under the Constitution of the then USSR.⁸ The return was also expressed to be in compliance with a confirmatory 'referendum' on 16 March 2014.⁹

To some extent, these justifications hearken back even further into Russian history, incorporating a long-standing – albeit during the Soviet period, interrupted – self-proclaimed mandate for the protection of, and other rights in relation to, nationals and Russian minorities, and in some cases Orthodox Christian populations, in historically 'Russian' areas of influence.¹⁰

Russia employs a different set of purpose indicators when interpreting rules fundamental to the liberal-internationalist RBO.



As Agnia Grigas writes:

A recent decision by the Russian Prosecutor General's Office to review the legality of a 1991 decision granting the Baltic states independence from the Soviet Union has irritated the governments of the Baltic states and raised concern among their allies... {This move} reflects a much deeper-rooted view held in Moscow on Baltic statehood and on the Soviet era that is much at odds with the view of the Baltic governments... ¹¹

The Russian approach to the RBO places claims in longer-term historical perspective and does not subordinate the past to the present.

This points to a perspective on the RBO that places claims in longer-term historical perspective and does not subordinate the past to the present. The RBO, in this view, exists to lawfully validate, facilitate, and structure legitimate and historically based national aspirations. This image of the RBO is not historically unique – as noted earlier. However, it is, at present, a minority image of the RBO maintained and endorsed by a few powerful states (such as Russia) in the face of the successor liberal-internationalist version of the RBO.

Crimea also indicates a thorough Russian appreciation of faultlines and weaknesses within the liberal-internationalist RBO – including the contexts in which proponents of the orthodox liberal-internationalist image of the RBO can be expected to hesitate in the face of dissonant perspectives. Thus the employment of 'little green men',¹² rather than badged Russian forces, was precisely targeted so as to introduce an initial element of complexity by exploiting (very cleverly, even if quite transparently) one of the 'grey' areas in current orthodox approaches regarding attribution of a use of force to a state.¹³ As William Burke-White has observed:

In Crimea, Russia has cleverly embraced international law and, in so doing, exploited the tension between a fundamental principle that prohibits the acquisition of territory through the use of force and an equally fundamental right of self-determination to take Crimea as its own.¹⁴





Such uncertainty generates hesitation and scope for divergent views; these factors in turn create the requisite conditions for slower and more uncoordinated multilateral responses, gifting time and space to alter and then entrench new ‘facts on the ground’. Similarly, by conducting the hasty ‘referendum’ on the (re)incorporation of Crimea into Russia, an additional element of hesitation was introduced by superficially leveraging one of the fundamental tenants of the liberal-internationalist RBO: self-determination. Exploiting, as Burke-White contends, a faultline in the ‘Western’ interpretation of international law that has formed around the Kosovo intervention, President Putin’s rhetoric on intervention to protect ethnic Russians is clearly intended to leverage this inherent weakness – by shifting ‘the balance between territorial integrity and self-determination far in the direction of the latter’, Russia’s policy objective is to ‘render... international borders more permeable and the international system far less secure’.¹⁵

On its own assessment buttressed by historical justification, Russia may be acting in accordance with an internally coherent, but by current measures insurgent, perspective on the fundamental purposes of the RBO, and thus of the content of some of its rules and norms. This should not be mistaken for a principled dissent, however, for the ability to leverage a coherent alternative vision of the RBO rarely means that a dissident state will miss any opportunity to structure their challenges precisely so as to exploit uncertainties and faultlines within the orthodoxy. That is, whilst there may be history, method, and coherence behind the current Russian-nationalist image of the RBO, this does not mean that Russia should, ultimately, be expected to act other than opportunistically, with transparent intent to damage and undermine the (in its view) ‘limiting’ and ‘wrong’ liberal-internationalist image of the RBO.

Russia may be acting in accordance with an internally coherent perspective on the fundamental purposes of the RBO.



Conclusion

Russia is hardly a model supporter of the RBO. Russia obfuscates and lies, and cleverly (albeit transparently) exploits grey areas in the orthodox liberal-internationalist view of the RBO in order to create uncertainty and division, and to exploit opportunities. Russia clearly, and routinely, acts contrary to the mainstream liberal-internationalist view as to the purposes of the RBO, and the generally agreed content of many of its basic and most fundamental rules.

Russia is not merely trampling upon the Western orthodox interpretation of the RBO; Russia is also using its own interpretation to practice lawfare.

It is also arguable, however, that Russia interprets some of those fundamental rules and norms differently because of a historically-influenced, nationalist, and -- to modern sensibilities -- irredentist, approach to the purpose of the RBO. The friction created is thus in some part attributable to the fact that 'their' version of the RBO stands in significant contrast to the mainstream liberal-internationalist ('our') version of the RBO, which is hinged around the promotion of human rights, a general predilection to maintenance of existing borders as a means of reducing conflict, and peaceful settlement of claims and disputes. If this is the case, then among the clearly opportunistic, instrumentalist, and belligerent treatment Russia is currently serving out to the liberal-internationalist image of the RBO, Russia is also to some extent acting in coherence with a centuries long Russian interpretation of the purposes of the RBO – including as a platform for, and mechanism by which, Russia can assert its rights to protect and defend greater Russia, and external Russian minorities and interests, within their claimed sphere of influence.

Thus Russia is not merely trampling upon the Western orthodox interpretation of the RBO; Russia is also using its own interpretation of the underpinning purposes of the RBO to practice one class of lawfare. Russia also employs its knowledge of the mainstream liberal-internationalist RBO in order to exploit weaknesses in that RBO. Such conduct certainly stresses the RBO as 'we' – that is, card-carrying members of the liberal-internationalist RBO union -- understand it, but it also points to a fundamental Russian acceptance of the fact that there is an RBO, and that it does and should guide foreign policy; it just needs to be remembered that the Russia version harkens back to a different understanding of the RBO (one that held sway quite widely 100 years ago).

Thus Russia rejects, in many of its facets, the mainstream liberal-internationalist RBO because it is, in their view, underpinned by errant interpretations of international rules, such errors having arisen as a result of the seduction and enslavement of those rules by an over-reaching liberal-internationalist perspective on the RBO.

So, what does this mean for policymakers? It means that Russia may actually be more susceptible to assertive, coordinated, liberal-internationalist RBO responses than their current conduct appears to indicate. This may be precisely because Russia is susceptible to a more robust approach to lawfare on two levels. First, Russia is not immune to the shaping consequences of sanctions and other collective and coordinated non-use of force measures – for which the liberal-internationalist RBO offers a range of mechanisms. This means the mechanisms of transnational trade, banking, and investment governance could be further exploited for sanctions.

Second, precisely because Russia asserts an internally coherent alternative orthodoxy, there is room for legal and political strategies that exploit faultlines and weaknesses in the Russian-nationalist image of the RBO – just as Russia transparently exploits faultlines and weaknesses in the liberal-internationalist RBO. However, in order to exploit this opportunity, policymakers must accept that there are indeed alternative images of the RBO that animate and underpin conduct by certain states, and that it is necessary to first recognise and understand these.

There is room for legal and political strategies that exploit faultlines and weaknesses in the Russian-nationalist image of the RBO.

Policy Recommendations

- ✦ Recognise that arguments that assume a common commitment to the liberal-internationalist RBO will continue to be relatively ineffective.
- ✦ Recognise that Russia marches to the drum beat of a different version of the RBO and seek to exploit fault-lines in the Russian conception of the RBO.

Endnotes

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