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Norms Governing the Interstate Use of Force: Explaining the Status Quo Bias of International Law

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NORMS GOVERNING THE INTERSTATE USE OF FORCE: EXPLAINING THE STATUS QUO BIAS OF INTERNATIONAL LAW

*Richard Hanania**

ABSTRACT

In this Article, the author argues against the standard view that there is no coherent and effective doctrine of international law regarding the interstate use of force. It is generally held that states interact with one another in a state of anarchy, at least when it comes to national security. After defining international law, I show that this is not completely accurate. Reflecting a status quo bias, classic invasions and territorial aggrandizement through force are illegal. Since 1945, states that have undertaken classic invasions have generally been sanctioned, and no state has taken territory from another by force since 1976. Part II presents a model that explains how norms not enforced by a centralized authority can have an impact on state behavior. I rely on political psychology and behavioral economics literature to show that the normative influence of law can cause states to refrain from attacking one another and the global community to sanction aggressors. The model as an explanatory tool is made even more plausible by investigations into earlier examples of the power of ideas to change state behavior and the finding that materialist or economic explanations of the status quo bias of international law are at best incomplete.

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INTRODUCTION

Even among those who specialize in the subject, international law is a much-derided field. Contemporary textbooks on international law, unlike those covering other subjects, regularly begin with the question of whether it actually exists.¹ This is not a new development. The first paragraph of Hans Kelsen's *Principles of International Law* asks whether "so-called international law . . . [is] law in the same sense as national or municipal law?"² To take a more recent example, two scholars begin their recent book with the observation that "[i]nternational law has long been burdened with the charge that it is not really law."³ The main criticism is simple enough. Within a single country, the state enforces the law, but there is no third-party to ensure compliance with international law, often rendering it ineffective.⁴ Therefore, according to this line of analysis, states are best understood as units that are simply concerned with advancing their own interests, not legality.

This criticism has been particularly salient when discussing the use of force. Maintaining peace between states has long been considered the central function of international law.⁵ Here, scholars conclude that the rules purporting to regulate interstate interactions, in particular Article 2(4) of the U.N. Charter,⁶ have been particularly ineffective.⁷ This appears to be a logical

¹ See, e.g., BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1 (3d ed. 1999); ALINA KACZOROWSKA, *PUBLIC INTERNATIONAL LAW* 4 (4th ed. 2010) (noting that "[t]he status of international law as 'law' has been challenged at both the theoretical level . . . and at the practical level"); MALCOLM N. SHAW, *INTERNATIONAL LAW* 3 (5th ed. 2003); GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 3 (7th ed. 1996) ("International law is to law as professional wrestling is to wrestling." (quoting Stephen Budiansky, *A New World's Signs of Confusion*, U.S. NEWS & WORLD REP., Sept. 20, 1993, at 8.)).

² HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 3 (Robert W. Tucker ed., 2d ed. 1966).

³ JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005).

⁴ SHAW, *supra* note 1, at 2–3. International law supposedly lacks the "identifying marks" of domestic law, such as "the existence of a recognised body to legislate or create laws, a hierarchy of courts with compulsory jurisdiction to settle disputes over such laws and an accepted system of enforcing those laws." *Id.*

⁵ Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 *ETHICS & INT'L AFF.* 293, 295 (2011) ("International law is centrally concerned with regulating war between states . . ."); see, e.g., ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 3 (2d ed. 2005); MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 2* (2001).

⁶ U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

⁷ Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 *AM. J. INT'L L.* 607, 607 (2003) (citing Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 *AM. J. INT'L L.* 809, 836 (1970)).

extension of the idea that the lack of an enforcement mechanism is what makes international law meaningless. If decisions relating to the economy or the domestic justice system are too important to be controlled by unenforceable mandates from abroad, states certainly cannot be expected to act in conformance with international law in the area of national security. Despite the fact that the U.N. Charter prohibits one state from using force against another, except in self-defense or with Security Council approval,⁸ there have been at least “690 overt foreign military interventions between 1945 and 1996.”⁹ Some blame the supposed failures of international law to stop war for tarnishing the reputation of the entire field.¹⁰ Others maintain that, to the extent that it does restrain state behavior in the area of national security, the effects of international law have been pernicious.¹¹

This Article challenges these pessimistic conclusions. Part I shows that, despite claims that international law is ineffective, the concept is not meaningless with regards to the interstate use of force. Whether we look at the text of the U.N. Charter or actual state practice, some forms of state aggression, particularly seizing territory by force, are universally considered unacceptable.¹² Violators of these norms face overwhelming sanctions from the world community. An analysis that uses both the text of the U.N. Charter and the “obey-or-be sanctioned” standard can help us find answers regarding the question of when the use of force by one state against another is illegal. Some illegal wars are outlawed both from the perspective of the U.N. Charter and customary international law. Even under the most stringent “state practice” standard, for example, one state seizing land from another is unquestionably prohibited.¹³ At the same time, certain uses of force that appear to be banned by the U.N. Charter have become accepted by the international community; this behavior may draw rhetorical condemnation but no meaningful sanctions.

⁸ U.N. Charter arts 50–51.

⁹ GLENNON, *supra* note 5, at 69.

¹⁰ CARTER & TRIMBLE, *supra* note 1, at 31 (“Some of the traditional skepticism about international law may be attributable to the extensive attention given to the highly indeterminate and often unobserved norms against the use of force . . .”).

¹¹ See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 782–84 (2004).

¹² *Cf. id.* at 780 (“[N]ations may use force to resist aggression that . . . seizes territory.”).

¹³ *Id.* State practice has been defined as “behaviors respecting a particular issue that amounts to direct action by, or has a direct effect on, the state whose behavior is in question.” A. Mark Weisburd, *The International Court of Justice and the Concept of State Practice*, 31 U. PA. J. INT’L L. 295, 303 (2009).

Humanitarian intervention and limited strikes retaliating against terrorism appear to fall into this category.

The fact that the world community punishes classic invasions goes a long way towards explaining why states do not initiate this type of war.¹⁴ At one level, this solves what has been called the compliance question, which asks why states would obey international law when it lacks an enforcement mechanism.¹⁵ On the other hand, this obscures the root of the problem, because it does not explain why third-parties to conflicts sanction aggressors. In the realist model, there is still a collective action problem: While it would be in the best interest of all members of the international community to enforce rules against aggression, every particular state is better off shirking its duty and hoping that others deal with the problem.¹⁶ To prevent this type of free riding in domestic law, the state exists to ensure that, for example, everyone pays their taxes or serves in wartime.¹⁷ The problem in interstate relations is the fact that there is no such “international leviathan.” If states do consistently sanction certain forms of aggression, as Part I shows, it only begs the question of what leads them do so. Part I closes by replying to those who argue that the decline of classic wars can be explained without invoking international law or global norms.¹⁸

The compliance problem is dealt with in Part II, which shows that most states do not invade one another because their leaders and populations have internalized the proposition that classical invasions are immoral. The rule against classic invasions is so embedded and unquestioned that those who violate this norm shock the conscience of the international community and become pariahs, as is what happened after Saddam Hussein’s 1990 invasion of Kuwait.¹⁹ Political scientists have shown that international law is most likely to

¹⁴ See *infra* Part I.B.

¹⁵ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2627–28 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL AGREEMENTS* (1995), and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

¹⁶ See MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 14 (2009).

¹⁷ *Id.*

¹⁸ See, e.g., Yoo, *supra* note 11, at 749 (“[L]eading political scientists and diplomatic historians attribute the reduced number of interstate wars and the stability of the international system generally during the Cold War period to the bipolar balance of power between the United States and the Soviet Union.”).

¹⁹ See Franck, *supra* note 7, at 612.

affect interstate relations when it can create objective Schelling Points that can shape expectations.²⁰ Building on the work of previous scholars, Part II presents a model that explains when an international norm is likely to be successful. As the rules composing the status quo bias are just the kind of norms that are likely to be respected, it is unsurprising that they have been followed. As will be shown, an embedded international norm virtually eliminating a certain practice is not new; the decline of slavery and colonialism are equivalent recent historical examples of the power of ideas, even without a third-party enforcer, to shape state conduct on the international plane. These norms share important similarities with the laws against classic invasions and seizing foreign territory: They are specific, inherently morally compelling, and at one point were backed by powerful norm entrepreneurs. Once one of these practices is considered immoral, logic dictates that the others also be forbidden.²¹ This Article ends with some thoughts on why understanding the current state of international law regarding the use of force is important and suggests that, before arguing for reform, future research and activism should take into account the fact that the current system has succeeded in maintaining a remarkable degree of stability.

A. *Methods of Analysis*

Many international law scholars who have incorporated lessons from international relations into their work have adopted the paradigm of realism, particularly in the area of the interstate use of force.²² Similar to the way classical economics derives insights from the aggregation of individual behavior, realism sees states as self-interested units seeking to maximize their own interests.²³ At the extreme, states are like “billiard balls” with similar internal properties and structures; they all want the related aims of wealth and

²⁰ See Paul K. Huth et al., *Does International Law Promote the Peaceful Settlement of International Disputes? Evidence from the Study of International Conflicts Since 1945*, 105 AM. POL. SCI. REV. 415 (2011). Schelling Points “refer to coordination brought about (at least partly) by exploiting the salience of decision labels.” Vincent P. Crawford et. al., *The Power of Focal Points Is Limited: Even Minute Payoff Asymmetry May Yield Large Coordination Failures*, 2008 AM. ECON. REV. 1443, 1443.

²¹ See *infra* text accompanying notes 309–13.

²² Stephen M. Walt, *International Relations: One World, Many Theories*, 110 FOREIGN POL’Y, Spring 1998, at 29 (Special Edition).

²³ See *id.* at 29, 31.

security, and how they behave towards one another is based on relative power.²⁴

The influence of realism on international law is not surprising. It has been the most dominant school of thought in international relations since the end of World War II.²⁵ Since the collapse of the Soviet Union, however, one analysis shows that realism may have been eclipsed by more liberal schools of thought.²⁶ Regardless, realism continues to be extremely influential, and has recently been used in international law scholarship.²⁷ Realism stands in contrast to “constructivism,” which rather than taking state interests as given, analyzes international relations by taking account of how interests and identities are construed in a way that is endogenous to the process of interaction between countries.²⁸

Realism and constructivism begin to blur together when we remember that many realists take “ideational” preferences into consideration. Kathryn Sikkink shows that the foreign policies of many Western states began putting an emphasis on human rights after the end of the Second World War.²⁹ She writes that “[t]he emergence of human rights policy is not a simple victory of ideas over interests. Rather, it demonstrates the power of ideas to reshape understandings of national interest.”³⁰ Both of these sentences appear to describe very similar processes, and neither construction is obviously superior to the other.

²⁴ Margarita H. Petrova, *The End of the Cold War: A Battle or Bridging Ground Between Rationalist and Ideational Approaches in International Relations?*, 9 EUR. J. INT’L REL. 115, 117 (2003) (citing JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001)) (reviewing JEFFREY CHECKEL, *IDEAS AND INTERNATIONAL POLITICAL CHANGE: SOVIET/RUSSIAN BEHAVIOR AND THE END OF THE COLD WAR* (1997), and ROBERT ENGLISH, *RUSSIA AND THE IDEA OF THE WEST: GORBACHEV, INTELLECTUALS, AND THE END OF THE COLD WAR* (2000), and JACQUES LÉVESQUE, *THE ENIGMA OF 1989: THE USSR AND THE LIBERATION OF EASTERN EUROPE* (1997)).

²⁵ See Thomas C. Walker & Jeffrey S. Morton, *Re-Assessing the “Power of Power Politics” Thesis: Is Realism Still Dominant?*, 7 INT’L STUD. REV. 341, 342 (2005) (citing JOHN VASQUEZ, *THE POWER OF POWER POLITICS: A CRITIQUE* (2d ed. 1983)).

²⁶ See *id.* at 350–53.

²⁷ See, e.g., GOLDSMITH & POSNER, *supra* note 3; Stephen D. Krasner, *Realist Views of International Law*, 96 AM. SOC. INT’L L. PROC. 265 (2002); Yoo, *supra* note 11.

²⁸ See Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 393–94 (1992).

²⁹ Kathryn Sikkink, *The Power of Principled Ideas*, in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 140 (Judith Goldstein & Robert O. Keohane eds., 1993).

³⁰ *Id.*

In another example demonstrating the point that even realists take ideas seriously, Goldsmith and Posner acknowledge that some states may care about ideological preferences and human rights.³¹ On the other hand, they write that their analysis “consistently exclude[s] one preference from the state’s interest calculation: a preference for complying with international law.”³² This is because they do not believe that states care about international law as much as they do about economic or security interests.³³

This Article does not contend that states care more about following international law *per se* than they do about other interests that might weigh against compliance. Rather, it argues that world leaders have a significant desire to comply with the most important rule of international law: the ban on classic invasions. Or, compliance is now in the “national interest” of most states. The language adopted is not important; what matters is the explanatory power of the theory presented as to why states follow international rules regarding the interstate use of force, even when doing so does not bring greater security or economic growth.

This Article breaks with realism by putting less emphasis on the concern with traditional areas of national interest like economic growth and security. If citizens only cared about that, few international collective action problems would be overcome. Also, realism underestimates the extent to which leaders adopt a “logic of appropriateness” in making international relations decisions and the potential for certain rules to be morally compelling across practically all of the world’s cultures. At the same time, the Article disagrees with the more extreme claims of constructivists who imply that human nature, and thus the concept of what counts as a state interest, is nearly infinitely malleable.³⁴ The approach is agnostic towards the efficacy of international law in general, but more optimistic about its influences when certain conditions are met. In the future, rather than focusing on the compliance problem as a general matter, legal scholars would be better served by differentiating between separate rules

³¹ Cf. GOLDSMITH & POSNER, *supra* note 3, at 6 (distinguishing themselves from realists “who assume that a state’s interests are limited to security and (perhaps) wealth”).

³² *Id.* at 9.

³³ *Id.* at 10 (“It is unenlightening to explain international law compliance in terms of a preference for complying with international law.”)

³⁴ See J. Samuel Barkin, *Realist Constructivism*, 5 INT’L STUD. REV. 325, 330 (2003) (“There exist theories of human nature that are incompatible with political realism, including those that argue that human nature is infinitely malleable or ultimately perfectible.”).

of international law and asking how effectively certain global norms apply towards different subject matters.

I. THE STATUS QUO BIAS OF INTERNATIONAL LAW

Just as it is often said that international law does not exist as a general matter, scholars argue that there is no coherent doctrine governing the interstate use of force in particular.³⁵ After NATO's bombing of Kosovo in 1999, many of those who believed that the war violated the U.N. Charter declared the document a dead letter.³⁶ In 1970, Thomas Franck argued that the attempts made by the United Nations to regulate the interstate use of force had failed, as states were still fighting wars without facing sanctions.³⁷ He revisited that same theme thirty-three years later, seeing the 2003 invasion of Iraq as confirming his earlier view.³⁸ Glennon writes that between 1945 and 1980, there were one hundred armed conflicts that killed over 25 million people, in addition to thirty major continuing wars as of 1998.³⁹ Like Franck, Glennon presents this as proof that the United Nations and the international community in general have been unsuccessful in their collective efforts to prevent war.⁴⁰ Other scholars argue that even if international law exists in some abstract sense, international legal norms do not actually influence state behavior.⁴¹ When describing the role of law in affecting state decisions regarding the use of force, any dissimilarities between those who deny the existence of relevant rules and those who believe that those rules are meaningless are more apparent than real. It is not easy to find scholars who defend the current state of affairs, or even argue that there is some coherence underlying the way that the international community reacts to interstate aggression.

This Part contends that these conclusions judge international law by unrealistic standards and rely on certain conceptual mistakes. A less ambitious conception of what international law can accomplish can provide an

³⁵ See Franck, *supra* note 7, at 607–08.

³⁶ See GLENNON, *supra* note 5, at 62.

³⁷ See Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 809–10, 835–36 (1970).

³⁸ Franck, *supra* note 7, at 607–08.

³⁹ GLENNON, *supra* note 5, at 67–69.

⁴⁰ *Id.* at 1–2.

⁴¹ See GOLDSMITH & POSNER, *supra* note 3, at 3 (submitting that international law does not influence state behavior, but that state behavior influences international law).

appreciation for our current period of remarkable peace and more realistic expectations regarding potential international law reforms. While this Article argues that a well-functioning and logically consistent doctrine of international law regarding the use of force exists, this does not necessarily mean that the world has eliminated all armed conflict. Rather, international law has succeeded in placing limits on the kinds of conflicts that have been the most destructive. This Part begins with a discussion of the general concept of international law and its origins.⁴² In determining the state of the law regarding the interstate use of force, there are two main tools of analysis: the U.N. Charter and the obey-or-be-sanctioned standard.⁴³ From there, this Article shows that certain kinds of interstate force can coherently be called illegal, while others are legal, and yet others fall somewhere in a kind of grey area.⁴⁴ Finally, this Part briefly discusses some alternative theories that seek to explain the decline of the classic invasion and describes their shortcomings.⁴⁵

A. *What Is International Law?*

Traditionally, there have been two sources of international law.⁴⁶ The first is treaties, which are written agreements signed by the relevant officials of two or more states.⁴⁷ Emer de Vattel wrote that rulers of states are independent, sovereign, and equal.⁴⁸ Through treaties, countries could bind their own future behavior.⁴⁹ Because of this, the rules governing interstate interactions have been said to be consent based.⁵⁰ The second source of international law is custom. A practice is part of customary international law when a large portion of states usually engage, or refrain from engaging, in the relevant act, and do so at least partly out of a sense of moral obligation.⁵¹ The latter requirement is

⁴² See *infra* Part I.A.

⁴³ *Id.*

⁴⁴ See *infra* Part I.B.

⁴⁵ See *infra* Part I.G.

⁴⁶ See Krasner, *supra* note 27, at 265.

⁴⁷ See e.g., DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 26 (3d ed. 2010).

⁴⁸ EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 68 (Béla Kaposy & Richard Whatmore eds., 2008) (1773).

⁴⁹ *Id.* at 77.

⁵⁰ See GOLDSMITH & POSNER, *supra* note 3, at 26.

⁵¹ *Id.* at 23; SHAW, *supra* note 1, at 70–71; J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 451–52 (2000).

referred to as *opinio juris*.⁵² This appears to be sensible, as without a third-party enforcer of international law, early modern theorists could only put their faith in the consciences of sovereigns.

Because the U.N. Charter has virtually unanimous consent,⁵³ it is where any discussion about the legality of state use of force must begin. The normative and legitimizing value of the document goes beyond that of a normal treaty; to many, it has the characteristics of an “international constitution.”⁵⁴ Scholars constantly debate whether instances of interstate uses of force are consistent with the U.N. Charter, while assuming that it has superseded any legal rules that preceded it.⁵⁵ Diplomats and politicians also regularly cite the document to support their positions.⁵⁶ Reflecting the concerns of the United Nation’s founding generation, Article 1 lists the purposes of the organization, with the first being “[t]o maintain international peace and security.”⁵⁷ The Charter echoes Vattel and other founders of international law in granting all member states sovereign equality.⁵⁸ Article 2(4) contains what is likely the most important sentence in the history of international law: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁵⁹

This seemingly unequivocal rule against the use of force is softened by Article 51, which states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken

⁵² *Opinio juris* “is the central concept of customary international law . . . [and] refers to the reason a state acts in accordance with behavioral regularity.” Goldsmith & Posner, *supra* note 3, at 23.

⁵³ See 1 UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 1 APRIL 2009, at 5–10, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009), for a list of signatories to the United Nations Charter.

⁵⁴ Russell S. Sobel, *The League of Nations Covenant and the United Nations Charter: An Analysis of Two International Constitutions*, 5 CONST. POL. ECON. 173, 173 (1994); see also Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529, 566–68 (1998) (“The United Nations is the primary institutional representative of the international community.”).

⁵⁵ See generally Franck, *supra* note 35, at 836; Yoo, *supra* note 11.

⁵⁶ Yoo, *supra* note 11, at 769, 771.

⁵⁷ U.N. Charter art. 4, para. 1.

⁵⁸ *Id.* art. 2, para. 1.

⁵⁹ *Id.* art. 2, para. 4.

the measures necessary to maintain international peace and security.”⁶⁰ The Security Council is given the exclusive right to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and decide on an appropriate response.⁶¹ If necessary to enforce its recommendations, the Security Council can mandate the use of force against the party that it decides is the aggressor.⁶²

Thus, the U.N. Charter outlines when countries may use force and provides guidance for action when the Charter has been breached. And from a purely textual perspective, it appears that international law bans the interstate use of force except in two circumstances: in self-defense or with the approval of the Security Council, as long as it finds a “threat to the peace, breach of the peace, or act of aggression.”⁶³ Importantly, the Charter does authorize the use of force for any reason, so long as the Security Council approves. Reflecting the era in which the United Nations was founded, a dispute must have an international dimension for the world community to have the right to intervene.

While the Charter is clearly the most important treaty that matters regarding the legality of interstate uses of force, it is difficult to infer the rules of customary international law. Criticisms have been raised regarding the determination of what rules, norms, or practices qualify.⁶⁴ These criticisms have caused some scholars to disfavor the use of customary international law as a means of legal analysis.⁶⁵ Traditional criteria provide little guidance in determining how broadly or narrowly to treat an international precedent.⁶⁶ For example, NATO’s bombing of Kosovo can be seen as evidence that customary practice allows: (1) general humanitarian intervention; (2) an alliance of states to attack an individual state without Security Council approval; or (3) a federation of democracies to attack a non-democracy.⁶⁷ Even this list does not exhaust the universe of plausible interpretations. Without something equivalent to the U.S. Supreme Court to decide how precedents apply, there is no way to

⁶⁰ *Id.* art. 51.

⁶¹ *Id.* art. 39.

⁶² *Id.* art. 42.

⁶³ *Id.* art. 39.

⁶⁴ See GLENNON, *supra* note 5, at 41–42.

⁶⁵ *Id.* at 42–45.

⁶⁶ *Id.* at 50.

⁶⁷ See GLENNON, *supra* note 5, at 49–51.

single out any one of the possible interpretations for any particular state act as “correct.”⁶⁸

Even if state practice can be established, there is still the difficulty of determining whether states comply with a rule out a sense of moral obligation. For instance, in the domestic sphere, public choice theorists have shown that there will be situations where a legislature cannot be said to have an “intent” behind its laws.⁶⁹ Similarly, it follows that a state’s actions on the international plane may have no clear intent behind them. Some individuals within a government may be acting out of moral conviction, while others might agree with the first group out of self-interest or a desire not to disturb superiors. States might engage in or refrain from an act for any number of reasons, or no real individual reason at all.

Ignoring the logic of public choice and assuming that a sovereign intent always exists still does not solve the problem. Psychological motives of world leaders are hard to prove and another explanation of why a state acted the way it did could always be created. For example, if states do not regularly invade the territory of others, an international lawyer might argue that this shows that the test of *opinio juris* is satisfied. But as Jack Goldsmith and Eric Posner point out, this could reflect, among other things, a coincidence of interests or an equilibrium resulting from a repeated, bilateral prisoner’s dilemma.⁷⁰ If two neighboring states with similar levels of military and economic power refrain from attacking one another, it is plausible that they avoid war because a cost-benefit calculation on each side shows invading to be illogical. For the purposes of customary international law, however, this restraint must be the result of a sense of moral obligation on the part of rulers, and there is no reason to assume that this is the case simply because state practice is consistent with such a theory.

A final problem with the concept of customary international law is that it may seem doubtful that the world community—representing all of the globe’s different cultures, traditions and histories—can actually agree on many

⁶⁸ *Id.* at 51–52.

⁶⁹ Frank H. Easterbrook, *Statute’s Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs’ hidden yet discoverable.”). *But see* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425 (1988) (“[T]he notion of a coherent legislative intent is consistent with current public choice theory.”).

⁷⁰ GOLDSMITH & POSNER, *supra* note 3, at 26–35.

norms.⁷¹ This is not the same as philosophical cultural relativism. Even natural law theorists see international law as consent based.⁷² What it does mean is that *opinio juris* depends on what states believe is moral, regardless of whether we hold that certain cultural values are “wrong” in any absolute sense. It seems correct that while we may have been able to establish rules of customary international law when the only states that mattered were European or European-derived, a more inclusive analysis would be much more difficult.

The theories underlying both sources of international law, treaties and custom, presume that international law does not have a third-party enforcer.⁷³ This leads to the realist criticism that international law has little to no effect on the behavior of world leaders.⁷⁴ This view discounts the possibility of state enforcement because of the collective action problems involved.⁷⁵ It seems intuitively correct that if the international community consistently punishes certain behavior, only then can that behavior be considered unlawful. The plausibility of this vision is today questioned by realists, while in earlier times scholars argued against its normative desirability.⁷⁶ Not only did traditional international law often ignore the possibility of states acting as enforcers, but Vattel considered such a proposition immoral.⁷⁷ Despite these concerns, if states consistently punish certain kinds of actions, and a ready explanation based on state interests appears to be lacking, an inference may be drawn that leaders are acting out of normative considerations. This is especially true if a series of independent international norms are logically consistent with one another, all seeming to rely on a larger coherent moral framework.⁷⁸

The early nineteenth century saw legal positivism rise to prominence, and international law was swept up with the larger trend.⁷⁹ Representing that same approach a century later, Kelsen argued that law could be distinguished from other societal practices that attempt to shape behavior, such as norms and

⁷¹ Kelly, *supra* note 51, at 466–75.

⁷² See GOLDSMITH & POSNER, *supra* note 3, at 26.

⁷³ *Id.* at 3.

⁷⁴ See, e.g., GOLDSMITH & POSNER, *supra* note 3, at 3.

⁷⁵ See STEARNS & ZYWICKI, *supra* note 16, at 1–3.

⁷⁶ VATTEL, *supra* note 48, at 256.

⁷⁷ *Id.* at 265.

⁷⁸ See *infra* Part II.A.

⁷⁹ Josef L. Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 947, 952 (1961).

rational persuasion, by the element of coercion.⁸⁰ A certain act is a delict when it is accompanied by a sanction handed out by a valid authority.⁸¹ Under this analysis the question of whether international law exists depends on whether certain acts considered violations of the norms of the world community are actually punished.⁸² International organizations may legitimize coercion, but individual states must act as the sanctioners.⁸³

A. Mark Weisburd adopts this positivist approach to determine the state of the law in the area of interstate armed conflict.⁸⁴ To find general patterns about whether some kinds of force consistently draw meaningful sanctions, he documents over 110 instances of states using force against one another between 1945 and 1991.⁸⁵ Under the “obey-or-be sanctioned” standard, these punishments have to go beyond mere rhetorical condemnation and significantly hamper the aggressor’s war effort or other goals.⁸⁶ Just because some states use force against others does not mean that there are no rules of international law regarding the use of force,⁸⁷ in the same way that people occasionally kill one another despite the illegality of murder. Such an analysis ignores the applicable sanctions along with the deterrence these sanctions achieve. In the words of Hans Kelsen:

If a definite conduct is prescribed or permitted, the possibility of a contrary conduct is of course presupposed. If theft were impossible, the norm “You shall not steal” would be meaningless. . . . Only because a certain conduct is made by law the condition of a sanction is this conduct a delict, or what amounts to the same, is this behavior legally prohibited.⁸⁸

We may add that, for a rule to qualify as law, it is not necessary that every single time it is violated, punishment follows. All that is necessary is that sanctions are able to stop and deter instances of the unlawful behavior to some

⁸⁰ Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 57–58 (1941) (“[T]he essential characteristic of law, by which it is distinguished from all other social mechanisms, is the fact that it seeks to bring about socially desired conduct by acting against contrary socially undesired conduct—the delict—with a sanction which the individual involved will deem an evil.”).

⁸¹ *Id.*; KELSEN, *supra* note 2, at 6–7.

⁸² KELSEN, *supra* note 2, at 16–17.

⁸³ *Id.* at 20.

⁸⁴ See A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II*, at 4 (1997).

⁸⁵ *Id.* at 308.

⁸⁶ See *id.* at 8.

⁸⁷ See FRANCK, *supra* note 7; GLENNON, *supra* note 5.

⁸⁸ KELSEN, *supra* note 2, at 6–7.

satisfactory degree. Little more can be asked of any norm worthy of being called “law.”

In determining the state of the law regarding the interstate use of force, the methodology adopted here gives credence to both the text and original intent of the U.N. Charter and the obey-or-be sanctioned standard. This Article rejects the position that only the U.N. Charter can determine what is lawful.⁸⁹ The U.N. Charter at the very least carries normative weight with the world community. This is reflected, for example, in the condemnation of the United States for its 2003 invasion of Iraq without Security Council approval.⁹⁰ Diplomats and leaders reference the text of the U.N. Charter along with what the Security Council has done to argue for or against different policies.⁹¹ On the other hand, focusing only on the U.N. Charter is to maintain formal coherence at the cost of real world relevance. Glennon is correct that not all, and probably not most, violations of the strict letter of Article 2(4) are punished.⁹² But to classify all interstate uses of force—the Soviet invasion of Afghanistan, the United States overthrowing the Taliban government, Saudi Arabia sending troops to Bahrain to crush a Shiite rebellion, etc.—the same way would be a conceptual mistake.

For instance, Weisburd has divided all interstate uses of force between 1945 and 1991 into different categories to see whether some kinds of attacks are more acceptable to the world community than others.⁹³ In the process of reviewing his work, his main findings can be connected to other international relations scholarship and provide a similar analysis of humanitarian intervention, a type of war that was rare to nonexistent before the end of the Cold War. While there is some arbitrariness involved in Weisburd’s method of dividing instances of interstate uses of force into different categories, this does not prevent classification.⁹⁴ While certain wars will fall at the margins of any category in which they are placed, classifications are both possible and

⁸⁹ See Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 130 (1986) (arguing that state conduct cannot nullify Article 2(4)).

⁹⁰ See, e.g., CLYDE V. PRESTOWITZ, *ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS* 276–77 (2004); Yoo, *supra* note 11, at 729–30.

⁹¹ Cf. Schachter, *supra* note 89, at 118, 121–22 (explaining how states view the text of the U.N. Charter and Security Council resolutions).

⁹² See GLENNON, *supra* note 5, at 61–62.

⁹³ WEISBURD, *supra* note 84, at 25–27.

⁹⁴ See *infra* Part I.B.

necessary, and, as seen below, can show normative agreement among members of the international community.

Furthermore, the text of the U.N. Charter is inadequate to determine the state of international law regarding the use of force, because doubts existed on whether the United Nations would eliminate all war at the time of the U.N.'s founding. Several founding U.N. members seemingly violated the plain text of Article 2(4) within the first decade of the organization's existence. For example, Great Britain unilaterally used force against Yemen in 1949 and the United States did so against Guatemala in 1954.⁹⁵ While this may simply be explained away as great power hypocrisy, the history of the founding of the United Nations indicates that Article 2(4) was meant to apply mainly to the kinds of conflict that had triggered the two world wars—what is referred to below as the classic invasion.⁹⁶ It is not realistic to believe that the U.N. founders thought that they would succeed in abolishing all kinds of interstate armed conflict, even if the concept may have been seen as an ideal to aspire towards.

In the methodology used here, when a type of state conduct both violates the Charter and draws international sanctions, then it can unquestionably be considered illegal. On the other hand, when a type of action is allowed by the Charter and state practice, it is lawful under international law. The most difficult cases, of course, are those where the U.N. Charter and state practice diverge, as what arguably has happened in the case of humanitarian intervention. While any definitive answer on the legality of these kinds of grey area conflicts will have to depend on methodological preferences, it is deeply problematic to consider humanitarian intervention legal, especially when carried out without Security Council approval.

B. The Illegality of Classic Invasions

Because the United Nations was created in reaction to World War II, an analysis of the legality of war should start with the case of the classic invasion, which is the kind of conflict that conforms best to the idea of what a prototypical “war” is. Precise, universally recognized national borders are a relatively recent phenomenon, dating back to no earlier than the eighteenth

⁹⁵ WEISBURD, *supra* note 84, at 209–11, 255.

⁹⁶ See *infra* Part I.B.

century.⁹⁷ From the time these first borders were drawn to the signing of the U.N. Charter, disputes over territory were the main causes of war.⁹⁸ This is why the Charter bans the use of force against the “territorial integrity or political independence of any state.”⁹⁹ The implication of the text is that, for an aggressor state to be violating Article 2(4), the target country must already have a certain degree of “territorial integrity” and/or “political independence.” “And” makes more sense than “or” in this context because the implication of Article 2(4) is that a fully formed sovereign state has both. By violating the “territorial integrity or political independence” of a well-established state, an aggressor is thus acting in a way inconsistent with international law.

Weisburd discusses ten cases of “classic invasions” in the world between 1945 and 1991.¹⁰⁰ He defines classic invasions as conflicts which satisfy the following six conditions: (1) The war involves a border crossing by regular troops of the state(s) initiating the use of force; (2) the border(s) crossed separate states; (3) the border(s) crossed have been recognized by the combatants for some time; (4) the purpose of the invasion is either to subjugate the state invaded, to seize a portion of its territory, or to replace an unfriendly government; (5) the invaded state, did not, prior to the invasion, stand in a position of *de facto* subordination to the invading state; and (6) the conflict cannot be seen as a continuation of earlier hostilities between the combatants that had ended without resolving the basic disputes between them.¹⁰¹

This Article will add one more part to Weisburd’s definition: the war must not be a humanitarian intervention.¹⁰² The analysis leads to some important conclusions. First, few classic invasions have occurred at all. Over a forty-six year period, there have been ten classic invasions, averaging to one every 4.6 years. The break with the past is more striking considering that there are more states today than there were before the founding of the United Nations. Just as importantly, six of the postwar classic invasions were met with significant international sanctions, which went beyond moral condemnation of the

⁹⁷ Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT’L ORG. 215, 216 (2001).

⁹⁸ *Id.* at 217–18.

⁹⁹ U.N. Charter art. 2, para. 4.

¹⁰⁰ WEISBURD, *supra* note 84, at 28–59.

¹⁰¹ *Id.* at 28.

¹⁰² *See infra* Part I.C.

aggressor.¹⁰³ In five of those six cases, the sanctions from the international community were an important reason behind the failure of the aggressor state's war effort.¹⁰⁴

Perhaps the postwar conflict closest to the ideal of the prototypical classic invasion has been Iraq's attempt to annex Kuwait in 1990.¹⁰⁵ One universally recognized sovereign entity with clear borders attempted to use force to annex and end the independent legal existence of another.¹⁰⁶ On August 2, 1990, Saddam Hussein invaded Kuwait.¹⁰⁷ A few days later, the Security Council responded by announcing its intent "to restore the authority of the legitimate Government of Kuwait" and to that end adopted heavy economic sanctions against the aggressor.¹⁰⁸ After a few weeks, it authorized a naval blockade, which twenty-three states helped enforce,¹⁰⁹ and finally, in Resolution 678, threatened military action if Iraq did not withdraw from Kuwait by January 15, 1991.¹¹⁰ After that deadline passed, an international coalition finally enforced these resolutions and expelled Saddam Hussein's army, restoring the Kuwaiti government.¹¹¹ The Iraqi forces were badly overmatched and the entire effort took less than two months.¹¹² There was consensus on the need to use military force among a broad cross section of states. Resolution 678 was opposed by only two non-permanent members of the Security Council¹¹³ and supported by all the permanent members except China, who abstained from the vote. The mission included financial or military support from, among others, the United States, the United Kingdom, France, Germany, Japan, Saudi Arabia, Canada, South Korea, and Australia.¹¹⁴ Eastern, Western, and Arab states agreed that one member of the United Nations annexing another by force was unacceptable.¹¹⁵

¹⁰³ WEISBURD, *supra* note 84, at 58–62.

¹⁰⁴ *Id.* at 59.

¹⁰⁵ In a world that accepted Hobbesian anarchy in international relations such an invasion would have drawn little third-party concern. *See infra* Part I.G.

¹⁰⁶ *See* WEISBURD, *supra* note 84, at 55–56.

¹⁰⁷ *Id.* at 56.

¹⁰⁸ S.C. Res. 661, paras. 2–5, U.N. Doc. S/RES/661 (Aug. 6, 1990).

¹⁰⁹ S.C. Res. 665, para. 1, U.N. Doc. S/RES/665 (Aug. 25, 1990); WEISBURD, *supra* note 84, at 57.

¹¹⁰ S.C. Res. 678, paras. 2–3, U.N. Doc. S/RES/678 (Nov. 29, 1990).

¹¹¹ WEISBURD, *supra* note 84, at 56–57.

¹¹² *See id.*

¹¹³ Those members were Yemen and Cuba.

¹¹⁴ WEISBURD, *supra* note 84, at 56–57.

¹¹⁵ *See id.* at 57–58.

The 1979 Soviet invasion of Afghanistan similarly saw wide-ranging sanctions applied against the aggressor. This example further proves the existence of a ban on classic invasions, because it involves a state much more economically and militarily powerful than Iraq was at the time of the Gulf War. In June 1978, rural Afghans began a revolt against their Marxist government, which itself had only recently come to power in a coup.¹¹⁶ About a year and a half later, the Soviet government invaded to preserve Afghanistan as a functioning communist border-state.¹¹⁷ The opponents of the Afghan Marxists and Soviets, mostly religiously-motivated guerillas collectively known as the *mujahideen*, received arms from China, the United States, Pakistan, and Iran.¹¹⁸ Also in reaction to the war, the United States pulled out of an arms treaty it was in the process of negotiating with the Soviet Union.¹¹⁹ The Soviet Union also suffered economic sanctions at the hands of the United States, Canada, and the European Community, and diplomatic sanctions from several states, including those represented by Western, communist, and Islamic governments.¹²⁰ In each year from 1980 to 1987, the General Assembly passed a resolution calling for all foreign troops to withdraw from Afghanistan.¹²¹ All of this pressure is thought to have contributed to Mikhail Gorbachev's decision to pull all his soldiers out of Afghanistan in the late 1980s.¹²²

Both the Iraqi and Soviet invasions saw third-party sanctions on the aggressor state that were used as a conduit for expressing, and sometimes enforcing, the positions of the international community.¹²³ Considerations of power may explain why Iraq was invaded because of its actions but the Soviet Union was not. Regardless, even the Soviets were sanctioned for invading a state that was, as an independent force, powerless on the international plane.

With such overwhelming global reactions to classic invasions, it is not surprising that wars fought over territory have ceased to exist, resulting in a

¹¹⁶ *Id.* at 44.

¹¹⁷ *Id.* at 45.

¹¹⁸ *Id.* at 45–46.

¹¹⁹ *Id.* at 46.

¹²⁰ *Id.* In addition to more traditional forms of sanctions, many states even boycotted the 1980 Moscow Olympics. *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See, e.g.*, S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990) (sanctions against Iraq); *see also* WEISBURD, *supra* note 84, at 45–46; Libby Hennemuth, 1980 U.S. *Partial Grain Embargo*, THE MONITOR, Summer 2012, at 44, available at <http://web.wm.edu/so/monitor/issues/17-2/4-hennemuth.pdf>.

“territorial integrity norm.”¹²⁴ Between 1648 and 1945, ninety-three out of 119 armed conflicts could be classified as “territorial wars,” defined as wars “concerned with . . . issues that clearly involve state control over territory.”¹²⁵ Eighty percent of territorial conflicts resulted in a redistribution of territory.¹²⁶ But for the time period from 1945 to 2000, there were forty territorial wars, and less than thirty percent led to a change in international borders.¹²⁷ Even the few post-World War II cases of territorial aggrandizement through war were concentrated during the period of decolonization.¹²⁸ Since 1976, no country has successfully used force to take territory from another state.¹²⁹ Perhaps even more impressively, no country has disappeared as a result of conquest since 1945.¹³⁰ The normal international reaction to classic invasions explains why.

These are no small accomplishments. The two world wars were essentially territorial conflicts between the world’s most powerful states.¹³¹ But as of 2012, no two superpowers have fought one another on the battlefield for fifty-nine years, the longest such streak in recorded history.¹³² And classic invasions have not only disappeared among the major states but amongst practically all countries. International sanctions must figure heavily in any state’s cost-benefit calculation regarding whether or not to overthrow a neighbor or seize its territory. The only mystery that remains to be solved is why third-parties have been willing to act as enforcers, when rational choice theory would expect states to shirk any responsibility for maintaining international stability.¹³³

¹²⁴ Zacher, *supra* note 97, at 215.

¹²⁵ *Id.* at 218, 223.

¹²⁶ *Id.* at 223.

¹²⁷ *Id.*

¹²⁸ *Id.* at 245.

¹²⁹ *Id.* at 244. This is not to say that there have not been cases of international borders being redrawn as the result of a region breaking away from a larger state. In 2011, for example, the international community recognized the independence of South Sudan. Jeffrey Gettleman, *Newest Nation Is Full of Hope and Problems*, N.Y. TIMES, July 8, 2011, at A1.

¹³⁰ STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 251 (2011) (noting that the unification of South Vietnam and North Vietnam may be an exception depending upon how the conflict between the two states is characterized).

¹³¹ See, e.g., John C. Duncan, Jr., *Following a Sigmoid Progression: Some Jurisprudential and Practical Considerations Regarding Territorial Acquisition Among Nation-States*, 35 B.C. INT’L & COMP. L. REV. 1, 6, 26–27, 31–32.

¹³² See PINKER, *supra* note 130, at 250.

¹³³ See *supra* text accompanying notes 15–17.

C. *The Lack of International Consensus on Humanitarian Intervention*

After the end of the Cold War, the idea of humanitarian intervention became popular among Western leaders and opinion-makers.¹³⁴ A humanitarian intervention has been defined as a situation where a state or coalition of states invades a country without the permission of the target government to nominally, “and at least to some extent actually,” stop some sort of atrocity.¹³⁵ Because such wars involve major violations of sovereignty and often result in the overthrow of the offending government, these wars can fit the definition of a classic invasion.¹³⁶

Since the end of the Cold War, however, analysis of the legality of the use of force has removed humanitarian interventions from the larger category of classic invasions. International lawyers have given the topic its own specialized focus.¹³⁷ And while the world community’s reactions, both rhetorically and with regards to sanctions, to classic invasions have been overwhelmingly negative, powerful states have supported using force against sovereign governments for the sake of defending human rights. Therefore, humanitarian intervention should have its own special category.

There have been at least three cases of humanitarian interventions in the post-Cold War era: the international community’s intervention in Somalia and NATO’s wars against the governments of the former Yugoslavia and Libya. In the cases of Somalia and Libya, the missions at least partly had the blessings of the United Nations, while the bombing of Kosovo did not.¹³⁸ With or without Security Council approval, humanitarian interventions appear to be illegal

¹³⁴ See Richard Hanania, *Humanitarian Intervention and the War Powers Debate*, 13 J. JURISPRUDENCE 47, 79 (2012).

¹³⁵ *Id.* (citing D.J.B. Trim & Brendan Simms, *Towards a History of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: A HISTORY 4 (Brendan Simms & D.J.B. Trim eds., 2011))

¹³⁶ While Weisburd noted the humanitarian justifications made for the 1978 Vietnamese invasion of Cambodia and Tanzania’s overthrowing of Idi Amin’s Ugandan regime, he did not see these motivations as warranting the creation of a new category. See WEISBURD, *supra* note 84, at 40–44.

¹³⁷ See, e.g., Saban Kardas, *Examining the Role of the UN Security Council in Post Cold-War Interventions: The Case for Authorized Humanitarian Intervention*, 2010 USAK Y.B. INT’L POL. & L. 55, 55

¹³⁸ See S.C. Res. 794, UN Doc. S/RES/794 (Dec. 3, 1992) (approving partial armed humanitarian intervention in Somalia); S.C. Res. 1973, UN Doc. S/RES/1973 (Mar. 17, 2011) (approving humanitarian intervention in Libya); Mohammad Taghi Karoubi, *Unilateral Use of Armed Force and the Challenge of Humanitarian Intervention in International Law*, 2001–2002 ASIAN Y.B. INT’L L. 95, 113–14 (discussing U.N. disapproval of Kosovo bombing).

under the plain meaning of the text of the U.N. Charter.¹³⁹ Not only does the document ban the use of force except in self-defense or when the Security Council finds a threat to international security, but it states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”¹⁴⁰

According to the Charter, the United Nations has no role in stopping intrastate humanitarian disasters. Further evidence against the legality of humanitarian intervention comes from the documents relating to the Charter’s founding.¹⁴¹ While originalism¹⁴² has been put in different terms when applied to treaties, the justification for its use as a tool to analyze the U.N. Charter is just as strong as the justifications commonly offered for the method in domestic constitutional law. If countries are morally or legally bound to obey treaties, because they previously agreed to them, then they can only be obliged to follow the terms to which they consented. This idea has long been accepted by the international community. The Vienna Convention on the Law of Treaties, for example, allows the preparatory work from the time of adoption to be used in the interpretation of treaties.¹⁴³

Scholars who have examined the *travaux préparatoires* of the U.N. Charter and other historical evidence have shown that the founders did not believe that they had created an organization that was to deal primarily,¹⁴⁴ if at all, with

¹³⁹ U.N. Charter art. 2, para. 7.

¹⁴⁰ *Id.*

¹⁴¹ THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 136 (2003).

¹⁴² In domestic American law, “originalism” refers to a method of analysis that determines legal principles by looking to the original meaning at the time of the adoption of the United States Constitution and its later amendments. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

¹⁴³ Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S 331; *see also* Tom J. Farer, *Human Rights in Law’s Empire: The Jurisprudence War*, 85 AM. J. INT’L L. 117, 117 (1991). While the Vienna Convention does not apply to the U.N. Charter, and has not been ratified by all countries, it was “largely a consolidation of the existing customary international law of treaties.” Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT’L L. 51, 51–52 (1974).

¹⁴⁴ U.S. DEP’T OF STATE, PUB. NO. 2297, *THE UNITED NATIONS DUMBARTON OAKS PROPOSALS FOR A GENERAL INTERNATIONAL ORGANIZATION*, U.N. DOC. JURIST 2, G/2 (Conf. Ser. No. 66, 1945), *reprinted in* 14 U.N. COMM. OF JURISTS, *DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION*, SAN FRANCISCO, 1945, at 453 (1945).

intrastate human rights violations.¹⁴⁵ For example, in deliberations preceding the adoption of the Charter, members of the U.S. Senate suggested that “a threat of force or violence” was necessary for the United Nations to interfere in the affairs of a state.¹⁴⁶ In the words of Tom Farer, “if one deems the original intention of the founding members to be controlling with respect to the legitimate occasions for the use of force, humanitarian intervention is illegal.”¹⁴⁷

Of course, one could reject using only the *travaux préparatoires* to determine the meaning of the U.N. Charter. Thomas Franck calls the Charter a “living document” and argues that, unlike most international agreements, it created a brand new international organization and was meant to keep pace with evolving norms.¹⁴⁸ The second clause of Article 2(7), after all, says that the principle of nonintervention does not apply when the United Nations is undertaking “enforcement measures under Chapter VII,” the part of the document which allows the Security Council to decide when a “threat to the peace, breach of the peace, or act of aggression” exists.¹⁴⁹ Therefore, Franck argues that humanitarian interventions approved by the Security Council can be considered legal, even if the definitions of the terms in the phrase “threat to the peace, breach of the peace, or act of aggression” need to be expanded from their original meanings.¹⁵⁰ On the other hand, Franck maintains that humanitarian interventions not approved by the Security Council are not permitted by the U.N. Charter.¹⁵¹

The argument about the legality of humanitarian intervention with the consent of the Security Council comes down to whether the organization is allowed to define its own mission and whether we should give greater weight to original meaning of the U.N. Charter or current state practices. In practical terms, if the Security Council approves of a war, that means that all the major powers are in agreement. Under such circumstances, the intervention will take place and no state or coalition can be expected to stop it. Also, such an effort

¹⁴⁵ See FRANCK, *supra* note 141; Farer, *supra* note 143, at 119–20 (“Nothing in the *travaux préparatoires* suggests that the parties envisioned a government’s treatment of its own nationals as a likely catalyst of a threat or breach.”).

¹⁴⁶ GLENNON, *supra* note 5, at 108–09.

¹⁴⁷ Farer, *supra* note 143, at 121.

¹⁴⁸ FRANCK, *supra* note 141, at 6–7.

¹⁴⁹ U.N. Charter art. 2 para. 7, art. 39.

¹⁵⁰ FRANCK, *supra* note 141, at 5.

¹⁵¹ *Id.* at 135–39.

can be expected to have a great deal of legitimacy. Therefore, arguing about legality under such circumstances has few real world implications. If all major powers support a humanitarian intervention, it will happen and the attacking states will not face sanctions as a result. However, in cases where the permanent members of the Security Council disagree on the need to use military force to stop an atrocity, we can still benefit from a debate about legality.

Under the obey-or-be sanctioned standard, humanitarian intervention, with or without Security Council approval, should not be considered illegal. The instigators of the three main wars of the post-Cold War era that fall into this category have not been sanctioned. The 1990s intervention in Somalia was supported and legitimized by several Security Council resolutions.¹⁵² While the NATO intervention in Kosovo was condemned by Russia, China, and India,¹⁵³ the United States and its allies did not suffer serious consequences. Finally, although certain countries complained during and after the attack on Libya, NATO was not seriously sanctioned for overthrowing Muammar Gaddafi.¹⁵⁴

Therefore, while humanitarian intervention may be illegal under the text and original meaning U.N. Charter, it is permitted under the obey-or-be sanctioned standard. The United States and its allies have not faced serious consequences for imposing their will on or even overthrowing weaker states to stop governments from committing atrocities against their own citizens. Still, it is difficult to believe that less powerful countries would be able to violate the sovereignty of other states with impunity even if they made a plausible case that they were defending human rights.

Even if we treat the U.N. Charter as a “living constitution,” it does not follow that humanitarian intervention has become legal through state practice. A “living constitution” at least requires that a significant portion of the relevant

¹⁵² See S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992); S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 746, para. 2, U.N. Doc. S/RES/746 (Mar. 17, 1992); S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

¹⁵³ See *NATO Air Strikes—The World Reacts*, B.B.C. NEWS (Mar. 25, 1999, 4:47 PM), <http://news.bbc.co.uk/2/hi/303446.stm>.

¹⁵⁴ See, e.g., Scott Bobb, *Several African Leaders Criticize Air Attacks in Libya*, VOICE OF AM. (Mar. 22, 2011, 8:00 PM), <http://www.voanews.com/content/several-african-leaders-criticize-air-attacks-in-libya-118435599/136876.html> (“South African President Jacob Zuma has warned that the Western-led bombings of Libyan military installations must not target civilians.”); Patrick Wintour & Ewen MacAskill, *Gaddafi May Become Target of Air Strikes, Liam Fox Admits*, GUARDIAN (Mar. 20, 2011, 5:37 PM), <http://www.guardian.co.uk/world/2011/mar/20/coalition-criticism-arab-league-libya?INTCMP=SRCH>.

community actually accept any change. Despite the broad support for humanitarian intervention on the part of NATO member-states, the concept has been more controversial in Russia and China,¹⁵⁵ which are two of the five permanent members of the Security Council and together make up nearly a quarter of the world's population. In reaction to the Kosovo War, "114 member states of the Non-Aligned Movement condemned humanitarian intervention in 2000."¹⁵⁶ The Somalia intervention may have had international support, but at the time, the country had no functioning government.¹⁵⁷ International forces did cross an established border, but no authority had enough effective control over the country for us to be able to say that its sovereign rights were violated.¹⁵⁸ The agreement of the United States, Great Britain, and a handful of other Western states does not alone form an international consensus.

The legal status of humanitarian intervention stands in sharp contrast to that of classic invasions. Without any kind of international consensus regarding humanitarian wars, efforts to protect civilians from their own government are taken on an *ad hoc* basis and usually controversial. At best, there is a spectrum of legality in this area of law, with Security Council-approved missions and those in countries with no functioning governments more legal than those undertaken when the opposite conditions apply. But certainly all humanitarian interventions could be considered illegal, due to both the plain text and original understanding of the U.N. Charter.¹⁵⁹ The obey-or-be sanctioned standard leads to a different conclusion, however, and there is no clear guidance as to whether this should trump the treaty-based method for determining legality.

D. The International Community and Responses to Terrorism

Article 51 of the U.N. Charter protects "the inherent right of individual or collective self-defense" once a state has been subject to an "armed attack," at

¹⁵⁵ See GLENNON, *supra* note 5, at 156–60 (discussing the "attitudinal gap" toward international human rights between the West and Russia and China in the context NATO's Kosovo intervention).

¹⁵⁶ *Id.* at 158.

¹⁵⁷ Valerie J. Lofland, *Somalia: U.S. Intervention and Operation Restore Hope*, in CASE STUDIES IN POLICYMAKING AND IMPLEMENTATION 53, 54 (David A. Williams, ed. 6th ed. 2002), available at www.au.af.mil/au/awc/awcgate/navy/pmi/somalia1.pdf; Fernando R. Teson, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 348–49 (1998).

¹⁵⁸ *Id.*

¹⁵⁹ U.N. Charter art. 2, para. 4; see also FRANCK, *supra* note 141.

least until the Security Council has had the opportunity to address the issue.¹⁶⁰ Because the United Nations was formed in reaction to World War II, it is possible to conclude that “armed attack” originally referred to a case of state-on-state violence.¹⁶¹ Unsurprisingly, events over the last few decades have led many scholars to argue that the rights granted under Article 51 are insufficient for purposes of modern self-defense against threats such as terrorism.¹⁶² Unlike the case of humanitarian intervention, however, there has been very little international condemnation of the principle of fighting terrorism and no evidence that the founders of the United Nations considered and rejected the idea that states should be able to respond to such threats.

Between 1945 and 1991, the international community did not sanction states that took limited action in response to terrorist attacks.¹⁶³ Examples include the United Kingdom’s attacks against Yemen in 1949 and 1957, the United States’ 1986 bombing of Libya, and several Israeli strikes against its Arab neighbors.¹⁶⁴

In more recent years, the practice of using force to respond to terrorism has only grown in acceptance. Only one day after the attacks of September 11, the Security Council passed a resolution that affirmed the right to respond in self-defense, called terrorism “a threat to international peace and security,” and expressed the Council’s “readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism.”¹⁶⁵ A few weeks later, it passed Resolution 1373, which called on all

¹⁶⁰ U.N. Charter art. 51.

¹⁶¹ See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 102–03 (“[I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein.’ This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.”).

¹⁶² See, e.g., Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 *HOUS. J. INT’L L.* 25 (1987); Yoo, *supra* note 11, at 751–72.

¹⁶³ WEISBURD, *supra* note 84, at 255, 257–58, 271–72, 292–300.

¹⁶⁴ *Id.* On the other hand, when the supposed “terrorists” being attacked were fighting for self-determination or the end of Western colonialism, the international community has reacted harshly towards the aggressor state. See *id.* at 300–01. With the end of European domination of third-world countries, however, this deviation from the rule is only of historical interest.

¹⁶⁵ S.C. Res. 1368, paras. 1, 5, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

states to take proactive steps to suppress terrorist activity.¹⁶⁶ By May 2002, a coalition of states was occupying Afghanistan and approximately half of the 14,000 foreign troops were non-Americans.¹⁶⁷

More than twenty countries have contributed troops to the Afghan War effort, and dozens more have provided support in the form of intelligence, logistics, equipment, or permission to fly over airspace.¹⁶⁸ All this international backing came despite the fact that the United States invaded Afghanistan to overthrow its government, something that is normally illegal under the plain text of the U.N. Charter.¹⁶⁹ A few scholars have argued that the invasion was not covered under Article 51 or explicitly authorized by the Security Council and hence illegal.¹⁷⁰ But there has been virtually no international resistance to the American-led effort; pragmatism has triumphed over adherence to the plain text of the U.N. Charter.¹⁷¹

In addition to invading and occupying Afghanistan, the United States has been using air drones to target and kill suspected terrorists in Somalia, Yemen, and Pakistan.¹⁷² Although this method of fighting terrorism has drawn criticism,¹⁷³ the United States has not suffered any international sanctions as a result. Perhaps the worst that has happened is that American relations with Pakistan have become strained, which is unsurprising considering that its territory has been targeted.¹⁷⁴

¹⁶⁶ S.C. Res. 1373, para. 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁶⁷ Ian S. Livingston & Michael O'Hanlon, *Afghanistan Index: Also Including Selected Data on Pakistan*, BROOKINGS INST., Figs. 1.1, 1.2, <http://www.brookings.edu/~media/Programs/foreign%20policy/afghanistan%20index/index20120930.pdf> (last visited Sept. 1, 2013).

¹⁶⁸ DEP'T OF DEF., FACT SHEET: INTERNATIONAL CONTRIBUTIONS TO THE WAR AGAINST TERRORISM (May 22, 2002), available at <http://www.defense.gov/news/May2002/d20020523cu.pdf>; Christopher L. Gadoury, *Should the United States Officially Recognize the Taliban? The International Legal and Political Considerations*, 23 HOUS. J. INT'L L. 385, 386 (2001).

¹⁶⁹ It is also likely relevant that, because of its human rights record, only three states recognized the Taliban at the time of the 2001 invasion. Oliver Roy, *The Taliban: A Strategic Tool for Pakistan*, in PAKISTAN: NATIONALISM WITHOUT A NATION? 149, 156 (Christophe Jaffrelot ed., 2002).

¹⁷⁰ See GLENNON, *supra* note 5, at 111–14.

¹⁷¹ See, e.g., Allen S. Weiner, *The Use of Force and Contemporary Security Threats*, 59 STAN. L. REV. 415, 457 (2006).

¹⁷² See Declan Walsh, *Major Review By Pakistan Calls for End to Drone Hits*, N.Y. TIMES INT'L, Mar. 21, 2012, at A8.

¹⁷³ See, e.g., Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 123–26 (2010).

¹⁷⁴ See Walsh, *supra* note 172, at A8.

A cynic may argue that the only reason that the international community accepts wars fought in reaction to terrorist threats is because the war on terror has the backing of the United States. This theory that American hegemony drives international norms does not, however, explain why states have been vocal in opposing both American humanitarian interventions and the 2003 invasion of Iraq,¹⁷⁵ even if the other countries have not been powerful enough to actually sanction the United States. One may conclude that considerations of power preclude sanctions against the United States, but we should also reject the idea that America is powerful enough to force other states to cooperate with its endeavors or chill the speech of those who would otherwise be critical of its policies.

Another reason to reject a strong version of the American power hypothesis is that countries less powerful than the United States have used force against other states in the name of fighting terrorism and not faced third-party sanctions. In the 1990s, after the international community had failed to leave behind a stable government in Somalia, much of the country came under the rule of Islamists.¹⁷⁶ Concerned with how the situation would affect its own security interests, Ethiopia invaded its neighbor in December 2006.¹⁷⁷ Ethiopia was able to quickly seize the capital Mogadishu, where it tried to prop up the internationally supported Transitional Federal Government.¹⁷⁸ After a prolonged insurgency, Ethiopia withdrew its forces in early 2009 without leaving behind a functional government and with Islamists still exercising control over parts of Somalia.¹⁷⁹ Shortly after the Ethiopian invasion, the Security Council called for an African Union peacekeeping force to help support the Transitional Federal Government in Somalia.¹⁸⁰ After the deployment of African peacemakers, the United Nations generally stood on the sidelines, its officials promising to send a peacekeeping force once the situation stabilized.¹⁸¹ In October 2011, the United States and France provided

¹⁷⁵ See Richard Falk, *The World Speaks on Iraq*, 62 GUILD PRAC. 91, 93 (2005).

¹⁷⁶ Bronwyn Bruton, *In the Quicksands of Somalia: Where Doing Less Helps More*, 88 FOREIGN AFF. 79, 82 (2009).

¹⁷⁷ Mike Pflanz, *Ethiopia Intervenes in Somali Civil War*, CHRISTIAN SCI. MONITOR, Dec. 26, 2006, at 6.

¹⁷⁸ Bruton, *supra* note 176, at 84.

¹⁷⁹ *Id.* at 85.

¹⁸⁰ S.C. Res. 1744, ¶ 3–5, U.N. Doc. S/RES/1744 (Feb. 20, 2007); Scott Baldauf & Alexis Okeowo, *Can African Peacekeepers Tame Somalia?*, CHRISTIAN SCI. MONITOR, Jan. 12, 2007, at 7.

¹⁸¹ Rob Crilly, *U.N. Faces Calls for Action in Somalia*, CHRISTIAN SCI. MONITOR, Aug. 15, 2007, at 7.

military support as Somalia was invaded once again, this time by its neighbor Kenya.¹⁸²

Similar to the backing of the American-led invasion of Afghanistan, the international community has supported, at least implicitly, violations of Somalia's sovereignty in the name of fighting terrorism.¹⁸³ Likewise, in 2008, when Turkey determined that certain elements among the Kurdish population in northern Iraq were supporting terrorism against the state, it launched incursions into the area.¹⁸⁴ These attacks were generally accepted and even aided by the United States, who was occupying Iraq and did little more than put diplomatic pressure on Turkey to quickly end the invasion.¹⁸⁵ The government in Baghdad condemned the attack but did not try to resist or take any other action.¹⁸⁶

Modern terrorism is a novel threat to the international community. The U.N. founders could not have imagined attacks like those of September 11. At the same time, the Charter makes clear that states retained the right to self-defense.¹⁸⁷ This right was "inherent," which implies that it could evolve to take account of developing norms and technologies in a way that other Charter provisions could not. Thus, room was left for the international community to respond to new threats that arguably make the old idea of imminence outdated.¹⁸⁸ When an analysis of the text of Article 51 is combined with the fact that third-party states do not sanction countries that respond militarily to terrorist threats, and often even support them, it is clear that using proportional force against terrorists in other countries fits under the modern rubric of self-defense.

¹⁸² *A Big Gamble*, ECONOMIST, Oct. 29, 2011, at 60. France was directly reacting to one of its citizens having been kidnapped and killed by extremists in that country. *Id.* at 60–61.

¹⁸³ See Jeffrey Gettleman, *World Leaders Are Meeting in a Script All Too Familiar to Somalis*, N.Y. TIMES, Feb. 23, 2012, at A8.

¹⁸⁴ *Turkey Invades Northern Iraq*, ECONOMIST, Mar. 1, 2008, at 51.

¹⁸⁵ Richard A. Oppel, Jr. & Mark Mazzetti, *Gates Urges Turkey to End Its Iraq Invasion by Mid-March*, N.Y. TIMES, Feb. 28, 2008, at A10.

¹⁸⁶ *Id.* Of course, Baghdad's passivity may partly be explained by the weakness of the central government. As of 2008, the Iraqi state did not have well-functioning institutions and maintained little control over the Kurdish north of the country.

¹⁸⁷ See U.N. Charter art. 51.

¹⁸⁸ See John C. Yoo, *Force Rules: U.N. Reform and Intervention*, 6 CHI. J. INT'L L. 641, 649–54 (2006) (arguing for updating the imminence standard that applied at the founding of the U.N.).

The U.N. Charter explicitly rejects the idea that one state could use force to interfere in the internal affairs of another.¹⁸⁹ But it affirms an inherent right to self-defense that had long-standing legitimacy amongst the members of the international community at the time of the U.N.'s founding.¹⁹⁰ With the rise of concerns over radical Islamic extremism, the international community has become more explicit in its acceptance of and support for preemptive and retaliatory strikes against terrorist targets.¹⁹¹ By attacking a country that harbors and supports terrorists, a state directly neutralizes the target and deters similar action in the future. Even before the attacks of September 11, such uses of force against other states were widely accepted and never sanctioned.¹⁹²

E. The Grey Areas

In determining the legality of different kinds of interstate uses of force, this article uses the obey-or-be sanctioned standard and the U.N. Charter as guideposts. The rules can be summed up as follows:

1. Classic invasions are illegal.¹⁹³
2. Limited strikes against terrorist targets are legal.¹⁹⁴
3. Other uses of force, including humanitarian intervention, cannot be said to be legal or illegal.

Relying on these rules, the third category, the “grey areas,” includes the use of interstate force in the following circumstances:

A. Third-party states supporting third world insurgencies or intrastate struggles against colonial and apartheid governments are not sanctioned.¹⁹⁵

¹⁸⁹ U.N. Charter art. 2, para. 4.

¹⁹⁰ U.N. Charter art. 51.

¹⁹¹ See, e.g., Andrea Armstrong & W. Michael Reisman, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 537–56 (2006).

¹⁹² See WEISBURD, *supra* note 84, at 255, 257–58, 271–72, 292–300.

¹⁹³ These are wars in which one country's soldiers or weapons cross the established borders of another to overthrow the government of the target state or seize its territory. This category does not include wars that are humanitarian interventions, continuations of previous conflicts, or can be interpreted as a major power using force to maintain a traditional sphere of influence.

¹⁹⁴ There is a principle of proportionality: After a major attack like that of September 11, the United States received international support for overthrowing the Taliban. Usually, terrorist attacks kill fewer people and retaliations or preemptive actions are more restrained.

B. Third-party intervention in a civil war on one side or another is not sanctioned, provided that the intervention does not rise to the level of a classic invasion.¹⁹⁶

C. Major powers are not sanctioned for using force to maintain their spheres of influence.¹⁹⁷

D. The instigators of “neo-colonial” wars are not sanctioned.¹⁹⁸

E. There is no consistent pattern of sanctions regarding the use of force in “post-imperial” wars.¹⁹⁹

F. There are generally no sanctions for aggressors in situations where the attack can be seen as the continuation of a previous conflict that was left unsettled.²⁰⁰

F. *The General Pattern*

International law scholars who decry the failure of international law to restrain the interstate use of force point to the absolute numbers of armed conflicts in the world and cases of countries violating the text of the U.N. Charter with impunity.²⁰¹ The list above appears to show that these critics have a point.²⁰² The initiation of interstate humanitarian interventions or wars that fit

¹⁹⁵ Between 1945 and 1991, European or European-derived people used interstate force to maintain colonies or apartheid governments in fifteen conflicts. *Id.* at 63–96. In each situation, the non-European side received significant support from third-parties, who were never sanctioned. *Id.* With the end of European colonialism and apartheid, this rule has lost any contemporary significance.

¹⁹⁶ *See id.* at 170–208.

¹⁹⁷ This includes when the United States invaded Grenada or when the Soviet Union put down the rebellion in Czechoslovakia. *Id.* at 219–42. When the Soviet Union invaded Afghanistan, however, it was attacking a state that was not traditionally under its control and therefore sanctioned. *Id.* at 44–46.

¹⁹⁸ These are instances in which third world states have sought to achieve authority over areas not recognized as states when the wars began. *Id.* at 243. Two conflicts that fit into this category are Morocco’s attempts over the decades to subdue Western Sahara and Indonesia’s 1975–83 invasion of East Timor. *Id.* at 244–51.

¹⁹⁹ *Id.* at 97–118. These are invasions in the immediate aftermath of imperial dissolution, involving the crossing of borders that lack long-term international acceptance. *Id.* at 97.

²⁰⁰ *Id.* at 119–69. In particular, the world has shown a “general acquiescence toward Arab-Israeli violence.” *Id.* at 165–66. As in all uses of force that do not draw sanctions, this is not to say that different combatants have not faced criticism. Israel, for example, is often condemned for its behavior, *See, e.g., id.* at 138. But third-party states never incur the costs of meting out serious punishment.

²⁰¹ *See supra* notes 34–38 and accompanying text.

²⁰² *See supra* Part I.E.

into the six other kinds of grey areas above arguably violate the U.N. Charter since, in the vast majority of cases, the aggressor cannot be said to be acting in self-defense or with Security Council approval. If the existence of a coherent doctrine of international law regarding the use of force requires the relevant rules to be written down in a treaty and violators to always be punished, then those who say there is no such law are correct. Further, if all armed conflict, except attacks authorized by the Security Council or justified on the grounds of self-defense, must be eliminated in order to say that international rules regarding the use of force exist, then once again the critics of the current system have it right.

Such criticisms set standards that are too high and go beyond even what the U.N. founders hoped to accomplish.²⁰³ If international law is conceived as a set of norms that bring sanctions when violated and deter the undesirable acts, then the conclusion follows that classic invasions, at the very least, are illegal. Importantly, this reflects a more general pattern. It shows that international law is biased towards preserving the status quo.²⁰⁴ A classic invasion upsets the current order and is thus likely to be sanctioned.²⁰⁵ On the other hand, in the case of interfering in a civil war or reinitiating hostilities in the midst of an ongoing dispute, there is no stable status quo to disrupt. The legality of superpowers maintaining their traditional spheres of influence through wars that would otherwise be classified as classic invasions also makes sense in this context. International terrorism promotes destruction and instability and, therefore, limited strikes to deal with the problem are not sanctioned but rather treated as legal uses of force. The major exception to the status quo bias of the law regarding the interstate use of force since World War II has been cases where third-parties support non-Europeans fighting to overthrow Western powers or achieve equality with European-derived people, as in the case of the international condemnation of the white regime in South Africa and the sanctions put on the country for attacking anti-apartheid activists in neighboring states.²⁰⁶ With the end of colonialism and legalized European privilege, however, this anomaly of international law has become irrelevant.

²⁰³ See *supra* notes 88–94 and accompanying text.

²⁰⁴ For an earlier version of this argument, see WEISBURD, *supra* note 84, at 310–13.

²⁰⁵ *Id.* at 313.

²⁰⁶ *Id.*

Even the international reactions to the four classic invasions between 1945 and 1991 that did not result in meaningful sanctions against the aggressor support the theory of the status quo bias or can be explained by other rules of international law. Iraq was not sanctioned for its invasion of Iran, and Tanzania faced no significant consequences for its attack against Uganda.²⁰⁷ In both situations, however, the target regime was itself a threat to international stability.²⁰⁸ Self-determination, the same principle that legitimized struggles against European colonialism and apartheid, explains the arguable legality of Indonesia's annexation of West Irian and India's seizure of Goa.²⁰⁹

The analysis of humanitarian interventions and the international reactions to them shows that they generally fit into the same pattern that other wars do. Wars that preserve the status quo are more acceptable than both wars that disrupt the status quo and wars that involve intervention in a situation where there is little stability to begin with.²¹⁰ Although Western countries sometimes allow humanitarian concerns to overrule other important considerations, other states like Russia and China tend to prefer maintaining international stability.²¹¹ Somalia had no functioning government when the United Nations intervened to deliver food aid;²¹² there was no way that the international community could preserve a status quo that did not exist. Yugoslavia was in the process of disintegrating when NATO attacked, but it was still a universally recognized state.²¹³ Therefore, the Kosovo intervention was greatly resisted by much of the world.²¹⁴ Finally, the African Union, Arab League, China, and Russia were willing to support a no-fly zone over Libya that would prevent Muammar Gaddafi from killing large numbers of civilians.²¹⁵ As soon as it became clear that NATO was trying to overthrow the government of an established state, however, the war came to look more like a classic invasion

²⁰⁷ *Id.* at 40–42, 47–52.

²⁰⁸ *Id.* at 60–61.

²⁰⁹ *Id.* at 59–60.

²¹⁰ *Id.* at 311.

²¹¹ See GLENNON, *supra* note 5, at 156–59.

²¹² See Jeffrey Gettleman & Neil MacFarquhar, *Somalia Food Aid Bypasses Nedy, U.N. Study Says*, N.Y. TIMES, March 7, 2010, at A1.

²¹³ Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659 (Mar. 26, 1999).

²¹⁴ *Id.*

²¹⁵ *Arab States Back Libya No-Fly Zone Against Gaddafi*, REUTERS, (Mar. 12, 2011), <http://www.reuters.com/article/2011/03/12/us-libya-idUSTRE7270JP20110312>; see also S.C. Res. 1973, U.N. Doc. S/Res/1973 (Mar. 17, 2011).

and the international community soured on the attack.²¹⁶ The leading states of NATO may be too powerful to suffer economic sanctions or military invasion as a result of the international community's anger, but expanding the mission in Libya has made it harder for the United States and its allies to effectively pressure the al-Assad regime in Syria to give up the struggle against its own domestic uprising and may have other future consequences.²¹⁷

Finally, understanding the status quo bias sheds light on the territorial integrity norm. For what can be more destabilizing to the international community than a redrawing of accepted borders? Throughout history, territorial disputes have been the main cause of war.²¹⁸ If the international community regards well-established borders as inviolable and states are sanctioned for trying to annex territory, then even countries predisposed to go to war will have much less to fight about. The result has been the end of territory wars and the near-elimination of states using their militaries to overthrow other sovereign governments.²¹⁹

G. *Should We Thank (or Blame) International Law?*

There are several reasons why territorial aggression and classic invasions may have become less common, some of which have nothing to do with international law. First, over time, land has become less valuable relative to "human capital," thus reducing the incentives to make war to seize territory.²²⁰ Second, the bipolar world during the Cold War was important for maintaining international stability.²²¹ Third, the spread of democracy can also be credited.²²² These theories may be partly correct. However, these material or structural explanations of the status quo bias fail to do fully describe the decrease in war for several reasons. The international reaction to classic

²¹⁶ *Russia Reacts with "Regret" to Military Action in Libya*, CNN (Mar. 19, 2011, 5:29 PM), http://articles.cnn.com/2011-03-19/world/russia.libya_1_military-action-russian-foreign-ministry-international-force?_s=PM:WORLD; *China Expresses Regret for Military Strike Against Libya*, XINHUANET (Mar. 20, 2011), http://news.xinhuanet.com/english2010/china/2011-03/20/c_13788512.htm.

²¹⁷ See Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 20, 2012, at A8.

²¹⁸ Zacher, *supra* note 97, at 215–16.

²¹⁹ *Id.* at 234.

²²⁰ *Id.* at 243.

²²¹ Mark R. Beissinger, *Demise of an Empire-State: Identity, Legitimacy, and the Destruction of Soviet Politics*, in *THE RISING TIDE OF CULTURAL PLURALISM: THE NATION-STATE AT BAY?* 93, 94–95 (Crawford Young ed., 1993); Yoo, *supra* note 188, at 653.

²²² See PINKER, *supra* note 130, at 278–84.

invasions indicates that there are severe sanctions for states that use force to seize land or overthrow other governments.²²³ In domestic law, if an act is prohibited by law with severe sanctions against those who violate the rule, then many would agree with the presumption that the sanctions are at least partly responsible for the undesirable act's infrequent occurrence.²²⁴ Supporting this position is the fact that since the end of the Cold War, the European Union, the United States, and the United Nations have all become much more willing to use sanctions to deal with human rights violations, nuclear proliferation, and other international problems.²²⁵ This indicates that today the international community would be at least as willing as it has been in the past to take meaningful steps in response to interstate aggression.

There are several reasons why explanations of the status quo bias of international law that ignore norms are inadequate. First, while it may be true that land has become less important in determining national wealth, with ownership of tangible resources, particularly oil, land can still make the difference between a country being rich or poor. From 1988 to 1996, eleven states had oil exports that had a total value that was higher than one quarter of their entire GDP.²²⁶ In the same time period, no less than seventeen states had oil exports that were valued at over ten percent of GDP, and six states had exported non-fuel minerals that were valued at least ten percent of GDP.²²⁷ Also, since 1996 the price of oil has skyrocketed. Between 2000 and 2002, oil was selling for between \$17 and \$40 a barrel.²²⁸ From the end of 2010 to the summer of 2012, it was fluctuating between \$68 and \$110 a barrel.²²⁹ Thus, it is possible that some states have become even more dependent on oil for their wealth over the last decade.

Second, the theory that the bipolar world is responsible for the international stability of the modern era also fails as a full explanation. Since the collapse of the Berlin Wall, the status quo bias has continued to be as much of a factor as

²²³ See *supra* Part I.B.

²²⁴ See JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 2–3, 11–13 (1975).

²²⁵ See Kimberly Ann Elliott, *Trends in Economic Sanctions Policy: Challenges to the Conventional Wisdom*, in INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM 3, 3–6 (Peter Wallensteen & Carina Staibano eds., 2005).

²²⁶ Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325, 326 (2001).

²²⁷ *Id.* at 326–27. These figures do not take into account domestic resource consumption. *Id.*

²²⁸ See *Crude Oil Spot Prices*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=D> (last visited Sept. 28, 2013).

²²⁹ *Id.*

it was before in international law, and the disappearance of the Soviet Union has not led to an upsurge of classic invasions. In fact, while the number of interstate wars did see a slight jump after 1991, the total number of people killed per interstate war has plummeted, meaning fewer overall deaths.²³⁰ Some have argued that it is actually a unipolar world that leads to stability and credit American hegemony for international peace.²³¹ But the norms favoring territorial integrity and prohibiting classic invasions have persisted both during and after the Cold War. This indicates that the international stability of the modern era depends less on whether the world is unipolar or bipolar than it does on other factors. Multipolarity, however, with three or more poles, has not existed since at least 1945 and may be a system less conducive to peace.

Finally, there are problems with using the democratic peace theory to explain the status quo bias of international law. In recent decades, the territorial integrity norm has applied to dictatorial regimes as well as democratic states, with no country having successfully annexed another's territory since 1976.²³² In the last thirty-eight years, the rule has been observed everywhere despite the presence of dictatorial regimes. The territorial integrity norm is not exclusively observed between democracies or between democracies and dictatorships. Non-democracies have followed the same norm for nearly four decades usually without undertaking classic invasions against one another.

While a few countries in the world like South Korea and Japan have become wealthy mostly due to human capital, others like Qatar and Kuwait have achieved a high standard of living by simply residing over a sea of oil. If countries mostly sought security and power, then it seems it would make sense to seize another state's territory and profit off of its oil or other resources. Yet arguably, the only national leader in the Middle East who has acted in a manner consistent with the theory of states as self-interested actors has been Saddam Hussein, and both he and his country suffered dire consequences as a result.²³³ Even if it is not logical to invade other countries to seize their resources, leaders do not have perfect information. In a Hobbesian system with asymmetric information and cognitive biases, at least some countries should be

²³⁰ PINKER, *supra* note 130, at 300–04.

²³¹ See William C. Wohlforth, *The Stability of a Unipolar World*, INT'L SECURITY, Summer 1999, at 5.

²³² Zacher, *supra* note 97, at 244.

²³³ See *supra* text accompanying notes 105–15.

expected to weigh their options and come to the conclusion that a classic invasion makes sense in a particular instance. The fact that no state does indicates either that moral scruples on the part of leaders prevent them from attacking other countries or that the international sanctions that come when one launches a classic invasion are deterring such actions.

One could potentially argue against the obey-or-be sanctioned standard by the saying that the behavior we observe simply shows states acting in their own interests.²³⁴ State *A* might not invade the smaller state *B* because state *C*, the largest state of all, has an interest in stopping state *A*.²³⁵ The rules of international law will only be followed if they are consistent with an equilibrium resulting from a system of international actors pursuing their own interests, because there is no third-party enforcer.²³⁶ As soon as circumstances change, states will not hesitate to violate the norms they once supported.

The universality of the territorial integrity norm indicates that there is more going on than states simply trying to maximize wealth, security, and power.²³⁷ It has been more than three and a half decades since a state has successfully seized the territory of another. In all that time, it seems quite implausible to believe that the world's more powerful states have never seen a single instance where it was in their interest to support one state's takeover of a part of another. A critic of international law may point out that stability itself is what powerful states might seek; therefore, the long term benefits of upholding the norm against classic invasions might outweigh the short-term benefits of supporting its violation in any particular instance.²³⁸

This theory of enforcement, however, is not an alternative to international law but rather another way of describing it. If it were shown that the police or a state's leader only enforced the law for self-interested reasons, that would be no reason to argue that domestic law did not exist. The more relevant question is whether enforcers of the law consistently punish certain actions and therefore deter what are considered crimes. Since classic invasions are

²³⁴ See GOLDSMITH & POSNER, *supra* note 3, at 28–29.

²³⁵ *Id.*

²³⁶ Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT'L L. 1075, 1085–88 (2004).

²³⁷ See *supra* Part I.G.

²³⁸ See Yoo, *supra* note 11, at 791–93 (arguing that the hegemonic stability theory may explain why a superpower might voluntarily bare the costs of providing a public good such as international stability).

consistently punished, it follows from both the U.N. Charter and the actual state practice that these kinds of wars are illegal.

Perhaps the reason that international law is not given more credit for the decline in interstate war is because the victory over classic invasions and territorial aggrandizement has been so complete. In 1990, after the international community succeeded in expelling Saddam Hussein from Kuwait, there was a burst of optimism that, with the end of the Cold War, a “new world order” had arrived that would finally provide collective security.²³⁹ Had a large number of classic invasions occurred since, perhaps the collective response would have been the same each time and more people would be optimistic about the enforcement of contemporary norms relating to the use of force and territorial integrity. But because this has not happened, and wars for territory have been eliminated, it is very easy to take what has been accomplished for granted. It is hard to believe that even the most optimistic global legalist alive in 1945 actually thought that Article 2(4) of the U.N. Charter was to be taken literally. Similarly, the collective effort to eliminate interstate conflict should be judged by more modest standards than one that demands the elimination of all war, at least in the short term.

If the decline of interstate conflict is based on factors unrelated to international law, perhaps there is little risk in tweaking the U.N. Charter or introducing new ways to deal with the domestic use of force by states. But before accepting the need for or desirability of reform, the current doctrine of international law regarding the use of force must be acknowledged. That doctrine may very well be responsible for the elimination of the kinds of conflicts that originally motivated the study of international law and the formation of the United Nations. In the postwar era, classic invasions have been met with severe sanctions, and a territorial integrity norm has been established and maintained.²⁴⁰ This indicates that among states, there is a normative bias in favor of the status quo, and states are willing to act to enforce this preference. Only by understanding the world community’s reactions to past instances of interstate uses of force can we have more informed discussions on the desirability of potential changes to the current international order.

²³⁹ See Koh, *supra* note 15, at 2630; Anthony Clark Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491, 491 (1993).

²⁴⁰ See *infra* Part II.C.

II. WHAT DETERMINES WHICH NORMS ARE EFFECTIVE

This Part presents a more general theory of how a global norm can become an effective part of international law. Having argued against material explanations for the status quo bias of international law, the broader issues surrounding global norms are examined here, including the questions of when they are adhered to and why. First, no norm can exist without a “norm entrepreneur,” which is often a powerful individual or group of sovereign states that accepts the rule and pushes the rest of the world to accept it. Once the norm has been created, whether it survives depends on its specificity and how inherently morally compelling it is. When a norm gains a high enough degree of legitimacy, its violation becomes unthinkable for most state actors. The world community punishes rule-breakers, and the norm thus meets the obey-or-be sanctioned standard of international law. Over time, not acting in conformance with the rule becomes even more unthinkable. Even if states are self-interested actors, if they behave as people do in the real world, they are not completely rational agents seeking their own good. They are shaped by norms and a desire to live up to standards of appropriateness; this Article argues that at the very least, world leaders are subject to the same influences that affect individuals.

The model presented explains why some norms take hold and some do not. Three historical examples are chosen as illustrations of the larger point: the decline of slavery, the end of colonization, and the campaign to establish a guaranteed minimum standard of living under international law. The goal is to avoid biasing the analysis by only discussing norms that took hold. While slavery is universally condemned and rarely practiced and colonization is similarly unthinkable, there is still no global consensus on issues regarding wealth redistribution. While just about every state able to do so provides some kind of social safety net, states do not try to force other countries to accept expansive welfare states, and in domestic politics, no one relies on international law to make the case for redistributionist policies. Examining the norms that have succeeded shows that materialistic accounts are incapable of explaining the creation and maintenance of the rules banning slavery and colonization.

Finally, a similar analysis is conducted regarding the two main legs of the status quo bias of international law: the territorial integrity norm and the ban on classic invasions. These norms have succeeded while others have failed because of the path-dependent course of international law and the fact that

these norms are clear and morally compelling. The moral correctness of the ban on classic invasions can be quibbled with despite the ban's effectiveness. The parameters of this rule are also uncertain. The territorial integrity norm works even better as an effective rule of international law and, consistent with the theory presented, has even more influence on state behavior.

A. *Why Do Some Norms Succeed?*

International norms have been defined as rules of state practice that are followed out of a sense of “oughtness” or because the rules are legitimized in the minds of relevant actors.²⁴¹ This is similar to the concept of customary international law, with its corresponding requirements of state practice and *opinio juris*.²⁴² To realist scholars, norms are about power; states follow them when convenient and then adjust their behavior as the international situation changes.²⁴³ For example, powerful states have always forced weaker ones to protect certain minorities out of ideational concerns.²⁴⁴ However, it is argued that those who believe that international law can trump national interests have failed to show that there is a mechanism that makes leaders follow the unenforceable rules of the world community.²⁴⁵

Some international relations scholars, in contrast, believe that norms occasionally have explanatory power in and of themselves.²⁴⁶ A few of these scholars have tried to explain why some norms become prominent and others do not, and why leaders would follow rules of the international system when doing so harms the national interest. For example, Ann Florini makes an analogy between the success or failure of a norm in the international system and the fate of a genetic trait in a biological population.²⁴⁷ Three factors determine whether a variation of a gene proliferates, goes extinct, or coexists with other alleles in a state of equilibrium—these factors are what she calls prominence, coherence, and environment.²⁴⁸ Prominence means that the gene must first establish a “foothold” in the population. The mutation must arise and

²⁴¹ Ann Florini, *The Evolution of International Norms*, 40 INT'L STUD. Q. 363, 364–65 (1996).

²⁴² See *supra* note 52 and accompanying text.

²⁴³ See Krasner, *supra* note 27, at 266.

²⁴⁴ See STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 73–104 (1999).

²⁴⁵ See GOLDSMITH & POSNER, *supra* note 3, at 171.

²⁴⁶ Florini, *supra* note 241, at 363.

²⁴⁷ *Id.* at 367–69.

²⁴⁸ *Id.* at 374.

have a chance for success.²⁴⁹ A bird born with unusually sharp vision will not have the chance to pass on its advantageous trait if it is killed soon after being born. Coherence depends on the other genes carried by an organism.²⁵⁰ One needs both sharp teeth and a suitable digestive system to eat meat; one trait without the other is much less useful. The environment is everything external to the actor, and the factor that is usually most heavily emphasized in accounts of natural selection.²⁵¹

All three factors have their equivalents in the study of the survival of norms. A rule must first become prominent due to the efforts of a “norm entrepreneur,” which can be a powerful state or nongovernmental organizations.²⁵² Once established, for a new norm to survive, it must be coherent with older rules.²⁵³ If it contradicts other practices widely accepted by the international community, the norm is less likely to succeed. Finally, the “environment” the international norm finds itself in depends on everything that goes on in the global system.²⁵⁴ This includes the international balance of power and technological developments over time.

Vaughn Shannon presents a slightly different model, which takes norms as a given and tries to explain why a state would follow an unenforceable rule when it conflicts with the national interest.²⁵⁵ He points to important findings from political psychology that can shed light on compliance. Perhaps the most important of these is that people, presumably including world leaders, try to maintain positive self-images and gain approval and esteem from their peers.²⁵⁶ The need for a positive self-image “has been characterized as being among the strongest and most persistent of human goals” and has been shown to exist even “in the absence of external sanctioning agents.”²⁵⁷ The need to be accepted by peers means that individuals are prone to making use of the acceptability heuristic, which is a finding that people are biased towards acting

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 376.

²⁵¹ *Id.*

²⁵² *Id.* at 375.

²⁵³ *Id.* at 376–77.

²⁵⁴ *Id.*

²⁵⁵ See Vaughn P. Shannon, *Norms Are What States Make of Them: The Political Psychology of Norm Violation*, 44 INT'L STUD. Q. 293, 299–300 (2000).

²⁵⁶ *Id.* at 300–01 (citations omitted).

²⁵⁷ David M. Bersoff, *Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior*, 25 PERS. & SOC. PSYCHOL. BULL. 28, 28 (1999) (citations omitted).

in ways that their relevant social community considers acceptable.²⁵⁸ This means that a president or prime minister does not exist in a vacuum. The leader is rather a social being with psychological needs, belonging to a certain “identity group” whose approval he seeks.²⁵⁹ What is considered normal or acceptable exerts a normative pull on his psyche that sometimes comes into conflict with more easily quantifiable economic desires. Today, it is reasonable to believe that world leaders see elites of other states as part of their peer group.²⁶⁰

Shannon, like other constructivist scholars, also makes use of the psychological concept of the omission bias, which teaches that people prefer acting in accordance with the status quo, all else being equal.²⁶¹ The presence of the omission bias is ubiquitous in the creation of legal systems. For example, pharmaceutical companies are punished for harmful effects of vaccinations but not for failing to create vaccines.²⁶² Many jurisdictions similarly impose no duty to help even when the costs of doing so are greatly outweighed by the harm prevented.²⁶³ People are often hesitant to pull the plug on life-saving medical care even if they would decline to initiate such care under identical circumstances.²⁶⁴ Due to the omission bias, a norm created by powerful states might occasionally be expected to stick, even if there is nothing inherently compelling about it.

Shannon’s model of compliance—relying on the acceptability heuristic, the omission bias, and the fact that leaders seek approval from themselves and others—takes conformance with the rules of the international community as the norm.²⁶⁵ From the perspective of political psychology, the question is not “why do states obey international law?” but “why do states break well accepted rules?”

²⁵⁸ Shannon, *supra* note 255, at 300–01 (citations omitted).

²⁵⁹ *Id.* at 299.

²⁶⁰ See Samuel P. Huntington, *Dead Souls: The Denationalization of the American Elite*, NAT’L INT., Spring 2004, at 5–8 (2004).

²⁶¹ Shannon, *supra* note 255, at 301 (citations omitted).

²⁶² See Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 475, 475 (1994).

²⁶³ *Id.*

²⁶⁴ *Id.* at 475–76.

²⁶⁵ See Shannon, *supra* note 255, at 300–01, for a flowchart detailing Shannon’s model of compliance.

For the issue of whether to comply to come up, there must first be a conflict between traditional interests and adherence to the rule in question. If there is, then we ask how interpretable, or “fuzzy,” the norm is. If the rule is extremely clear—everyone agrees it is wrong to do *X* and what constitutes *X* is not in dispute, particularly in this situation—then violation becomes very difficult. On the other hand, if a particular situation arguably fits into an exception, then the actor may be able to justify violating the norm in question to himself and his peers. Finally, even if the situation clearly does not fall into an exception to the rule, if incentives to violate are high enough and the state can get away with breaking the rule through covert means, a leader may still act in opposition to the norm.

Behavioral research has confirmed the importance of both the “fuzziness” of a rule and maintaining a positive self-image in our daily lives.²⁶⁶ Most people like to think of themselves as honest, regardless of whether anyone else is looking.²⁶⁷ In summing up a series of experiments where individuals had the opportunity to cheat others while believing that no one would find out, Jonathan Haidt explained: “People [did not] try to get away with as much as they could. Rather . . . they cheated only up to the point where they themselves could no longer find a justification that would preserve their belief in their own honesty.”²⁶⁸ In one case, students participated in an experiment in which they were told that they had earned \$6.25.²⁶⁹ When they went to receive their payment, the cashier purposefully made a mistake by giving them two extra dollars.²⁷⁰ Some students were simply given the extra money, but in a different run of the experiment, the cashier asked, “Is that right?” after counting the cash.²⁷¹ The prompt made all the difference. In the baseline experiment of 120 students, only twenty students pointed out the mistake compared to sixty who did so when asked if they had received the correct amount.²⁷²

Other studies also support the view that human beings are neither completely honest nor ruthless self-interest maximizers. In one experiment,

²⁶⁶ Shannon, *supra* note 255, at 294, 304.

²⁶⁷ See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED OVER POLITICS AND RELIGION* 83 (2012).

²⁶⁸ *Id.*

²⁶⁹ Bersoff, *supra* note 257, at 31.

²⁷⁰ *Id.* at 31.

²⁷¹ *Id.* at 32.

²⁷² *Id.* at 33–34.

subjects were given a fifty question multiple-choice exam and were told that they would be awarded ten cents for every correct answer.²⁷³ After answering the questions, a control group transferred their answers to a blank scoring sheet.²⁷⁴ The control group answered an average of 32.6 questions correctly.²⁷⁵ Another group of students transferred their answers to a scoring sheet with the correct answers already marked.²⁷⁶ This group claimed to have answered, on average, 36.2 questions correctly.²⁷⁷ Interestingly, they did not act as rational choice actors and report no errors, but simply chose to give themselves a small bump.²⁷⁸ This was not due to the students being afraid of getting caught, because it made no difference in reporting their scores on whether they could shred their answer sheets after the experiment.²⁷⁹ It can easily be seen how the participants could have believed that they were acting honestly while also, giving themselves the benefit of the doubt in ambiguous cases.

This supports the idea that states would have a preference for behaving in accordance with widely accepted norms, even if leaders only had to answer to their own consciences. Yet, some norm violations, such as invading another state, occur in clear view of the rest of the world. The aggressor suffers psychological disutility from knowing that it behaved inappropriately and also from reputational damage. Even when no one is watching, people only behave dishonestly to the extent to which one can maintain a positive self-image. When reputation comes into play, the incentives for behaving in accordance with widely-accepted norms are even stronger.

Florini and Shannon are asking two separate but related questions. Florini's evolutionary analogy seeks to help us predict whether a norm will become universal, die out, or like certain genes, come to exist in a state of equilibrium with some states acting in conformance and others behaving in a contrary manner.²⁸⁰ Shannon's model works on a case-by-case basis. Instead of asking whether the norm will succeed, it takes the norm as given and addresses the question of "is state *X* likely to conform with the norm in this particular

²⁷³ DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 274 (2008).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 276.

²⁷⁶ *Id.* at 274.

²⁷⁷ *Id.* at 276.

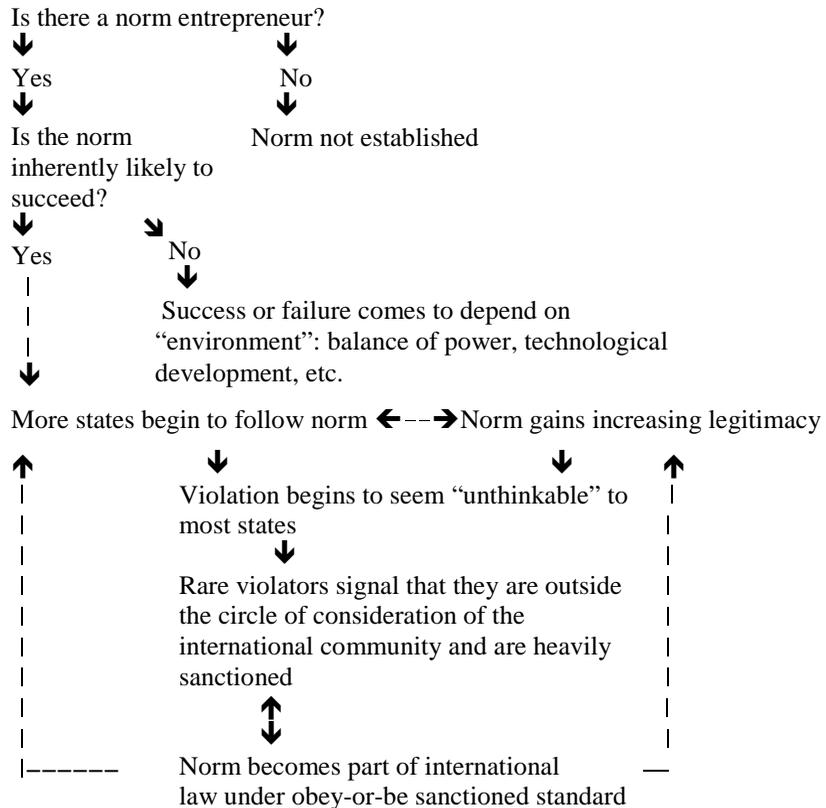
²⁷⁸ *Id.* at 277.

²⁷⁹ *Id.*

²⁸⁰ Florini, *supra* note 241, at 365, 367–69.

instance?"²⁸¹ The two inquiries are similar because the survival of a norm depends on whether states behave in accordance with it.²⁸² If they ignore the rule often enough, it is no longer a norm.

How an Effective Norm Develops



²⁸¹ See Shannon, *supra* note 255, at 305–10 (discussing the American invasion of Panama, which contradicted the international norm of noninterventionism).

²⁸² Florini's concept of "environment" is too broad for our purposes here. While it is true that balance of power considerations and technological developments affect the ultimate fate of norms, as they do just about everything else, focusing on these facts does not help us predict from an *ex ante* perspective how likely a norm is to succeed. The tools of international relations do not allow us to forecast future changes in culture and technology. On the other hand, no historical study of the development of an international rule would be complete without considering such factors. In this model, most of the emphasis is placed on the qualities of norms themselves, even though the spread of ideas must depend to some degree on the state of technology and the international distribution of power.

Instead of taking norms as a given, the model presented here explains both their origins and how much each particular rule can be expected to influence state behavior in individual circumstances. Much of the work is done by determining a norm's "robustness." If a norm has the inherent qualities that make it likely to influence state behavior in particular circumstances, it can, from an *ex ante* perspective, be expected to "stick." Over time, if the norm is followed often enough, it becomes more and more legitimized in the minds of the actors of the world community.

In the model presented, a rule is established through the actions of a norm entrepreneur. Many norms owe their existence to a powerful state—or sometimes a coalition of states—coming to believe that it has an interest in encouraging or suppressing a certain kind of activity. The worldwide abolition of the slave trade by the British is a prominent example.²⁸³ Similarly, after each world war, the United States played a unique role in shaping the League of Nations and the United Nations.²⁸⁴ In the modern era, much of what can be called norm creation has originated with NGOs and international institutions.²⁸⁵ Regardless, the degree to which a new rule gains a "footing" among the world community depends to a large extent on the power of the initial norm entrepreneur and its zeal in enforcing the standard it sets.²⁸⁶ NGOs and multi-national corporations are generally less likely than strong states to create effective norms.

The reasons the original actor has for enforcing a norm may be economic, ideational, or some combination of both. The power of the norm entrepreneur and how committed it is to the new international rule will affect the likelihood that the norm sticks. A state may be anti-slavery but do little to stem the practice or, like the British in the nineteenth century, it can actively suppress it.²⁸⁷ The United States cared enough about world peace after World War II to push for the U.N. Charter, which became the authoritative legal text on the interstate use of force.²⁸⁸ Article 2(4) and related provisions became Schelling Points around which all future discussions of war and peace would be

²⁸³ See *infra* Part II.B.1.

²⁸⁴ See G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* 20 (2001).

²⁸⁵ Florini, *supra* 241, at 375.

²⁸⁶ *Id.*

²⁸⁷ See *infra* Part II.B.1.

²⁸⁸ Fassbender, *supra* note 54, at 529; see *supra* notes 150–58 and accompanying text.

focused.²⁸⁹ Thus, a certain path-dependency was created regarding international law and the use of force after World War II.

After a norm has been created, two factors will influence its potential for affecting the consciences of world leaders and mass publics and becoming a point around which coalesce future discussion and thinking regarding the issues the rule pertains to. First, the more specific a norm is, the more likely it is to be effective.²⁹⁰ This depends on how precisely the norm is defined and, relatedly, how well it is understood.²⁹¹ How many “exceptions” are there to the rule, and how much time can countries spend debating whether the exception applies in any individual case? Can a leader violate the norm and still be able to convince the world community that he was actually behaving in a way appropriate for a modern statesman? Once the relevant borders have been established for a long period of time, the concept of the ban on aggressive war is ambiguous in a way that the territorial integrity norm is not.²⁹²

Second, a norm will be more effective the more morally compelling it is. The most cursory examination of world cultures would seem to cast doubt on the proposition that there can be universal moral precepts that the entire world can agree.²⁹³ Anthropologists who have taken a closer look, however, have found many societal traits, including certain moral ideas about right and wrong, to be universal across cultures.²⁹⁴ In the modern era, there is a world

²⁸⁹ See *supra* notes 52–58 and accompanying text.

²⁹⁰ Shannon, *supra* note 255, at 304.

²⁹¹ See Jeffrey W. Legro, *Which Norms Matter? Revisiting the “Failure” of Internationalism*, 51 INT’L ORG. 31, 33–34 (1997). Besides specificity, Legro proposes that two other criteria that determine whether a particular norm is followed: durability, and concordance. *Id.* at 34. Regarding durability, the relevant factors are how long the norm has been accepted by the international community and how often it has been legitimized and enforced. *Id.* at 34–35. Concordance is determined by the degree to which the norm is incorporated into diplomatic discussion and international documents. *Id.* at 35. Under Legro’s proposed theory, the more specific and durable a norm is, and the more robust it is in terms of concordance, the more it affects state behavior. *Id.* at 34–35. This framework may, like the Shannon model, be useful for predicting whether a specific norm is going to matter within a certain time period. For our purposes, however, Legro’s model is somewhat circular and in many ways begs more fundamental questions. Part of what we are trying to explain is how durable a norm is. Why are some norms “durable” while others are not? Similarly, concordance is defined as “how widely accepted the rules are in diplomatic discussions and treaties.” *Id.* at 35. As already noted, in this Article the goal is to show what the Legro model takes for granted, or why the norm is widely accepted.

²⁹² See *infra* Part II.C.

²⁹³ See DONALD BROWN, HUMAN UNIVERSALS 1 (1991).

²⁹⁴ *Id.* at 130, 139.

consensus on a handful of moral debates. Few today defend slavery, piracy, or racial apartheid.²⁹⁵

Constructivists have emphasized that “cosmopolitan” values have a competitive edge in the market place of ideas.²⁹⁶ And once individuals assent to a principle such as self-determination or human equality, then other positions logically follow. This is consistent with the concept of “coherence,” which precludes norms that blatantly contradict one another.²⁹⁷

Philosopher Peter Singer writes of the “escalator of reason” and how it provides a mechanism through which humans who share only their ability to think logically can arrive at common ideas about morality.²⁹⁸ Human beings evolved intelligence to help us survive, find mates, and reproduce, not to be moral.²⁹⁹ Yet the interesting thing about the tool of reason is that it can take us places we did not expect to go. Singer tells the story of Thomas Hobbes one day glancing at the Forty-seventh Theorem of Euclid’s *The Elements of Geometry*.³⁰⁰ Hobbes found what he read impossible to believe, until he examined the entire chain of reasoning and was unable to dispute a single point.³⁰¹ Singer argues that the process of thinking about moral issues works in the same way.

[B]y thinking about my place in the world, I am able to see that I am just one being among others, with interests and desires like others. I have a personal perspective on the world, from which my interests are at the front and centre of the stage, the interests of my family and friends are close behind, and the interests of strangers are pushed to the back and sides. But reason enables me to see that others have similarly subjective perspectives, and that from ‘the point of view of the universe’ my perspective is no more privileged than theirs.³⁰²

In fact, realists do not deny the effect of morality on human behavior. For national leaders to act in the interests of their country in the first place, they must not behave as self-interested agents in the public choice sense. Instead, a

²⁹⁵ See *infra* Part II.B.

²⁹⁶ See Chaim D. Kaufmann & Robert A. Pape, *Explaining Costly International Moral Action: Britain’s Sixty-Year Campaign Against the Atlantic Slave Trade*, 53 INT’L ORG. 631, 642 (1999).

²⁹⁷ See *supra* notes 264–72 and accompanying text.

²⁹⁸ PETER SINGER, HOW ARE WE TO LIVE? 225–26 (1995).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 226.

³⁰¹ *Id.*

³⁰² *Id.* at 229.

certain amount of altruism towards their fellow co-nationals is required.³⁰³ Thus, to a certain extent constructivists and realists only disagree about which moral code leaders adopt. There is no self-evident reason why we should begin with a model that says states act in their national interests. This Part argues that different moral considerations explain the effectiveness of international norms.

Many constructivists do not simply assume that world leaders are equally likely to hold all plausible normative preferences but go a step further. They often follow realists in adopting the states-as-rational actors model to formulate a null hypothesis.³⁰⁴ From there, they only consider nonrealist explanations after showing that national interests as traditionally conceived cannot explain certain changes in the external behavior of a state.³⁰⁵ As we will see, certain case studies have persuasively shown that—at least when discussing Western states—some of the biggest changes of the last few centuries in how countries interact with one another cannot be explained by considerations of power, economic interest, or national security. Ideational concerns about right and wrong have mattered greatly.³⁰⁶

There is some relation between the path-dependency requirement and the degree of specificity and inherent moral appeal of a norm. A norm might become popular in a powerful state because of its moral coherence. This state and its allies begin forming international institutions that aspire to propagate and enforce the norm, and the rest of the world community accepts it partly for the same reasons it initially became a successful cause in the original country. This is what happened in the case of slavery; abolitionists within Great Britain opposed the practice, and the greater public eventually compelled the government to make abolition a goal of its foreign policy.³⁰⁷ Britain at first had to use force to implement this preference, but after a long enough time,

³⁰³ See Stephen M. Walt, *Nationalism Rules*, FOREIGN POL'Y (July 15, 2011), http://www.foreignpolicy.com/articles/2011/07/15/the_enduring_power_of_nationalism (on the connection between nationalism and realism) (last visited Sept. 28, 2013).

³⁰⁴ *Id.*

³⁰⁵ See Judith Goldstein & Robert O. Keohane, *Ideas and Foreign Policy: An Analytical Framework*, in IDEAS & FOREIGN POLICY, *supra* note 27, at 3, 6 (“We demonstrate [the] need to go beyond pure rationalist analysis by using its own premise to generate our null hypothesis: that variation in policy across countries, or over time, is entirely accounted for by changes in factors other than ideas.”).

³⁰⁶ See SINGER, *supra* note 298, at 223.

³⁰⁷ See, e.g., NETA C. CRAWFORD, ARGUMENT AND CHANGE IN WORLD POLITICS: ETHICS, DECOLONIZATION, AND HUMANITARIAN INTERVENTION 177 (2002); James Lee Ray, *The Abolition of Slavery and the End of International War*, 43 INT'L ORG. 405, 412–13 (1989).

practically every state agreed that slavery was wrong.³⁰⁸ Similarly, after the Union won the American Civil War, slavery's legal status was settled in the United States.³⁰⁹

The danger of constructing theories based on moral appeal is that such theories may simply assume that whatever the current culture believes in is the morally correct position. Many Westerners might feel very strongly that gays have a right to marry or that there must be a minimum wage. Yet people of intelligence and good faith can disagree with these positions for very coherent reasons. Few would say the same about the view that invading a neighboring state and enslaving its population is immoral. Thus, a cause that has low "inherent moral appeal" is simply a position regarding which, relative to other norms examined in this Part, there is much more room for debate. Therefore, the right to a decent standard of living, government-mandated restrictions on the working day, and the right to unionize can be said to have low moral appeal.³¹⁰ This is because opposite positions can be taken on natural law or utilitarian grounds.³¹¹

If a norm is widely followed because it is specific and morally compelling, then more and more states will fall into line. The process is dynamic; the less often the rule is broken, the more marked are violations. At this point, when a state is tempted to violate the norm, it not only must overcome the desire to conform with a rule that has inherent normative pull. It also must deal with the fact that the norm has been legitimized by the behavior of much of the rest of the international community.

Finally, the model presented here explains not only why norms are followed, but how the international community can overcome the collective action problem of punishing those that violate the rule. Perhaps not all leaders can be expected to internalize the rules of international law such as the ban on classic invasions. And while reciprocity works in a model with two agents

³⁰⁸ See SINGER, *supra* note 298, at 223.

³⁰⁹ Ray, *supra* note 307, at 413. Today, a not insignificant number of Southerners still celebrate the "Lost Cause," but not even they defend slavery, instead claiming that the Civil War was actually about the more morally palatable concerns of self-government and states' rights. See Edward T. Linenthal, *The Contested Landscape of American Memorialization: Levinson's Written in Stone*, 25 L. & SOC. INQUIRY 249, 253 (2000) (book review).

³¹⁰ See *infra* Part II.B.3.

³¹¹ See, e.g., DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 109 (2011).

repeatedly trying to overcome a collective action problem, game theory instructs that in larger groups it is usually not in an individual's interest to be the one who sanctions those who violate norms.³¹² A punisher incurs the costs of sanctioning another individual yet only receives a fraction of the benefit.³¹³ A rational-choice agent should therefore hope that someone else punishes a cheater or slacker so the agent can receive the benefits of the deterrent effect through free-riding.

Contrary to theory, however, people do punish cheaters, or those they see as behaving unfairly. Punishment itself is not inconsistent with rationalism, as rational choice models would predict that people would be inclined to sanction others when the benefits of doing so outweigh the costs for the punisher. But individuals go further than that, punishing when there is nothing to gain, and even when they must pay to do so.³¹⁴ For instance, in one oft-repeated experiment, one of two participants is given a certain amount of money and instructed to offer a portion of it to his partner.³¹⁵ If the partner accepts, the transaction goes through, while if the offer is rejected, neither player receives anything.³¹⁶ A rationalist account would expect the first player to make the smallest offer possible, and the second to accept it. The recipient knows that something is better than nothing, and the allocator should know that the recipient knows that something is better than nothing. In fact, in the original experiment, the first party on average offered the second party over thirty percent of the total pot.³¹⁷ Recipients did not accept any nonzero sum but instead rejected nearly a quarter of all offers.³¹⁸ They were willing to give up a small reward so that the party that angered them would be forced to forgo a larger prize.

In another experiment, each of four players on a team was given twenty tokens worth about ten cents each.³¹⁹ The players were then told that they could choose how much to put into a common pot.³²⁰ The number of tokens

³¹² James H. Fowler, *Altruistic Punishment and the Origin of Cooperation*, 102 PROC. NAT'L ACAD. SCI. 7047, 7047 (2005); see also *supra* notes text accompanying notes 13–16.

³¹³ *Id.* at 7049.

³¹⁴ Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSP. 195, 197 (1988).

³¹⁵ *Id.* at 196–97.

³¹⁶ *Id.* at 196.

³¹⁷ *Id.* at 197.

³¹⁸ *Id.*

³¹⁹ See HAIDT, *supra* note 267, at 178.

³²⁰ *Id.*

put into the pot was then multiplied by 1.6, and the new total was divided between the players.³²¹ In the next round, the teams were scrambled so that no norms of cooperation could develop within groups.³²² The rational strategy then was to never contribute anything and hope that all the other players had contributed a lot. People, however, began the game by contributing an average of about ten tokens.³²³ But after six rounds, the more generous players had tired of being burned, and participants were only contributing six tokens each.³²⁴

At that point players were told that the experiment would continue as before, with only one change.³²⁵ After learning how much each partner put into the common pool, they would have the option of punishing those who did not contribute their fair share.³²⁶ For every one token a player who was willing to pay, three would be taken away from the cheater.³²⁷ Over the course of the experiment, eighty-four percent of players chose to punish someone at least once, and as a result, cooperation skyrocketed.³²⁸ Players were contributing fifteen tokens each by the twelfth round.³²⁹ For a rational actor, the new conditions should not have made a difference. If I punish a cheater, that may make him think twice about not contributing his fair share in the next round. But that does me little good because the experiment was designed so that I could expect to be playing with different agents from then on. The purely rational strategy stayed the same throughout the game: contribute nothing and do not punish. These experiments are not anomalies, as it has been shown time and time again in laboratory settings that people sanction others “even when interactions are anonymous, there are no reputation effects, and the punisher is a third-party who is unaffected by the free rider’s actions.”³³⁰

Like the experiments showing limited cheating with plausible deniability, this research supports models that emphasize the importance of a positive self-image. Most players began by trying to pull their fair share, instead of

321 *Id.*

322 *Id.* at 179.

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.*

329 *Id.*

330 Fowler, *supra* note 312, at 7047.

exclusively looking out for their own self-interest. This indicates that even if world leaders could flout international law without consequences, and even if they identified the national interest with their own, they may still incur costs in order to conform with international norms. But carrying out a classic invasion that clearly violates international law is something that happens transparently. The norm violator declares its intentions to the world. Not only are there negative reputational affects resulting from the aggression, but in enforcing international law other states may be rewarded by reputational gains. If people will sanction cheaters at a cost even when no one else can possibly know, it follows that they are even more likely to do so, and less likely to cheat themselves, when everyone is watching. If circumstances and the inherent properties of the norm allow for it, a point comes when adherence to the rule is nearly universal and violators are almost always punished. At this point, the rule meets the obey-or-be sanctioned standard and can be considered part of international law.

Rule violators may also be punished because when a state has behaved in a way universally recognized as inappropriate, leaders of powerful states may be better able to justify breaking the rule against classic invasions in attacking the aggressor. Shannon points out that one may violate a norm against a group of people when the “[t]argets are ‘exempt’ from moral consideration because they are perceived to have directly threatened or injured the subject (self-defense) or because they lie outside normative parameters by virtue of their status as a socially unacceptable group (e.g., ‘terrorists’)”³³¹ In other words, when a state violates a well established norm, it may come to be seen as outside of the group to which one applies the normal rules of international relations. At the extreme, the outsider may invoke feelings of hatred and disgust.³³² This demonization, combined with the natural human urge to punish violators of accepted norms, leads states to incur costs to sanction those who behave in ways widely considered unacceptable.

This process is dynamic. The norm becoming part of international law under the obey-or-be sanctioned standard increases its legitimacy. At a certain point, those who violate the rule are seen as close to psychotic. After all, when a norm is universally accepted and enforced, who would defy the entire planet and unleash certain retribution on his state? The fact that the aggressive actor is

³³¹ Shannon, *supra* note 255, at 303.

³³² *Id.*

so “irrational” adds to the case for opposing him. For instance, Saddam Hussein’s reputation never recovered after the invasion of Kuwait, and this was perhaps why he was unsuccessful in regaining any degree of international acceptance over the course of the rest of his reign.³³³

In sum, a norm becomes established because it is pushed by a powerful norm entrepreneur. If it has the qualities of an inherently compelling rule—specificity and moral appeal—leaders will follow it to maintain a positive self-image and a desirable reputation. Eventually, violation becomes unthinkable, and states will punish the few remaining rule-breakers, even at a cost. This only reinforces the normative pull of the norm, making compliance still more likely even in cases where a state may not expect to be sanctioned for a violation.

B. Case Studies

This Part provides three case studies to test the theory presented. To avoid biasing the inquiry, this Part will review two norms that “stuck”—the abolition of slavery and colonization—and one that has had much less success—the right to a decent standard of living. In the process, this Part shows that the two popular schools of analysis that tend to put more emphasis on material considerations, rational choice and Marxism, fail to explain why slavery and colonial rule ended when they did. In these cases, accounts stressing the power of ideas have much greater explanatory force.³³⁴ Indeed, states were often acting against their own interests when they took it upon themselves to eliminate slavery and colonialism.³³⁵ However, a requirement that individuals be guaranteed a decent standard of living has lacked a powerful norm entrepreneur. The idea also falls short on measures of specificity and moral appeal, unlike the causes of antislavery and anti-colonialism. Finally, I address how well the model explains both parts of the status quo bias of international law: the ban on classic invasions and the territorial integrity norm. Both parts of the status quo bias are specific and morally compelling, although the model presented predicts that the territorial integrity norm would be more robust than the ban on classic invasions. That is exactly what we see.

³³³ See Kevin Woods et al., *Saddam’s Delusions: The View from the Inside*, FOREIGN AFF., May–June 2006, at 2–26.

³³⁴ See, e.g., Ray, *supra* note 307, at 415.

³³⁵ *Id.*

1. *The British Outlaw Slavery*

Slavery had been an unquestioned part of virtually every developed civilization.³³⁶ With the beginnings of colonialism and the Industrial Revolution, however, it came to be practiced on a previously unimaginable scale.³³⁷ The international slave trade reached its peak in the last decades of the eighteenth century.³³⁸ During the 1790s, over 750,000 slaves were shipped to the West Indies, the United States, and Brazil.³³⁹ From 1791 to 1805, British ships carried fifty-two percent of the slaves shipped overseas, and partly as a result, British colonies produced fifty-five percent of the world's sugar between 1805 and 1806.³⁴⁰ The country's shares of both the slave and sugar trades were rising at this time.³⁴¹

In 1807, however, Great Britain officially ended its participation in the slave trade, becoming only the third country to do so.³⁴² It made slave trading a capital offense seventeen years later.³⁴³ In 1833, Britain became the first state to free its slaves.³⁴⁴ It was not content to simply do away with the practice domestically, however. Until 1867, the state took it upon itself to use its global naval hegemony to end the slave trade all over the world, employing a mix of bribery and coercion against uncooperative governments.³⁴⁵ Great Britain's efforts are credited with ending close to eighty percent of the international traffic of human beings.³⁴⁶ According to one estimate, the Royal Navy freed nearly 150,000 slaves between 1810 and 1864.³⁴⁷ In the second half of the 1800s, Brazil and Cuba became two of the last major slave importers in the Western hemisphere to ban the import of slaves.³⁴⁸ By the twentieth century, there was no thriving international slave trade, and the scale was much lower

³³⁶ See *id.* at 407.

³³⁷ Kaufmann & Pape, *supra* note 296, at 634.

³³⁸ See *id.*

³³⁹ *Id.*

³⁴⁰ See *id.*

³⁴¹ *Id.*

³⁴² LESLIE BETHELL, *THE ABOLITION OF THE BRAZILIAN SLAVE TRADE: BRITAIN, BRAZIL, AND THE SLAVE TRADE QUESTION 1807–1869*, at ix (1970); Ray, *supra* note 307, at 409.

³⁴³ CRAWFORD, *supra* note 307, at 184.

³⁴⁴ Kaufmann & Pape, *supra* note 296, at 634; Ray, *supra* note 307, at 409.

³⁴⁵ Kaufmann & Pape, *supra* note 296, at 634.

³⁴⁶ *Id.*

³⁴⁷ CRAWFORD, *supra* note 307, at 186 n.111 (citing DAVID ELTIS, *ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE*, 97–98 (1987)).

³⁴⁸ See Kaufmann & Pape, *supra* note 296, at 634.

than it had been before the British's efforts in the nineteenth century. Today, the prevalence of slavery in the world is near zero.³⁴⁹

Britain's campaign to end the slave trade from 1807 to 1867 was "the most expensive international moral effort in modern world history, with most of the cost paid by one country."³⁵⁰ This poses obvious problems for realism, since Britain dominated the slave trade but expended blood and treasure over an extended period of time to win the freedom of strangers. About 5000 British lives were lost suppressing the slave trade.³⁵¹ Between 1807 and 1842, British West Indian sugar production declined by almost twenty-five percent while competitor states that relied on slavery saw a 210 percent increase.³⁵² In 1805, Britain produced fifty-five percent of the world's sugar; by 1850, that number was down to fifteen percent.³⁵³ According to one estimate, the anti-slavery campaign cost Britain nearly two percent of its national income between 1808 and 1867.³⁵⁴ The economic costs impacted all classes and were well understood by the general public.³⁵⁵

Both free market thinkers and Marxists have maintained that the growth and decline of slavery could be explained by economics.³⁵⁶ Adam Smith argued that forced labor was inefficient, because the slave had no rational incentive to work hard.³⁵⁷ He predicted that owners would come to see that the production of slaves was not worth the costs of feeding and housing them.³⁵⁸ Thus, the decisions of slaveholders and a free market would eventually replace slavery with paid labor.³⁵⁹ Marxists similarly argue that slavery ended when wage labor objectively became more profitable for the exploiting class.³⁶⁰

These materialistic explanations, however, have not stood up to empirical scrutiny. While there was a time when scholars argued British sugar

³⁴⁹ *Id.* at 633.

³⁵⁰ *Id.* at 632–33.

³⁵¹ *Id.* at 635 (citations omitted).

³⁵² *Id.* at 636.

³⁵³ *Id.*

³⁵⁴ *Id.* at 636–37.

³⁵⁵ *Id.* at 636, 639–40.

³⁵⁶ See Ray, *supra* note 307, at 409 (citing Richard K. Ashley, *Three Modes of Economism*, 27 INT'L STUD. Q., 463 (1983)).

³⁵⁷ ADAM SMITH, *WEALTH OF NATIONS* 63 (Modern Library 1937) (1776).

³⁵⁸ *Id.* (citing DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 434 (1966)).

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 410.

production was in decline and that emancipation served Britain's national interests, these views are no longer taken seriously.³⁶¹ If slavery ended when it was no longer profitable, then it is reasonable to believe that it would have ended when owners voluntarily emancipated their slaves. In fact, all over the world, the opposite happened, with slaveholders clinging to the institution as long as possible, as in the American Civil War.³⁶² Subsequent economic analysis proved that they were rational to do so; Britain suffered great economic losses as a result of abolition. Evidence from the United States also contradicts the idea that slavery ended because it ceased being efficient. In the run-up to the Civil War, per capita income in the American South was growing thirty percent faster than it was in the North.³⁶³ Capitalists in the rest of the country benefited from trade with the slaveholding states.³⁶⁴ Thus, nothing indicates that there was ever anything inherent to the economics of slavery that would have eventually led to its abolition.

The prohibition against slavery has been codified in several international law documents. The Brussels Conference Act of 1890 sought to "prevent the capture of slaves and intercept the routes of the slave trade."³⁶⁵ The 1926 Slavery Convention called on all signatories "[t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."³⁶⁶ The 1948 Universal Declaration of Human Rights has a similar clause.³⁶⁷ In 1981, Mauritania became the last country to abolish slavery, although arguably the practice has not actually been eradicated there yet.³⁶⁸

Slavery still exists, but not as an accepted practice. Just as there are killers and rapists but no one who actually defends murder or rape, there are slaveholders but no one who defends slavery. Even in Mauritania, the practice

³⁶¹ PINKER, *supra* note 130, at 155 ("Most historians have concluded that Britain's policing of the abolition of slavery was driven by humanitarian motives."); Kaufmann & Pape, *supra* note 296, at 636 n.11 (calling such views "discredited"); *see also* Ray, *supra* note 307, at 407–17.

³⁶² Ray, *supra* note 307, at 411–15.

³⁶³ *Id.* at 414 n.41 (quoting ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 251 (1974)).

³⁶⁴ *Id.* at 413.

³⁶⁵ General Act for the Repression of the African Slave Trade art. 2, July 2, 1890, 27 Stat. 886.

³⁶⁶ Convention to Suppress the Slave Trade and Slavery art. 2, Sept. 25, 1926, 46 Stat. 2183, 60 U.N.T.S. 253.

³⁶⁷ Universal Declaration of Human Rights, G.A. Res. 217(III) A, art. 4, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

³⁶⁸ A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN. ST. INT'L L. REV. 809, 818–19 (2005).

continues because slaves often do not try to run away.³⁶⁹ This has led some to argue that what is called “slavery” by modern activists and NGOs is usually something closer to a caste system or economic relationships involving major power asymmetries.³⁷⁰

The case of abolition fits into the model presented above. The “norm entrepreneur” can be considered British antislavery advocates or the British government. Great Britain was willing to incur the costs of creating an antislavery norm once public sentiment was overwhelmingly in favor of abolition. In 1787, the Committee for the Abolition of the Slave Trade was formed in Great Britain.³⁷¹ Abolitionists sent 519 antislavery petitions with 400,000 signatures to the House of Commons in 1792 alone.³⁷² No issue had ever before generated a larger number of petitions over the course of one year.³⁷³ Rather than rely on economic arguments, these documents focused on the inhumanity of the slave trade.³⁷⁴ In 1814, Parliament received 800 petitions with one million signatures demanding that the British government encourage France to give up the slave trade.³⁷⁵ The public pressure continued to grow after Britain itself stopped trafficking in human beings. In early 1833, the year of the Emancipation Act, Parliament received over 5000 anti-slavery petitions.³⁷⁶ In addition to petitioning their elected representatives, abolitionists used economic pressure to make forced labor less profitable, with activists organizing boycotts against sugar made with slave labor in the early 1790s and again in the late 1820s.³⁷⁷

The success of abolitionism in Britain and its eventual acceptance by international law are both due to the fact that a rule against slavery has the characteristics of a robust norm. The idea that human beings could not own one another is a simple one. Precise dates can be ascertained for when

³⁶⁹ See *id.* at 819 (“[L]ittle to no violence is required to keep the slaves from leaving . . . because . . . economic alternatives to slavery simply do not exist.”).

³⁷⁰ See Pieter Tesch, *It’s Wrong to Claim that Slavery Still Exists in Mauritania*, GUARDIAN, Sept. 6, 2012, <http://www.guardian.co.uk/commentisfree/2012/sep/06/mauritania-eradicate-hangover-slavery-pieter-tesch>.

³⁷¹ CRAWFORD, *supra* note 307, at 177.

³⁷² *Id.*

³⁷³ *Id.* at 177–78.

³⁷⁴ *Id.* at 178.

³⁷⁵ *Id.* at 184.

³⁷⁶ *Id.* at 182.

³⁷⁷ *Id.* at 178.

countries abolished slavery without quibbling over what institutions do or do not count. The 1926 Slavery Convention calls slavery “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”³⁷⁸ This “remains the agreed upon definition of slavery in international law.”³⁷⁹ There may be other forms of exploitation, but they are not the same as the system of forced labor that ceased to exist in all developed countries over the course of the nineteenth century.

The case for abolition is also morally clear.³⁸⁰ As soon as the Enlightenment was under way and individuals were expected to defend practices with reason, people quickly realized that slavery was unquestionably immoral. The moral foundations of forced labor were attacked by Enlightenment thinkers such as John Locke and Jacques-Pierre Brisson.³⁸¹ The cause of abolition in Britain picked up steam rapidly, as reflected in the number of petitions sent to Parliament over the years and the response by the government. But the time period is also marked for the inability of pro-slavery forces to make an acceptable moral case for their position. They relied on biblical arguments or claimed that abolition would harm British economic or national security interests.³⁸² Elsewhere, particularly in the United States, some argued that Africans were naturally fit only to be slaves.³⁸³ This moral case relies on the best interests of the slaves but was easily refuted by the logic that lesser ability should not exclude one from the social contract. In addition, the fact that slaves celebrated abolition, rather than mourning its passing, discredited the paternalistic argument.³⁸⁴

It is true that not all countries agreed that slavery was wrong when the moral case was presented to them, as entrenched interests and old ways of thinking were still very powerful.³⁸⁵ This is why British enforcement and the Civil War were necessary.³⁸⁶ But once the interests protecting slavery had been

³⁷⁸ Convention to Suppress the Slave Trade and Slavery art. 1, para. 1., *supra* note 366.

³⁷⁹ Jean Allain, *Definition of Slavery in International Law*, 52 HOWARD L.J. 239, 240 (2009).

³⁸⁰ It has been implied by some that “wage slavery” under capitalism is not much different from forced labor. See NOAM CHOMSKY, *LANGUAGE AND POLITICS* 44 (C.P. Otero ed., 2004). Tellingly, those few who make this argument still believe that abolition was a moral step forward.

³⁸¹ PINKER, *supra* note 130, at 155.

³⁸² See CRAWFORD, *supra* note 307, at 175–76, 180–81.

³⁸³ Cf. PINKER, *supra* note 130, at 155.

³⁸⁴ See Jim Chen, *Mayteenth*, 89 MINN. L. REV. 203, 208–09 (discussing the origins of Juneteenth).

³⁸⁵ Cf. PINKER, *supra* note 130, at 154–55.

³⁸⁶ See generally *id.*

destroyed, the practice did not reemerge in those countries that had abolished it, except in the case of France, which abolished slavery in 1794 and reinstated it eight years later in some colonies.³⁸⁷ Established interests may block moral reform, but without anyone directly benefiting from a practice universally considered morally abhorrent, once banned it does not reemerge.

2. *Postwar Decolonization*

Colonialism has been defined as one government physically occupying and controlling the land of another people for the benefit of the occupying state.³⁸⁸ Like slavery, it had been a near human universal for all of recorded history.³⁸⁹ Also, as in the case of slavery, European states in the early modern era took the practice to new heights.³⁹⁰ At the end of World War II, Great Britain controlled land that today consists of more than two-dozen countries, including the areas in the modern states of India, Pakistan, Bangladesh, Jordan, Malaysia, Myanmar, and Nigeria.³⁹¹ At the same time, France either ruled over or was a protectorate of Vietnam, Algeria, Morocco, Tunisia, and a handful of modern states in sub-Saharan Africa.³⁹² Part of the Congo was under the control of Belgium,³⁹³ and the Netherlands ruled Indonesia.³⁹⁴ Other European states had less significant colonial holdings.³⁹⁵

Yet after World War II, each of these empires crumbled. This process started immediately after the war, as India gained independence in 1947, and Indonesia followed suit two years later.³⁹⁶ In the late 1950s and early 1960s, the process was completed when even the least developed territories under European rule became sovereign states. Among other holdings, Britain lost British Somaliland and Nigeria in 1960, Jamaica and Uganda in 1962, Kenya

³⁸⁷ *Id.* at 155. Slavery was abolished again in France in 1848. *Id.*

³⁸⁸ CRAWFORD, *supra* note 307, at 131.

³⁸⁹ *See id.*

³⁹⁰ *Cf.* CRAWFORD, *supra* note 307, at 131 (comparing colonial empires of ancient Persia, Greece, and Rome to those of Britain, Spain, and France).

³⁹¹ *See British Imperial Territories from 1783*, in *THE CAMBRIDGE ILLUSTRATED HISTORY OF THE BRITISH EMPIRE* 384–89 (P.J. Marshall, ed. 1996).

³⁹² *See* PATRICK MANNING, *FRANCOPHONE SUB-SAHARAN AFRICA 1880–1995*, at 20 (1998); WEISBURD, *supra* note 84, at 70–72, 74–75; MARILYN B. YOUNG, *THE VIETNAM WARS 1945–1990*, at 2 (1991).

³⁹³ MANNING, *supra* note 392, at 20.

³⁹⁴ WEISBURD, *supra* note 84, at 68–70.

³⁹⁵ *See, e.g.*, CRAWFORD, *supra* note 307, at 292 n.6 (“Spain had five colonies including Spanish Morocco The Portuguese Empire included eight colonies”).

³⁹⁶ WEISBURD, *supra* note 84, at 35, 69.

and Zanzibar in 1963, and Bechuanland, Basutoland, and British Guiana in 1966.³⁹⁷ France granted independence to Morocco and Tunisia in 1955 and 1956, respectively.³⁹⁸ Between 1958 and 1960, fourteen sovereign states were formed out of former French territory in sub-Saharan Africa.³⁹⁹

The materialist arguments regarding the decline of colonization are similar to those employed to explain the abolition of slavery.⁴⁰⁰ Supposedly, the practice ended when it ceased being profitable.⁴⁰¹ Indeed, in some cases, force was instrumental. Algeria, for instance, was only granted independence after a bitter insurgency against the French.⁴⁰² But in other cases, there was little to no resistance to European rule. While the North African Arabs struggled against the French, sub-Saharan Africans generally parted with their colonial rulers on amicable terms.⁴⁰³ As the 1950s went on, France became less and less willing to fight to hold on to its old colonies and by the end of the decade had no desire to continue ruling over them at all.⁴⁰⁴

There is no economic or military reason that can wholly explain the rapid process of decolonization.⁴⁰⁵ In fact, postwar British and French leaders, including Charles de Gaulle and Winston Churchill, took the view that the colonies were more economically valuable than ever since they could contribute to the recovery effort.⁴⁰⁶ British colonial and cabinet documents from the era of decolonization talked of granting states independence not out of any idea that changes in military or economic interests made doing so necessary.⁴⁰⁷ Rather, these deliberations stressed public opinion and the views of the international community.⁴⁰⁸

³⁹⁷ *British Imperial Territories from 1783*, *supra* note 435, at 386–88.

³⁹⁸ WEISBURD, *supra* note 84, at 70.

³⁹⁹ MANNING, *supra* note 392, at 20.

⁴⁰⁰ *See* CRAWFORD, *supra* note 307, at 344.

⁴⁰¹ *See id.* The increased costs resulted from a variety of factors including growing effectiveness of national liberation movements, increased expense against declining profits, and the exhaustion of the colonizer. *Id.*

⁴⁰² WEISBURD, *supra* note 84, at 74–75.

⁴⁰³ Robert H. Jackson, *The Weight of Ideas in Decolonization: Normative Change in International Relations*, in *IDEAS AND FOREIGN POLICY*, *supra* note 29, at 111, 129.

⁴⁰⁴ *See id.* at 124–25.

⁴⁰⁵ *See* Jackson, *supra* note 403, at 128; CRAWFORD, *supra* note 307, at 356.

⁴⁰⁶ Jackson, *supra* note 403, at 127–28.

⁴⁰⁷ *Id.* at 128 (citing A.N. PORTER & A.J. STOCKWELL, *BRITISH IMPERIAL POLICY AND DECOLONIZATION: 1938–1964*, at 278–83 (1987)).

⁴⁰⁸ *Id.*

Not only did Western states give up their own colonies, but they also condemned other states that tried to hold on to third world territories and occasionally punished them.⁴⁰⁹ In fact, aside from classic invasions, the only kind of aggression that has consistently drawn sanctions in the postwar era has been wars by Europeans to maintain colonial or apartheid systems and institutions.⁴¹⁰ For example, while the Netherlands was fighting to maintain control of Indonesia, the colony's independence was recognized by the U.N. Security Council.⁴¹¹ States promised aid to Indonesia, and Great Britain suspended arms and training it had previously agreed to provide to the Netherlands.⁴¹² When France was attempting to put down the rebellion in Algeria, even its closest allies refused to support the effort, and the General Assembly recognized Algeria's right to independence years before the war was over.⁴¹³ The pattern repeated itself when African insurgents resisted Portuguese rule in the 1960s and 70s.⁴¹⁴ Communist and African states supported the Mozambique rebels and were instrumental in helping them finally achieve independence.⁴¹⁵

If material forces were the main factors behind decolonization, European countries would have given up their overseas territories at different times and there would be variations regarding which territories gained independence.⁴¹⁶ For instance, landlocked territories might have ceased being profitable while territories bordering oceans did not, or the degree of independence granted might have been related to the costs imposed on rulers by freedom fighters resisting foreign domination. It is also possible that all colonies ceased being profitable but only some states came to realize this fact. Instead, within the short time period of a few decades, almost every third world territory under Western control gained independence and joined the state system.⁴¹⁷ This happened regardless of who the colonial ruler was, whether the territory was resource rich, whether the region had strategic value, or whether the natives violently resisted foreign occupation.

⁴⁰⁹ WEISBURD, *supra* note 84, at 95–96.

⁴¹⁰ *Id.* at 94–96.

⁴¹¹ *Id.* at 68–69.

⁴¹² S. Res. 67, U.N. Doc. S/Res/67 (Jan. 28, 1949); (Weisburd, *supra* note 83 at 69.

⁴¹³ *See id.* at 75.

⁴¹⁴ *Id.* at 77–80.

⁴¹⁵ *Id.* at 83–84.

⁴¹⁶ Jackson, *supra* note 403, at 130–31.

⁴¹⁷ *Id.* at 125–26.

Decolonization is best explained by the international community's embrace of the concept of self-determination. While the idea is often traced to the French Revolution, it was not given "quasi-official status" in international law until the 1919 Paris Peace Conference.⁴¹⁸ The norm entrepreneur was the Wilson administration, which was instrumental in creating the League of Nations. The fifth of President Wilson's Fourteen Points called for "[a] free, open-minded . . . adjustment of all colonial claims," under the principle that the wishes of the people being ruled were to be given equal weight to the interests of the government in question.⁴¹⁹ The Covenant of the League of Nations made the "advanced nations" responsible for helping the states that had become independent as a result of the war develop their institutions.⁴²⁰ In effect, the document declared that some regions were closer than others to being ready for self-government.

Some states were indeed granted full sovereignty in the interwar period.⁴²¹ But while those that had been ruled by the Axis Powers gained their independence, France and Britain in particular held on to their overseas territories.⁴²² Yet once the right of self-determination was enshrined into international law, it became difficult to justify why only territories that had been controlled by countries that lost World War I deserved their freedom. The period of decolonization followed the same pattern as the abolition of slavery: those who wanted to end the unpopular practice made primarily moral arguments, while defenders made a practical case that purported to take account of the interests of the people subordinated.⁴²³

Those who tried to forestall decolonization relied on the same logic that had motivated Article 22 of the Covenant of the League of Nations. The U.N. Charter followed in the footsteps of its predecessor, affirming the principle of self-determination but also paternalism. Colonial powers were obliged "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free

⁴¹⁸ *Id.* at 120.

⁴¹⁹ President Woodrow Wilson, Address on the Fourteen Points of Peace (Jan. 8, 1918), in 56 CONG. REC. 677, 680.

⁴²⁰ League of Nations Covenant art. 22, para. 2.

⁴²¹ *See generally* JACKSON, *supra* note 403, at 120–21.

⁴²² *Id.*

⁴²³ CRAWFORD, *supra* note 307, at 132–33.

political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.”⁴²⁴

In the following decades, however, self-determination came to be seen as a right that people inherently held and one that was divorced from utilitarian logic and notions of paternalism.⁴²⁵ History, culture, degree of ethnic fragmentation in the colony, and the level of its institutional or economic development were irrelevant. Jackson writes that today, “it would be about as hard for an independent country to become a colony—even if the people voted to do so—as it would be for citizens of a democracy to sell themselves into slavery.”⁴²⁶ By the 1960s, few leaders were “prepared to defend [colonialism’s] legitimacy and lawfulness in public.”⁴²⁷

While President Wilson called for self-determination for “peoples,” the right to independence was granted to various colonies, many of which were ethnically and culturally heterogeneous.⁴²⁸ But true ethnic and cultural self-determination was and is problematic—there are endless ways to divide different “peoples.” The lines of the third world drawn by the European powers were arbitrary, but, putting aside a few isolated cases, it would have been difficult to divide Africa and Asia into true nation-states in a nonarbitrary way.⁴²⁹ Therefore, self-determination came to mean the right of individual countries or former colonies to rule their own affairs if they saw themselves as distinct enough from the master country, whether a sense of nationhood had developed in the territory or not.⁴³⁰

Once the existence of states was taken as a given and the United Nations was established based on the equality of states, the anticolonization norm could have been expected to be robust. It applied universally and was specific. Britain has no more right to rule over Uganda than Uganda does to rule over Britain. The moral case against colonialism could have been challenged on the basis of utilitarian logic, as it has been argued that some developing countries

⁴²⁴ U.N. Charter art. 73(b).

⁴²⁵ See Jackson, *supra* note 403, at 131–32.

⁴²⁶ *Id.* at 138.

⁴²⁷ *Id.* at 129. The Portuguese, Rhodesian, and South African governments did defend colonialism. *Id.*

⁴²⁸ CRAWFORD, *supra* note 307, at 256–57; Jackson, *supra* note 403, at 122.

⁴²⁹ See *id.*

⁴³⁰ See Yoav J. Tenenbaum, *The Right to Self-Determination*, NEW JURIST (Jan. 10, 2012), <http://www.newjurist.com/the-right-of-self-determination.html>.

were simply not ready for independence.⁴³¹ Yet, the world was moving away from these kinds of paternalistic arguments and they have become unacceptable in discourse over civil and human rights.⁴³² Perhaps a blanket rule against colonialism was based on the worry that once an exception for less “developed” areas was granted, the natives would be stigmatized and the colonial powers would simply look after their own interests while fooling themselves and others into believing that they were behaving altruistically. But regardless of the “inherent” moral argument for an absolute ban on colonization, such a norm is perfectly coherent with the general intellectual currents of the last century. When this fact is combined with the specificity of the rule, it is hard to see how a leader could test its parameters and delude himself into believing he is acting appropriately, or justify his actions before the international community.

3. *The Right to a Decent Standard of Living*

In order to see what an effective norm looks like, it is helpful to look at one that is much less robust: the right to a decent standard of living.⁴³³ The Universal Declaration of Human Rights, adopted in 1948 by the General Assembly, guarantees every individual “a standard of living adequate for the health and well-being of himself and of his family,” which includes basic provisions of “food, clothing, housing and medical care and necessary social services, and the right to security” in case of disability or advanced age.⁴³⁴ From a legalist perspective, although part of a nonbinding resolution, this standard of living provision should matter a great deal.⁴³⁵ Less than two

⁴³¹ See Ali A. Mazrui, *Recolonization or Self-Colonization?: Decaying Parts of Africa Need Benign Colonization*, in 2 GOVERNANCE AND LEADERSHIP: DEBATING THE AFRICAN CONDITION 339, 339–41 (Alamin M. Mazrui & Willy Mutunga eds., 2003) (arguing for a new “benign colonization” of Africa after the mid-1990s genocide in Rwanda).

⁴³² See Jackson, *supra* note 403, at 134.

⁴³³ See, e.g., Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 348 (1996); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 60 (1982).

⁴³⁴ Universal Declaration of Human Rights, *supra* note 385, art. 25.

⁴³⁵ According to one scholar, “[t]he Universal Declaration remains the primary source of global human rights standards,” and its widespread acceptance “distinguishes it from conventional obligations.” Hannum, *supra* note 433, at 290.

decades later, the International Covenant on Economic, Social and Cultural Rights included a very similar provision.⁴³⁶

Despite the hopes of many international lawyers, however, the international community does not yet force states to provide their citizens disability benefits, support for the elderly, or any of the other programs of the modern welfare state. When Americans debated health care reform during President Obama's first term, anyone who suggested that international law required Congress to pass the Affordable Care Act⁴³⁷ would have been ignored, if not widely derided. In fact, some conservatives were proud that the United States remained an international outlier in not providing universal healthcare, seeing it as a positive example of "American exceptionalism."⁴³⁸

The failure of this international norm can be explained by the model presented. First of all, there was never a powerful norm entrepreneur that forced states to adopt a welfare state. The most powerful countries of the last two centuries, Great Britain and the United States, have had relatively *laissez-faire* economic policies by world standards.⁴³⁹ They have opposed communism but have generally neither encouraged other states to adopt generous welfare policies nor discouraged them. Unsurprisingly, neither the U.N. Charter nor its predecessor, the Covenant of the League of Nations, mentions anything about domestic redistributionist policies. In fact, by affirming sovereign rights in the domestic sphere, these documents arguably precluded international law from requiring states to guarantee citizens a minimum standard of living. While the Soviet Union was a powerful actor that stressed the primacy of positive rights, it was never in the dominant global position that Britain and the United States were in in the late nineteenth century and after World War II respectively. Furthermore, communist states, because of their records, lacked the moral

⁴³⁶ International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 19, 1966, S. EXEC. DOC. 95-2, 993 U.N.T.S. 3. ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.")

⁴³⁷ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 20, 21, 25, 26, and 42 U.S.C.).

⁴³⁸ See Paul Roderick Gregory, *American Exceptionalism: Obama's Achilles Heel?*, FORBES, (June 10, 2012, 8:58 PM), <http://www.forbes.com/sites/paulroderickgregory/2012/06/10/american-exceptionalism-obamas-achilles-heel/>.

⁴³⁹ Gary Marks, *The Revival of Laissez Faire, in POLITICS IN BRITAIN AND THE UNITED STATES: COMPARATIVE PERSPECTIVES* 28, 31 (Richard Hodder-Williams & James Ceaser, eds. 1988).

capital to make the causes they championed seem compelling.⁴⁴⁰ It is little wonder, then, that across the world communist governments were only able to come to power through force.

Even if the Soviet Union could be considered a sufficiently strong moral entrepreneur, the standard of living norm lacks any degree of specificity. People disagree about what level of health care, disability insurance, and other benefits are sufficient for an “adequate” standard of living. Over the past several decades, all segments of the American population have seen an increase in overall living standards.⁴⁴¹ By many measures, such as height and nutritional intake, the average poor Americans today are better off than middle class Americans of the 1950s.⁴⁴² But government agencies continue to find tens of millions of Americans living in “poverty” by simply changing the definition of the term as living standards improve.⁴⁴³ This malleable definition shows how difficult it is to determine an adequate standard of living. A standard of living norm thus lacks any objective standards a would-be enforcer can point to, and thus specificity.

The standard of living norm also lacks moral clarity. One survey found that Americans named the Bible as the book that most influenced their lives, with Ayn Rand’s *Atlas Shrugged* in second place.⁴⁴⁴ Rand’s novel put forth a utilitarian critique of the welfare state, but her main arguments were moral.⁴⁴⁵ Individuals were said to have a right to contract with one another and have their agreements enforced, and the state was to do no more than was absolutely necessary for a consent-based society to function.⁴⁴⁶ Some philosophers make

⁴⁴⁰ See DANIEL C. THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM* 195 (2001). Conversely, human rights activists in the communist world were galvanized when Eastern bloc governments agreed to grant their citizens negative rights such as freedom of speech and religion as a matter of international law. *Id.* at 196.

⁴⁴¹ See Robert Rector & Rachel Scheffield, *Air Conditioning, Cable TV, and an Xbox: What is Poverty in the United States Today?*, in *BACKGROUNDERS* 2011, at 1, (Heritage Found. No. 2575, July 18, 2011), available at http://thf_media.s3.amazonaws.com/2011/pdf/bg2575.pdf.

⁴⁴² See *id.* at 2.

⁴⁴³ *Id.* at 2 n.2.

⁴⁴⁴ Stephen Moore, ‘Atlas Shrugged’: *From Fact to Fiction in 52 Years*, *WALL ST. J.*, Jan. 9, 2009.

⁴⁴⁵ Craig Biddle, *Atlas Shrugged and Ayn Rand’s Morality of Egoism (Part 2 of 3)*, *CAPITALISM MAGAZINE*, (Aug. 14, 2010), <http://capitalismmagazine.com/2010/08/atlas-shrugged-and-ayn-rands-morality-of-egoism-part-2-of-3/> (last visited Sept. 18, 2013).

⁴⁴⁶ AYN RAND, *ATLAS SHRUGGED* (1957) (“The only proper functions of a government are [the police, army,] . . . and the courts, to protect your property and contracts from breach or fraud by others, to settle disputes by rational rules, according to objective law.”)

similar arguments in a more systemized fashion, putting a great deal of emphasis on the distinction between acts of commission and omission, or the granting of positive and negative rights.⁴⁴⁷ Jonathan Haidt has found that cultures universally value the idea of fairness.⁴⁴⁸ But, in the American context, to conservatives it means people getting what they deserve, while liberals are more concerned with achieving an equitable distribution of resources.⁴⁴⁹ This moral divide of modern American politics stems from whether persons are inclined to view “fairness” as requiring proportionality—i.e. to each what is his due—or equality.⁴⁵⁰

This is not to say that there are not good moral arguments for the welfare state. From a purely utilitarian perspective, the declining marginal utility of money may justify taking from the rich and giving to the poor.⁴⁵¹ But Haidt finds that educated, modern Westerners are unique in believing that morality is only about fairness and harm, or that decisions regarding political and social issues should solely be based on utilitarian calculations.⁴⁵² Those who believe that arguments against the welfare state will one day be as unacceptable as arguments against abolition are likely to be disappointed. As of June 2012, the vast majority of governments in Africa, Asia, and Latin America did not even provide their citizens universal healthcare.⁴⁵³ In the first American presidential debate of 2012, Mitt Romney accused President Obama of engineering a “government takeover” of the healthcare industry, something that the incumbent denied.⁴⁵⁴ Unlike the abolitionist position, which took off relatively soon after it was presented to democratic publics, many Americans and other educated people with access to uncensored media have heard the arguments for the welfare state and rejected them.⁴⁵⁵ They may be wrong, but, their positions

⁴⁴⁷ See James P. Sterba, *Recent Work on Alternative Conceptions of Justice*, 23 AM. PHIL. Q. 1, 3–5 (1986).

⁴⁴⁸ Haidt, *supra* note 267, at 134–38, 167–70.

⁴⁴⁹ *Id.* at 137–38.

⁴⁵⁰ *Id.*

⁴⁵¹ See Peter Singer, A DARWINIAN LEFT: POLITICS, EVOLUTION, AND COOPERATION 9 (1999).

⁴⁵² See Haidt, *supra* note 267, at 95–127.

⁴⁵³ See Max Fisher, *Here's a Map of Countries That Provide Universal Health Care (America's Still Not on It)*, ATLANTIC (June 28, 2012, 6:09 PM), <http://www.theatlantic.com/international/archive/2012/06/heres-a-map-of-the-countries-that-provide-universal-health-care-americas-still-not-on-it/259153/#>.

⁴⁵⁴ Michael Cooper et al., *Taking Stock of Some of the Claims and Counterclaims*, N.Y. TIMES, Oct. 4, 2012, at A20.

⁴⁵⁵ See Peter Ferrara, *America's Ever Expanding Welfare Empire*, FORBES, (Apr. 22, 2011, 7:27 PM), <http://www.forbes.com/sites/peterferrara/2011/04/22/americas-ever-expanding-welfare-empire/>.

are not absurd and destined to fail because of some inherent contradiction with other, more fundamental moral ideas.

Attempts to create a standard of living norm through international law have failed. States do not pressure other governments to provide their own citizens with education or healthcare. Despite claims that it has been part of international law for decades, the standard of living norm has not inspired protests or demands that foreign countries adopt more generous domestic welfare policies.

C. The Inherent Appeal of the Status Quo Bias

The status quo bias of international law has two parts: a ban on classic invasions and forcibly taking territory.⁴⁵⁶ Here, I show that both parts of the status quo bias fit into the model presented.

1. The Ban on Classic Invasions

International law did not ban any interstate use of force until the conclusion of World War I.⁴⁵⁷ Influenced by the Anglo-American peace movement and Christian progressivism, Woodrow Wilson announced his support for a league of states that would keep the peace once the war was over.⁴⁵⁸ After that, every major combatant supported some form of collective security arrangement.⁴⁵⁹ The Americans and British were again on the winning side of World War II, and were able to design a postwar order in their image.

The moral case against interstate aggression can be stated quite clearly. It is simply the “Golden Rule” applied to foreign affairs: Do not harm others because you would not want them to harm you. Before World War I, major intellectuals wrote about war as a heroic and invigorating experience.⁴⁶⁰ Yet as first-hand accounts from World War I became available, and film allowed people to see graphic images of injured and mutilated soldiers and civilians, this romantic vision of armed conflict was discredited.⁴⁶¹

⁴⁵⁶ See *supra* Part I.B.

⁴⁵⁷ See *supra* Part II.C.II.

⁴⁵⁸ THOMAS J. KNOCK, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* 11–12, 106–15 (1992).

⁴⁵⁹ *Id.* at 115.

⁴⁶⁰ PINKER, *supra* note 130, at 242–43.

⁴⁶¹ *Id.* at 246–47.

However, the U.N. Charter lacks complete specificity. It contains some exceptions that are subject to interpretation. In particular, much debate centers around the inherent right of self-defense protected by Article 51.⁴⁶² The concept of humanitarian intervention remains controversial because it is the terrain on which two broad intellectual trends meet. Conceptualizing states as individuals with rights leads to support for a ban on interstate aggression,⁴⁶³ while the application of utilitarian logic seems to suggest that one state has the duty to prevent atrocities from being committed in another when it can do so at a relatively low cost.⁴⁶⁴ Adding to the ambiguity, the Security Council can act to stop aggression and arguably has the right to define the term.⁴⁶⁵ Thus, the ban on classic invasions lacks the specificity of the ban on colonization, for example.

At the same time, the exceptions and grey areas are not so large that they swallow the rule. Certain kinds of interstate aggression are unthinkable. Leaders cannot invade their neighbors for territorial gain or plunder and still see themselves as behaving in a way that is appropriate for a political figure. While a state may deceive itself into believing that it is acting in self-defense when it is actually engaging in aggression, the need for plausible deniability creates certain limits to the degree to which humans may behave immorally.⁴⁶⁶ Importantly, each state knows that its neighbor is not going to invade unless it can do so in a way that still shows respect for the norm.⁴⁶⁷

This argument requires that at least some wars be considered illegal by most or all of the world community. There is nothing problematic about this assumption. While grey areas that pose difficult moral and legal questions exist, this does not mean that the larger rule is nonexistent. Just as most individuals never seriously consider murdering other people, few leaders need

⁴⁶² See *supra* notes 198–201 and accompanying text.

⁴⁶³ See *supra* Part I.B.

⁴⁶⁴ See *supra* Part I.C.

⁴⁶⁵ See *supra* Part I.E (showing that different interpretations can justify certain types of aggression).

⁴⁶⁶ See *supra* notes 283–96 and accompanying text.

⁴⁶⁷ This has important implications for what international relations scholars call the security dilemma. This is a situation where two states may want peace with one another, but neither can be aware of the intentions of its neighbor. Thus, each ends up behaving aggressively in order to be in a better position to defend itself, and measures taken out of a concern for self-preservation are seen as threatening. Yet small changes to initial conditions can make all the difference. If the entire international community values the status quo, and one's neighbor has to some extent internalized this norm and values its own reputation, then states have less of a need to prepare for the worst kinds of naked aggression. See Glenn H. Snyder, *The Security Dilemma in Alliance Politics*, 36 *WORLD POL.* 461 (1984).

to think about the sanctions resulting from a classic invasion before deciding to refrain from engaging in interstate aggression. In extreme cases, international sanctions have been used. While the ban on classic invasions may be fuzzy at its borders, there is a core to the rule that creates an effective international norm.

2. *The Territorial Integrity Norm*

The bans on territorial aggrandizement through force and classic invasions have been intertwined since the beginning of the twentieth century. Clauses in both the League of Nations Covenant and U.N. Charter express respect for the territorial integrity of states.⁴⁶⁸ The moral case against using force to take a neighbor's territory is clear. People generally want to see their state preserved. From the "perspective of the universe," no sovereign state has the right to take territory from another.

The territorial integrity norm is also very specific. Therefore, since 1945, states that have sought to forcibly change well-established borders have been sanctioned.⁴⁶⁹ While the classic invasion ban has grey areas, the territorial integrity norm does not. The international community understands clearly whether a state has seized territory that belongs to another state. Nearly four decades of absolute compliance with the territorial integrity norm casts doubt on rationalist explanations for this feature of international law. Modern conditions may very well have made territorial aggrandizement less economically rational than it has been in the past, but even if this were the case, absent the territorial integrity norm, self-interested states could be expected to occasionally midjudge this fact and launch wars to seize territory.

The territorial integrity norm has not been disturbed by the growing acceptance of humanitarian intervention or strikes against terrorism. For even if intervening to stop atrocities in a country is justifiable, the intervening state cannot make a case as to why it should annex the territory of the target. While the international community may have pushed for the breakup of Yugoslavia, the involved powers sought the creation of new states rather than allowing Kosovo to join Albania or the United States.⁴⁷⁰ The absolute ban on territorial

⁴⁶⁸ U.N. Charter art. 2, para. 4; League of Nations Covenant art. 10.

⁴⁶⁹ See *supra* Part I.B.

⁴⁷⁰ See Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

aggrandizement through force has likely decreased the likelihood of aggression accompanied by self-serving claims of self-defense or humanitarian motivations.

D. Towards an Abolition of War?

In reviewing the history of the abolition of slavery, some scholars find reasons to be optimistic about the potential of abolishing war.⁴⁷¹ While some claim that armed conflict is natural and inevitable, in the past much of the same had been said about slavery.⁴⁷² The rules against colonization, slavery, and aggressive war share a common moral core. They are all based on the general principle that it is wrong to use force to extract benefits from others.⁴⁷³ In the model presented here, once some version of the “Golden Rule” or non-exploitation principle is accepted, norms survive and proliferate via the escalator of reason and the desire of each psychologically normal individual to maintain a positive reputation and self-image. The importance of ideas in shaping international law is reflected in the fact that there is a great deal of similarity between each of the successful norms reviewed and the failure of economic explanations to fully account for the development of these rules.⁴⁷⁴

We are a long way from the abolition of war. But, the trends have been headed in the right direction.⁴⁷⁵ And while desire for territory has been the main cause of war throughout history, states no longer use force to take land from one another.⁴⁷⁶ Without the possibility of accomplishing the most historically common major aim of war, the option of initiating armed conflict has unsurprisingly become less appealing to world leaders, including the rare individuals that do not internalize international norms and simply behave in a self-interested manner. The model and empirical evidence combine to provide a plausible account of how international law can influence state behavior even in a system traditionally thought to be anarchic and when the most important state interests are at stake.

⁴⁷¹ Ray, *supra* note 307, at 406.

⁴⁷² *Id.* at 405–06.

⁴⁷³ *Id.* at 422–29.

⁴⁷⁴ *See supra* Part I.

⁴⁷⁵ *See* Ray, *supra* note 307, at 425–29.

⁴⁷⁶ *See supra* Part I.B.

CONCLUSION

From the moment states began interacting with one another, they have engaged in armed conflict.⁴⁷⁷ Until the twentieth century, few thought that it was possible that states would ever stop trying to overthrow the rulers of other states or seize foreign territory. Without an international leviathan analogous to a domestic government, it has been argued, states would always interact with one another in a state of anarchy.⁴⁷⁸ In fact, it was not until after the First World War that any form of interstate aggression was prohibited by international law.⁴⁷⁹ The period immediately following the founding of the League of Nations is often emphasized for the lessons in supposedly taught about not being naïve regarding the prospects of international law leading to orderly interactions.⁴⁸⁰

After World War II, however, most states gave up on classic invasions and in the majority of situations many sanctioned the few states that did not adopt this new norm.⁴⁸¹ Further, no state has taken territory from another by force in close to four decades.⁴⁸² There is thus a status quo bias in how the international community treats the interstate use of force—the more destabilizing a military action is, the more likely the world community is to sanction the aggressor.⁴⁸³ By any reasonable definition, there is a coherent doctrine of international law governing the interstate use of force.

While realism is still an important paradigm in international relations, its influence has waned over the last few decades.⁴⁸⁴ Approaches that rely on political psychology are better suited to explain the status quo bias of international law regarding the use of force.⁴⁸⁵ If states only cared about security and power, then one would have to maintain that every state in the world decided that it no longer had an interest in seizing territory from other states at about the same time. The abolitionist and decolonization movements stand as perhaps the two clearest historical precedents showing the importance

⁴⁷⁷ See STEVEN A. LEBLANC & KATHERINE E. REGISTER, *CONSTANT BATTLES* 1–4 (2003).

⁴⁷⁸ *But see supra* Part I.

⁴⁷⁹ See League of Nations Covenant art. 10.

⁴⁸⁰ See e.g., WEISBURD, *supra* note 84, at 1; KELSEN, *supra* note 2, at 266.

⁴⁸¹ See *supra* Part I.B.

⁴⁸² See Zacher, *supra* note 97, at 234.

⁴⁸³ See *supra* Part I.

⁴⁸⁴ See *supra* notes 26–28 and accompanying text.

⁴⁸⁵ See *supra* Part II.A.

of ideas in shaping international law.⁴⁸⁶ These norms share the same underlying logic, which is that no individual or group has the right to use force to dominate another.⁴⁸⁷ This reasoning has over time naturally come to be extended to issues of war and peace.⁴⁸⁸

None of this is to say that in international relations relative power between states is unimportant. Perhaps, states ignore international law when making policy in areas that are not traditionally governed by global norms, or in those where there is more ambiguity regarding appropriate rules. But once a norm entrepreneur has created a rule of international law that is specific and morally compelling, the norm can shape behavior.⁴⁸⁹ This is especially true when the idea fits into the larger intellectual climate of the era. Today, classic invasions are rare, and when they occur the aggressor state tends to be punished.⁴⁹⁰ National leaders who do not internalize the rules of international law are at least deterred by the sanctions they would face for beginning wars.

Political psychology explains why it makes sense to believe that leaders internalize rules of international law and punish aggressors out of a sense of moral conviction. In laboratory settings, people only behave in ways they consider immoral to the extent to which they can maintain “plausible deniability” and see themselves as acting in conformance with social norms. The rule against classic invasions is somewhat fuzzy, but virtually everyone agrees certain cases qualify. In any particular instance, it is easy to discern whether the territorial integrity norm is being followed. Its prohibition on forcible annexation takes what has historically been the main motivation for war off the table. When states know they will not forcibly lose territory, they are less likely to seize land as a defensive measure, which has important implications for the security dilemma.⁴⁹¹

Furthermore, we have also seen that individuals punish norm violators or cheaters, even when the sanctioning party has nothing to gain by doing so.⁴⁹² This helps to explain why states sanction governments that violate the norms maintaining the international status quo. Any actors that still wish to behave as

⁴⁸⁶ *Supra* Part II.B 1 & 2.

⁴⁸⁷ *Id.*

⁴⁸⁸ *See supra* Part II.A.

⁴⁸⁹ *See supra* Part II.A.

⁴⁹⁰ *See supra* Introduction.

⁴⁹¹ *See* SNYDER, *supra* note 467, at 469–70.

⁴⁹² *See supra* Part I.A.

more completely self-interested units must take this into account when deciding whether to go to war. As the forms of prohibited aggression become less common, violators send an even larger signal indicating that they are mentally unbalanced or otherwise unfit to be leaders of a modern state.

Some may argue that the status quo bias of international law is not ideal, or even desirable. John Yoo, for example, writes that it is far from self-evident “that the desirable level of force, apart from examples of self-defense, in the international system is in fact zero.”⁴⁹³ According to this train of thought, to the extent that it is followed, this bias prevents the international community from dealing with the modern threats of terrorism, intrastate humanitarian disasters, and rogue states.⁴⁹⁴ Similarly, Glennon argues that there should be a legalist regime that allows for humanitarian intervention, even as he concedes that such wars cannot currently be considered legal under international law.⁴⁹⁵

Whatever the merits to these arguments, it is only by clearly understanding what modern norms are good for—whether and how they influence state behavior—that we can more carefully think about whether they should be changed. If economic and technological changes made the decline of classic invasions and territorial aggrandizement through force inevitable, then there may be little risk in tinkering with the current rules governing the interstate use of force. On the other hand, if international law is biased towards preserving the status quo as a result growing humanitarian sentiment and the two world wars, then changing the rules governing the interstate use of force may risk the stability of the world order. James Fearon argues that the international community should reject attempts at secession because weakening the norm in favor of preserving territorial integrity could embolden other actors to fight for independence, and thus lead to more armed conflict.⁴⁹⁶ Similarly, if a principle of humanitarian intervention came to be more widely accepted, the parameters of the norm against classic invasions would become fuzzier than they already are. This could make it easier for states to justify attacking others for self-interested reasons. Encouraging more armed conflict is especially dangerous in an era of weapons of mass destruction. It may or may not be worth taking this

⁴⁹³ Yoo, *supra* note 11, at 782.

⁴⁹⁴ *Id.* at 749–51.

⁴⁹⁵ GLENNON, *supra* note 5, at 5–7, 102–13, 198–204.

⁴⁹⁶ James D. Fearon, *Separatist Wars, Partition, and World Order*, 13 SECURITY STUD. 394, 397, 404–15 (2004).

risk to, for example, develop a new norm allowing states to stop governments that are committing atrocities against their own people.

On the other hand, perhaps a loosening of the norm banning classic invasions would not lead to more armed conflict, because the territorial integrity norm would remain clear and put a limit on self-serving and hypocritical behavior. Either way, a basic review of the history of changes in international behavior shows how influential moral ideas about right and wrong can be. Proposed changes must therefore be considered in a holistic manner, all the while taking into account cognitive biases and potential adjustments in incentive structures. A complete cost-benefit analysis of reforming the international system must include the chances and harms of weakening the norms underlying the status quo bias of international law regarding the interstate use of force.