

**THE RISING DRAGON AND THE DYING BEAR:
REFLECTIONS ON THE ABSENCE OF A UNIFIED AMERICA
FROM THE WORLD STAGE AND THE RESURGENCE OF
STATE-BASED THREATS TO U.S. NATIONAL SECURITY**

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I. Introduction

“On January 19, 2018, Secretary of Defense Mattis released the unclassified summary of the Department of Defense (DOD)’s first congressionally mandated National Defense Strategy (NDS).”¹ In it, Secretary Mattis notes that the United States is facing “increased global disorder, characterized by decline in the long-standing rules-based international order” and that “[i]nterstate strategic competition, *not terrorism*, is now the primary concern in U.S. national security.”² This pivot away from international terrorism and towards the prospect of “great power conflict”³ is

1. Kathleen J. McInnis, *The 2018 National Defense Strategy*, FED’N OF AM. SCIENTISTS (Feb. 5, 2018), available at <https://fas.org/sgp/crs/natsec/IN10855.pdf> (last visited Oct. 28, 2018); see generally JIM MATTIS, U.S. DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018), available at <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> (last visited Oct. 28, 2018) [hereinafter 2018 NDS SUMMARY].

2. 2018 NDS SUMMARY, *supra* note 1, at 1 (emphasis added).

3. See, e.g., *The Growing Danger of Great-Power Conflict*, THE ECONOMIST (Jan. 25, 2018), available at <https://www.economist.com/news/leaders/21735586-how-shifts-technology-and-geopolitics-are-renewing-threat-growing-danger> (last visited Oct. 28, 2018) (reporting on the global dynamics that likely helped shape the 2018 NDS).

a significant departure from U.S. foreign policy goals over the last seventeen years,⁴ implemented following the tragic terror attacks in New York, Washington D.C., and the skies over Pennsylvania on September 11, 2001.⁵

The 2018 NDS places special emphasis on both China and Russia as potential adversaries of the United States.⁶ Indeed recently, relations between Russia and China have reached “a new age of diplomacy between

4. See Adam Taylor, *The Pentagon Says China and Russia Are Bigger Problems For U.S. Than Terrorists; American Voters May Not Agree*, WASH. POST (Jan. 20, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/01/20/the-pentagon-says-china-and-russia-are-bigger-problems-for-u-s-than-terrorists-american-voters-may-not-agree/?utm_term=.5ccf549745e6 (last visited Oct. 28, 2018) (reporting that “[a]fter almost two decades of a ‘war on terror’ that came at huge expense, but often had few tangible benefits, such a strategy shift would mark a noteworthy change in the way the United States conducts its foreign policy”). Compare WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <https://www.state.gov/documents/organization/63562.pdf> (last visited Oct. 28, 2018); CENT. INTELLIGENCE AGENCY, NATIONAL STRATEGY FOR COMBATING TERRORISM (2003), available at https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf (last visited Oct. 28, 2018); U.S. DEP’T. OF DEF., THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (2004), available at <http://archive.defense.gov/news/Mar2005/d20050318nms.pdf> (last visited Oct. 28, 2018); WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), available at <http://nssarchive.us/NSSR/2006.pdf> (last visited Oct. 28, 2018); U.S. DEP’T. OF DEF., NATIONAL DEFENSE STRATEGY (2008), available at <https://archive.defense.gov/pubs/2008NationalDefenseStrategy.pdf> (last visited Oct. 28, 2018); WHITE HOUSE, NATIONAL SECURITY STRATEGY (May 2010), available at <http://nssarchive.us/NSSR/2010.pdf> (last visited Oct. 28, 2018); U.S. DEPT. OF DEF., THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (2011), available at https://www.army.mil/e2/rv5_downloads/info/references/NMS_Feb2011.pdf (last visited Oct. 28, 2018); WHITE HOUSE, NATIONAL SECURITY STRATEGY (2015), available at <http://nssarchive.us/wp-content/uploads/2015/02/2015.pdf> (last visited Oct. 28, 2018), and U.S. DEPT. OF DEF., NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (2015), available at http://www.jcs.mil/Portals/36/Documents/Publications/2015_National_Military_Strategy.pdf (last visited Oct. 28, 2018), with WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017), available at <http://nssarchive.us/wp-content/uploads/2017/12/2017.pdf> (last visited Oct. 28, 2018); U.S. DEPT. OF DEF., NUCLEAR POSTURE REVIEW EXECUTIVE SUMMARY (2018), available at <https://media.defense.gov/2018/Feb/02/2001872877/-1/-1/1/EXECUTIVE-SUMMARY.PDF> (last visited Oct. 28, 2018); 2018 NDS SUMMARY, *supra* note 1.

5. See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), available at <https://govinfo.library.unt.edu/911/report/911Report.pdf> (last visited Oct. 29, 2018) [hereinafter 9/11 REPORT].

6. See 2018 NDS SUMMARY, *supra* note 1, at 1-2.

the two countries”⁷ in response to their perceived common international rival, the United States.⁸ Both nations are apparently exploring “the viability of an alternate world order, one which is separate to and stands up to America.”⁹

The 2018 NDS lists China as a “strategic competitor” who is “leveraging military modernization, influence [sic] operations, and predatory economics to coerce neighboring countries to reorder the Indo-Pacific region to their advantage” with the end goal of establishing a “regional hegemony in the near term and displacement of the United States” at the top of the world order in the long-run.¹⁰ “Three decades of unprecedented economic growth provided China with the wealth to transform its armed forces, giving its leaders the sense that their moment has come.”¹¹

With regard to Russia, the 2018 NDS paints a picture of a spoiler nation with a history of violating the borders and sovereignty of its neighbors, leveraging “emerging technologies to discredit and subvert democratic processes,” all the while seeking to undermine the “North Atlantic Treaty Organization and change European and Middle East security and economic structures to its favor.”¹² Russia is a nation in decline,¹³ with a

7. Ben Westcott, *China Says Relations With Russia at “Best Level in History,”* CNN (Apr. 6, 2018), available at <https://www.cnn.com/2018/04/06/asia/russia-china-relations-us-intl/?no-st=1523377706> (last visited Oct. 29, 2018).

8. *See id.*

9. *Id.* (quoting Richard McGregor, senior fellow at the Lowy Institute in Sydney).

10. *See* 2018 NDS SUMMARY, *supra* note 1, at 1-2; *see also* Steven L. Myers, *With Ships and Missiles, China Is Ready to Challenge U.S. Navy in Pacific*, N.Y. TIMES (Aug. 29, 2018), available at <https://www.nytimes.com/2018/08/29/world/asia/china-navy-aircraft-carrier-pacific.html> (last visited Oct. 29, 2018).

11. *The Growing Danger of Great-Power Conflict*, *supra* note 3.

12. 2018 NDS SUMMARY, *supra* note 1, at 2; *see also* Olga Oliker, *Will Russia Continue to Play the Role of Spoiler*, CSIS (Dec. 15, 2016), available at <https://www.csis.org/analysis/will-russia-continue-play-role-spoiler> (last visited Oct. 28, 2018); *see generally* *Syria Strikes Lock U.S. and Russia Into New Era of Animosity*, BLOOMBERG (Apr. 16, 2018), available at <https://www.bloomberg.com/news/articles/2018-04-16/syria-strikes-lock-u-s-and-russia-into-a-new-era-of-animosity> (last visited Oct. 28, 2018) (reporting that competition between Russia and the West has significantly increased over the last few months).

13. *See* Jacob Sharpe, *Putin Is Looking Vulnerable in a Crumbling Russia*, NEWSWEEK (Apr. 14, 2017), available at <http://www.newsweek.com/putin-looking-vulnerable-crumbling-russia-583593> (last visited Oct. 29, 2018); *see also* Paul D. Shinkman, *The Inevitable Decline of Putin’s Russia*, U.S. NEWS (May 18, 2016), available at <https://www.usnews.com/news/articles/2016-05-18/the-inevitable-decline-of-putins-russia> (last visited Sept. 20, 2018); *see generally* S. Enders Wimbush & Elizabeth M. Portale, *Russia in Decline*, JAMESTOWN FOUND. (Mar. 2017),

smaller population than the United States, a weaker military, and an economy that “doesn’t produce anything that anybody wants to buy, except oil and gas and arms.”¹⁴ Thus, it may feel pressure to assert itself into world affairs now, while it still can and “[i]ts leaders have spent heavily to restore Russia’s hard power”¹⁵ and asymmetric capabilities, specifically in the cyber-realm to ensure that they can maintain their own sovereignty (and very likely the role of Vladimir Putin at the head of government)¹⁶ and continue to exert regional, if not international, influence.¹⁷

Furthermore, the 2018 NDS identifies “a resilient, but weakening, post-WWII international order” as a contributor, motivator, and exploitable environment for China’s and Russia’s posture of rivalry toward the United States.¹⁸ The NDS’ position that “China and Russia are now undermining the international order from within the system by exploiting its benefits while simultaneously undercutting its principles”¹⁹ rings a bit hollow, however, considering the United States’ own contributions to undermining the international order that it worked so very hard to create from the ashes of the last great power conflict.²⁰

available at <https://jamestown.org/wp-content/uploads/2017/08/Russia-in-Denial-Full-Text.pdf> (last visited Oct. 29, 2018) (noting that Russia is in significant decline across nearly every metric of national prestige—population, economic, militarily).

14. Greg Miller, Ellen Nakashima, & Adam Entous, *Obama’s Secret Struggle to Punish Russia for Putin’s Election Assault*, WASH. POST (June 23, 2017), available at https://www.washingtonpost.com/graphics/2017/world/national-security/obama-putin-election-hacking/?utm_term=.6f1649a2d0b7 (last visited Oct. 28, 2018) (quoting President Obama).

15. *The Growing Danger of Great-Power Conflict*, *supra* note 3.

16. See FIONA HILL & CLIFFORD G. GADDY, MR. PUTIN: OPERATIVE IN THE KREMLIN 388-93 (2013) (“[Putin’s] larger strategic goal is ensuring the defense of Russia’s interests—which are tightly fused with and now largely inseparable from, his own and his system’s interests.”).

17. *See id.* at 378-80; *see also* AGLAYA SNETKOV, RUSSIA’S SECURITY POLICY UNDER PUTIN: A CRITICAL PERSPECTIVE 193-94 (2015).

18. *See* 2018 NDS SUMMARY, *supra* note 1, at 2.

19. *Id.*

20. *See* Peter S. Goodman, *The Post-World War II Order Is Under Assault From the Powers That Built It*, N.Y. TIMES (Mar. 26, 2018), available at <https://www.nytimes.com/2018/03/26/business/nato-european-union.html> (last visited Oct. 29, 2018) (noting that:

[i]n the aftermath of World War II, the victorious Western countries forged institutions—NATO, the European Union, and the World Trade Organization—that aimed to keep the peace through collective military might and shared prosperity. They promoted democratic ideals and international trade while investing in the notion that coalitions were the antidote to destructive nationalism . . . But now the model that has dominated geopolitical affairs for more than 70 years appears increasingly fragile. Its tenets are being challenged by a surge of nationalism and its institutions under assault from some of the very powers that constructed them—not least, the United States . . .);

This paper will examine America's steady withdrawal from international fora and regimes, and how a rising China and a declining Russia have taken advantage of both a divided America and the oft-conscious absence of American international leadership in a manner that increasingly threatens the United States and raises the potential for future great power conflict. Further, both China and Russia are proficiently employing gray zone²¹ tactics to achieve their strategic goals, but do so in slightly different fashions because of their relative positions in the existing world order.

Part II starts by challenging a fundamental assumption in the 2018 NDS, specifically that the threat posed by international terrorism has diminished to such an extent that America can afford to refocus its efforts towards countering state rivals. This is an important issue because the pivot that General Mattis suggests will require significant resources.²²

see also U.S. DEF. INTELLIGENCE AGENCY, *RUSSIA MILITARY POWER, BUILDING A MILITARY TO SUPPORT GREAT POWER ASPIRATIONS* iv (2017), available at <http://www.dia.mil/Portals/27/Documents/News/Military%20Power%20Publications/Russia%20Military%20Power%20Report%202017.pdf> (last visited Oct. 29, 2018) (noting that post WWII international order that developed through the Cold War was "underwritten primarily [through] the strength of the United States) [hereinafter *RUSSIA MILITARY POWER*]; *John McCain Reminds Us How Important—And How Tenuous—American Leadership Is*, *L.A. TIMES* (Oct. 18, 2017), available at <http://www.latimes.com/opinion/editorials/la-ed-mccain-trump-nationalism-20171018-story.html> (last visited Oct. 29, 2018) (quoting Senator John McCain, that:

[t]he international order we helped build from the ashes of world war, and that we defend to this day, has liberated more people from tyranny and poverty than ever before in history . . . To fear the world we have organized and led for three-quarters of a century, to abandon the ideals we have advanced around the globe, to refuse the obligations of international leadership and our duty to remain the last best hope of Earth for the sake of some half-baked, spurious nationalism cooked up by people who would rather find scapegoats than solve problems is as unpatriotic as an attachment to any other tired dogma of the past that Americans consigned to the ash heap of history . . . We have a moral obligation to continue in our just cause, and we would bring more than shame on ourselves if we don't, [for] [w]e will not thrive in a world where our leadership and ideals are absent. We wouldn't deserve to.)

21. See Hal Brands, *Paradoxes of the Gray Zone*, *FOR. POL'Y RES. INST.* (Feb. 5, 2016), available at <https://www.fpri.org/article/2016/02/paradoxes-gray-zone/> (last visited Oct. 29, 2018); see also MICHAEL J. MAZARR, *Thinking about Gray Zone Conflict* 5 (on file with the author) [hereinafter *MAZARR*]; MICHAEL J. MAZARR, *MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA IN CONFLICT* 79-101 (2015) [hereinafter *MAZARR, MASTERING THE GRAY ZONE*]; Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 *YALE J. INT'L L. ONLINE* 1, 1-21 (2017) (analyzing the 2016 Russian hack into the DNC through the lens of gray zone conflict).

22. See Richard Sisk, *Here's What the Military Gets in \$1.3 Trillion Omnibus Spending Bill*, *MILITARY* (Mar. 22, 2018), available at

American military resources, while substantial, are not infinite, and as such may not be available to support this renewed focus on state rivals if they are required to remain fully engaged in ongoing counter-terror operations at the same time. Part II continues by noting that since approximately 1980, America has steadily pulled back from the international order it helped create after WWII, with itself at the center, and provides examples of this withdrawal to highlight the point. Part II concludes by examining the general concept of the gray zone of international rivalry and conflict.

Part III, the crux of this paper, first analyzes China's activities in the South China Sea as within the burgeoning understanding of gray zone actions and then reviews Russia's interference in the 2016 American elections as another threatening gray zone tactic. Part IV concludes the paper by recommending certain specific actions to address these two Chinese and Russian gray zone threats.

II. Background

A. Is It Truly the End of the "War on Terror?"

The status of ongoing U.S. actions in both Syria and Afghanistan indicate that the NDS' dismissal of the threat posed by terror may be incorrect. The terror attacks launched by Al Qaeda against the United States on September 11, 2001²³ ushered in an era of deployed expeditionary U.S. military forces waging a "war on terror" that continues through today, with American armed forces conducting operations and fighting in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen,²⁴ and increasingly throughout large parts of Africa.²⁵

<https://www.military.com/daily-news/2018/03/22/heres-what-military-gets-13-trillion-omnibus-spending-bill.html> (last visited Oct. 29, 2018) (describing the nearly \$700 million in new equipment, projects, and gear for the DoD included within the recent \$1.3 trillion omnibus spending bill). Much, but not all, of the defense spending is geared towards major weapons systems like capital ships and fighter jets more suited to address great power rivalry, rather than counter-terror operations. *Id.*

23. See 9/11 REPORT, *supra* note 5.

24. See WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 6-10 (2016), available at https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf (last visited Oct. 28, 2018) (providing the domestic and international legal support for continued U.S. military and counter-terror operations in certain locations overseas).

25. See Dan Lamonthe, *Pentagon Adds Niger, Mali and Parts of Cameroon to Areas Where U.S. Troops Receive Imminent Danger Pay*, WASH. POST (Mar. 8, 2018), available at <https://www.washingtonpost.com/news/check-point/wp/2018/03/08/pentagon-adds-niger-mali-and-parts-of-cameroon-to-areas->

In a recent speech, however, at Johns Hopkins University, which marked the release of the 2018 NDS, Secretary of Defense James Mattis stated, “[w]e will continue to prosecute the campaign against terrorists, but great-power competition—not terrorism—is now the primary focus on U.S national security.”²⁶ The United States has not been the victim of an organized terror operation near the same extent as the 9/11 attacks.²⁷ But does such a pivot away from terrorism make sense given the state of the world today? In addressing this question, it is reasonable to examine the state of international terror in general, and America’s “War on Terror” in two specific theatres—Syria and Afghanistan.

To start, “[t]he number of people dying in terrorist attacks is dropping.”²⁸ “In 2017, militants conducted 22,487 attacks worldwide, down 7.1 percent from 24,202 in 2016.”²⁹ Most striking was a 45 percent

where-u-s-troops-receive-imminent-danger-pay/?utm_term=.6f58ca6ba6c6 (last visited Oct. 28, 2018) (noting that U.S. military personnel are now receiving hazardous duty pay to assist West African allies in dealing with “militants who have rebranded themselves as Islamic State-West Africa” joining “Al-Qaeda in the Islamic Maghreb (AQIM),” which itself recently rebranded); see also Dionne Searcey & Eric Schmitt, *In Niger, Where U.S. Troops Died, A Lawless and Shifting Landscape*, N.Y. TIMES (Oct. 29, 2017), available at <https://www.nytimes.com/2017/10/29/world/africa/niger-ambush-isis.html> (last visited Oct. 28, 2018) (reporting on a battle involving U.S. special forces that resulted in the deaths of four U.S. Army members and noting that there were 800 U.S. service members in Niger and approximately 6,000 spread throughout the African continent).

26. Dan Lamonthe, *Mattis Unveils New Strategy Focused on Russia and China, Takes Congress to Task for Budget Impasse*, WASH. POST (Jan. 19, 2018), available at https://www.washingtonpost.com/news/checkpoint/wp/2018/01/19/mattis-calls-for-urgent-change-to-counter-russia-and-china-in-new-pentagon-strategy/?utm_term=.22c922a3d3ff (last visited Oct. 28, 2018).

27. See Ashley Halsey III, *As Terrorists Turn to “Lone Wolf” Attacks, TSA Adjusts Its Tactics*, WASH. POST (Mar. 7, 2018), available at https://www.washingtonpost.com/local/trafficandcommuting/as-terrorists-turn-to-lone-wolf-attacks-tsa-adjusts-its-tactics/2018/03/06/555f74bc-213c-11e8-94da-ebf9d112159c_story.html?utm_term=.f2b03ea4c180 (last visited Oct. 28, 2018). “The face of terrorism has evolved from the coordinated, carefully plotted events of 9/11 to a helter-skelter approach where lone wolves use low-tech means to attack soft targets.” *Id.*

28. Amanda Erickson & Laris Karklis, *Every 2017 Terrorist Attack, Mapped*, WASH. POST (Jan. 18, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/01/18/every-2017-terrorist-attack-mapped/?utm_term=.a44fe435f41 (last visited Oct. 28, 2018); see also Adam Taylor, *Terrorist Attacks Are Quietly Declining Around the World*, WASH. POST (Aug. 15, 2018), available at https://www.washingtonpost.com/world/2018/08/15/terrorist-attacks-are-quietly-declining-around-world/?utm_term=.2081ee3e9c59 (last visited Oct. 28, 2018).

29. Matthew Henman, *Global Militant Attacks Caused Fewer Fatalities*, IHS MARKIT (Jan. 18, 2018), available at <https://ihsmarkit.com/research->

decrease in the average annual rate of non-militant fatalities over the past five years.³⁰ The ongoing, confused, and multi-lateral conflict in Syria accounted for a large portion of attacks, representing “more than one-third of all attacks worldwide—almost surpassing the five next most violent countries in total attacks.”³¹ But, of particular note to the United States, where a citizen is more likely to perish in a lawnmower accident incident than an Islamist terror attack,³² attacks in Iraq “fell by more than one-third and fatalities by almost two-thirds.”³³

Despite gains in Iraq, the conflict in neighboring Syria shows no signs of slowing anytime soon. The Islamic State, despite being stripped of major territorial holdings, will in the next few years attempt to “re-group . . . and maintain its operational threat through a combination of low-level insurgent operations and periodic asymmetric mass-casualty attacks . . . [while] continu[ing] to export its supporters worldwide to continue to launch attacks in their home countries.”³⁴ As a result, “Syria now looks like the latest chapter in [an American] war on terror, that has lasted nearly 17 years—starting in Afghanistan and spreading to Iraq, Pakistan, and many other countries—and that shows no signs of stopping.”³⁵ An

analysis/global-militant-attacks-caused-fewer-fatalities-in-2017.html (last visited Oct. 28, 2018) (reporting on Jane’s Terrorism and Insurgency Centre’s Global Attack Index report of 2017, which “uses open source data to build a global database of politically—and ideologically—motivated violence by non-state armed groups and individuals, archived to 1997”).

30. *Id.*

31. *Id.*

32. Taylor, *supra* note 4.

33. Henman, *supra* note 29; see also Susannah George & Qassim Abudul-Zhara, *With ISIS in Iraq Defeated, the US Military Is Beginning to Draw Down From Baghdad*, BUS. INSIDER (Feb. 5, 2018), available at <https://www.businessinsider.com/with-isis-in-iraq-defeated-the-us-military-is-beginning-to-draw-down-from-baghdad-2018-2> (last visited Oct. 28, 2018) (noting that U.S. forces are shifting out of Iraq, because due to their efforts in cooperation with Iraqi security forces, the Islamic State’s “self-styled caliphate stretching across Iraq and Syria has crumbled . . . [with] militants no longer hold[ing] a contiguous stretch of territory”).

34. Henman, *supra* note 29.

35. Adam Taylor, *Quicksand: American’s Forever War Is Expanding, Again*, WASH. POST (Jan. 19, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/01/19/americas-forever-war-is-expanding-again/?utm_term=.4a2495aa3b92 (last visited Oct. 28, 2018). Compare Karen DeYoung & Shane Harris, *Trump Instructs Military to Begin Planning for Withdrawal From Syria*, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/world/national-security/trump-instructs-military-to-begin-planning-for-withdrawal-from-syria/2018/04/04/1039f420-3811-11e8-8fd2-49fe3c675a89_story.html?utm_term=.6d08b2ea54e8 (last visited Oct. 28, 2018) (“President Trump has instructed military leaders to withdraw U.S. troops from Syria as soon as possible.”), with Karen DeYoung & Missy Ryan, *As Trump Talks*

in depth discussion of the ins and outs of the conflict in Syria exceeds the scope of this paper and merits its own independent academic discussion. In sum, though, many believe that while “[t]he war against the Islamic State in Syria and Iraq has actually been one of the brighter spots . . . [through use of] [f]requent coalition airstrikes . . . [that] helped dismantle [ISIS’] self-proclaimed caliphate . . . it [remains] unclear whether the Islamic State can be conclusively defeated any more than the Taliban can.”³⁶

As for the Taliban, the Trump administration certainly seems willing to try to hand them defeat, and as such announced its intention to increase the American military footprint in Afghanistan in late 2017.³⁷ “Part of the plan is to deploy more American troops to Afghanistan to continue to train Afghan forces there, with the goal of convincing the Taliban—which has . . . gained substantial ground . . . that they could not win on the battlefield.”³⁸ “In practical terms, it means the American military mission [in Afghanistan] will [likely] continue for many more years, despite its unpopularity with the American public.”³⁹ “The Trump administration says [its Afghanistan strategy is focused on] escalating pressure on the Taliban to advance a negotiated solution to the fighting.”⁴⁰ This renewed focus on active fighting in Afghanistan is, however, hardly consistent with a renewed focus on traditional rivals such as China and Russia, as eluded to by General Mattis.

So, even with the trend away from complex, organized September 11, 2001-type attacks and despite the general drop in terror fatalities and

of Leaving Syria, His Top Commander in the Middle East Emphasizes the Need to Stay, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/world/national-security/as-trump-talks-of-leaving-syria-his-top-commander-in-the-middle-east-emphasizes-the-need-to-stay/2018/04/03/2ccdcff8-3753-11e8-8fd2-49fe3c675a89_story.html?utm_term=.509699bcfedb (last visited Oct. 28, 2018).

36. Taylor, *supra* note 35.

37. See Julie H. Davis & Mark Landler, *Trump Outlines New Afghanistan War Strategy with Few Details*, N.Y. TIMES (Aug. 21, 2017), available at <https://www.nytimes.com/2017/08/21/world/asia/afghanistan-troops-trump.html> (last visited Oct. 28, 2018).

38. *Id.*

39. Rob Nordland, *U.S. Expands Kabul Security Zone, Digging in for Next Decade*, N.Y. TIMES (Sept. 16, 2017), available at <https://www.nytimes.com/2017/09/16/world/asia/kabul-green-zone-afghanistan.html?action=click&contentCollection=Asia%20Pacific&module=RelatedCoverage®ion=EndOfArticle&pgtype=article> (last visited Oct. 28, 2018).

40. Matthew Pennington, *US, Afghan Leaders Agree on Peace Push, Taliban Don't*, AP NEWS (Mar. 4, 2018), available at <https://www.apnews.com/1eeb3ce17028472aa92b95e1af73e70a> (last visited Dec. 23, 2018).

attacks over the last year,⁴¹ given the highly dynamic and seemingly ever-changing battlefield and political considerations, it certainly appears unlikely that America will be able to choose to suspend its current heavily militarily-dependent, counter-terror operations in any real or meaningful way, anytime soon.

Syria, still a hotbed of terror activity,⁴² remains a tangled, Gordian knot⁴³ where the existing regime, supported by both Iran and Russia,⁴⁴

41. See Erickson & Karklis, *supra* note 28; see also Henman, *supra* note 29.

42. See Henman, *supra* note 29.

43. See Max Fisher, *Straightforward Answers to Basic Questions About Syria's War*, N.Y. TIMES (Sept. 18, 2016), available at <https://www.nytimes.com/2016/09/19/world/middleeast/syria-civil-war-bashar-al-assad-refugees-islamic-state.html?mtrref=www.google.com> (last visited Oct. 28, 2018) (tracing the history of the ongoing Syria conflict); see also Kathy Gilsinan, *The Confused Person's Guide to the Syrian Civil War*, THE ATLANTIC (Oct. 29, 2015), available at <https://www.theatlantic.com/international/archive/2015/10/syrian-civil-war-guide-isis/410746/> (last visited Oct. 28, 2018); Andrew Tabler, *How Syria Came to This*, THE ATLANTIC (Apr. 15, 2018), available at <https://www.theatlantic.com/international/archive/2018/04/syria-chemical-weapons/558065/> (last visited Oct. 28, 2018).

44. See Tabler, *supra* note 43; see also Thomas Gibbons-Neff, Jeremy White, & David Botti, *The U.S. Has Troops in Syria; So Do the Russians and Iranians—Here's Where*, N.Y. TIMES (Apr. 11, 2018), available at <https://www.nytimes.com/interactive/2018/04/11/world/middleeast/syria-military-us-russia-iran.html> (last visited Oct. 29, 2018) (providing a detailed explanation of the Syrian battle lines and territory “controlled” by each faction fighting in Syria); see also Ivan Nechepurenko, Neil MacFarquhar, & Thomas Gibbons-Neff, *Dozens of Russians Are Believed Killed in U.S.-Backed Syria Attack*, N.Y. TIMES (Feb. 13, 2018), available at <https://www.nytimes.com/2018/02/13/world/europe/russia-syria-dead.html> (last visited Oct. 29, 2018); David Brennan, *New Russian SU-57 Stealth Jets Deployed to Syria Despite Putin Promise of Drawdown*, NEWSWEEK (Feb. 23, 2018), available at <http://www.newsweek.com/new-russian-su-57-stealth-jets-deployed-syria-despite-putin-promise-drawdown-817573> (last visited Oct. 29, 2018).

has committed,⁴⁵ and continues to commit,⁴⁶ atrocious human rights violations against its population, while at the same time is either “unwilling or unable” to prevent cross-border terror attacks launched by ISIS into Iraq.⁴⁷ At the request of Iraq, the United States provided ground advisors,⁴⁸ and continues to provide critical air support,⁴⁹ in operations

45. See, e.g., Sarah Almukhtar, *Most Chemical Attacks in Syria Get Little Attention; Here are 34 Confirmed Cases*, N.Y. TIMES (Apr. 13, 2018), available at <https://www.nytimes.com/interactive/2018/04/13/world/middleeast/syria-chemical-attacks-maps-history.html> (last visited Oct. 29, 2018) (stating that “[t]he Independent International Commission of Inquiry on the Syrian Arab Republic says it has confirmed at least 34 chemical attacks since 2013, many of which it said used chlorine or sarin, a nerve agent, and were conducted by the Syrian government.”); see also Rick Gladstone, *U.S. Says Syria Has Used Chemical Weapons at Least 50 Times During War*, N.Y. TIMES (Apr. 13, 2018), available at <https://www.nytimes.com/2018/04/13/world/middleeast/un-syria-haley-chemical-weapons.html> (last visited Oct. 29, 2018) (providing the history of the Assad regime’s use of chemical weapons during the current conflict in Syria, stating:

[I]t’s be clear: Assad’s most recent use of poison gas against the people of Douma was not his first, second, or third, or even 49th use of chemical weapons . . . The United States estimates that Assad has used chemical weapons in the Syrian war at least 50 times. Public estimates are as high as 200.);

see generally Derek Chollet, *Obama’s Red Line, Revisited*, POLITICO (July 19, 2016), available at <https://www.politico.com/magazine/story/2016/07/obama-syria-foreign-policy-red-line-revisited-214059> (last visited Oct. 29, 2018) (stating that “[in August 2013, the Syrian military] attacked rebel-controlled areas of the Damascus suburbs with chemical weapons, killing nearly 1,500 civilians, including more than 400 children.”).

46. See Daniel Brown, *A Compelling Theory Explains the Latest Chemical Attack in Syria—And It Looks Like Assad Got What He Wanted*, BUS. INSIDER (Apr. 9, 2018), available at <http://www.businessinsider.com/why-assad-probably-used-chemical-weapons-syria-2018-4> (last visited Oct. 29, 2018) (explaining how Assad regime used chemical weapons against Jaysh al-Islam rebels in response to this rebel group resisting a Russian brokered cease-fire); see also Ben Hubbard, *Dozens Suffocate in Syria as Government Is Accused of Chemical Attack*, N.Y. TIMES (Apr. 8, 2018), available at <https://www.nytimes.com/2018/04/08/world/middleeast/syria-chemical-attack-ghouta.html> (last visited Oct. 29, 2018).

47. See Benjamin Wittes, *State Department Legal Adviser Egan’s Speech at ASIL*, LAWFARE, (Apr. 8, 2016), available at <https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil> (last visited Oct. 29, 2018) (providing legal analysis of U.S. activity in Syria); see also Letter from Charles Faulkner, Bureau of Legis. Aff., U.S. Dep’t of St., to Bob Corker, Chairman of the Senate Comm. on For. Rel. (Aug. 2, 2017) available at <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000> (last visited Oct. 29, 2018).

48. See Nechepurenko, MacFarquhar, & Gibbons-Neff, *supra* note 44.

49. See *id.*; see also Madeline Conway, *Timeline: U.S. Approach to the Syrian Civil War*, POLITICO (Apr. 7, 2017), available at <https://www.politico.com/story/2017/04/timeline-united-states-response-syria-civil-war-237011> (last visited Oct. 29, 2018).

intended to destroy ISIS' abilities to fight its way into Iraq, deny ISIS its desired territorial holdings, and defend U.S. and coalition forces.⁵⁰ While in theatre, U.S. forces also provide support to anti-Assad forces, or at least "certain rebels, providing [them with] arms and training,"⁵¹ which brings with it the risk of expanding the conflict into an international armed conflict between the United States and Syria.⁵² Such a change in the character of the conflict could have grave consequences considering the close relationship between the Assad regime and Russia.⁵³

50. See Tim Lister, *What Does ISIS Really Want?*, CNN (Dec. 11, 2015), available at <https://www.cnn.com/2015/12/11/middleeast/isis-syria-iraq-caliphate/index.html> (last visited Oct. 29, 2018); see also Gibbons-Neff, White, & Botti, *supra* note 44.

51. Gilsinan, *supra* note 43.

52. See, e.g., Liz Sly & Erin Cunningham, *Regional Tensions Soar in Syria as Trump Threatens to Strike and Iranians Die in an Attack*, WASH. POST (Apr. 10, 2018), available at https://www.washingtonpost.com/world/middle_east/syria-says-strike-on-military-base-carried-out-by-israeli-war-planes/2018/04/09/4179f3a2-2864-46ec-9b35-fef7c4eaf247_story.html?utm_term=.20b446ea0b49 (last visited Oct. 29, 2018); see generally Tess Bridgeman, *About That "Deconfliction Zone in Syria: Is the United States on Firm Domestic and International Legal Footing?*, JUST SEC. (June 15, 2017), available at <https://www.justsecurity.org/42183/deconfliction-zone-syria-united-states-firm-domestic-international-footing/> (last visited Oct. 29, 2018) (noting that:

[t]he more the ongoing conflicts in Syria overlap in geography, in the actors participating, and importantly, in the territorial or other strategic aims of those actors, the harder it will be for the U.S. military to maintain the line operationally between participating in one [conflict] (against ISIL) while generally avoiding the other (against Assad and his allies [in particular, Russia]).).

53. See, e.g., Zachery Cohen & Kevin Liptak, *US, UK and France Launch Syria Strikes Targeting Assad's Chemical Weapons*, CNN (Apr. 14, 2018), available at <https://www.cnn.com/2018/04/13/politics/trump-us-syria/index.html> (last visited Oct. 29, 2018) (providing an overview of the recent joint missile strike by the United States, United Kingdom, and France against the Assad regime's chemical weapons territory in response to a chemical weapon attack attributed to the regime earlier in the week); see also Ray Sanchez & Laura Smith-Spark, *After Syrian Airstrikes Comes Finger-Pointing and Condemnation*, CNN (Apr. 14, 2018), available at <https://www.cnn.com/2018/04/14/politics/syria-strikes-russia-us-response-intl/index.html> (last visited Oct. 29, 2018); Missy Ryan & Paul Sonne, *Broad Attack on Syria Would Face Risk From Air Defenses, Escalation With Russia*, WASH. POST (Apr. 12, 2018), available at https://www.washingtonpost.com/world/national-security/broad-attack-on-syria-would-face-risk-from-air-defenses-escalation-with-russia/2018/04/11/f14e9a96-3db2-11e8-974f-aacd97698cef_story.html?utm_term=.1736e9b918ad (last visited Oct. 29, 2018) (reporting on the increasing tensions between the United States and Russian-backed Syria, as President Trump decides how to respond to the Assad regime's most recent use of chemical weapons against Syrian rebel forces); Anton Troianovski, *Kremlin Backers Warn of Threat of War With U.S. as Syria Tensions Rise*, WASH. POST (Apr.

In Afghanistan, America's "longest war," despite routing Al Qaeda, the Taliban remains a viable adversary to the Afghan government, apparently with the capacity of mounting attacks, even in the country's most secure areas.⁵⁴ In February 2018, the Taliban issued a letter "to the American people" looking "to solve the Afghan issue through peaceful dialogue" and talks with Washington.⁵⁵ Yet, this contradicts the longstanding American position, which pushes any discussion of peace talks towards the Afghan government for resolution.⁵⁶ "U.S. officials . . .

10, 2018), available at https://www.washingtonpost.com/world/russia-backers-warn-of-threat-of-war-with-us-as-syria-tensions-rise/2018/04/10/3a5fb4ec-3cbc-11e8-912d-16c9e9b37800_story.html?utm_term=.12c0cd3d36ed (last visited Oct. 29, 2018); Alex Lockie, *Russia Says the US Is About to Strike Syria—And That It Will Strike Back*, BUS. INSIDER (Mar. 13, 2018), available at <http://www.businessinsider.com/russia-us-syria-attack-2018-3> (last visited Oct. 29, 2018); Tom O'Connor, *Russia Says It Will Attack U.S. Military If Trump Strikes Syria Again*, NEWSWEEK (Mar. 3, 2018), available at <http://www.newsweek.com/russia-threatens-attack-us-forces-if-trump-strikes-syria-again-843128> (last visited Oct. 29, 2018). But see Anton Troianovski, *Russia Responds to Airstrikes in Syria With Harsh Words but No Fire*, WASH. POST (Apr. 14, 2018), available at https://www.washingtonpost.com/world/russia-responds-to-airstrike-with-harsh-words-but-no-fire/2018/04/14/a02ce438-3f97-11e8-955b-7d2e19b79966_story.html?utm_term=.197ff124e31e (last visited Oct. 29, 2018) (reporting that the Russian response to the most recent instance of America's, with the assistance of Great Britain and France, retributive strike against the Assad regime's use of chemical weapons in Syria has been limited to rhetoric).

54. See Dan Lamonthe, *Inside the Marines' New Mission in Afghanistan: Tackling Back Territory Previously Won*, WASH. POST (Apr. 16, 2018), available at https://www.washingtonpost.com/world/asia_pacific/inside-the-marines-new-mission-in-afghanistan-taking-back-territory-previously-won/2018/04/15/a91d4668-382c-11e8-af3c-2123715f78df_story.html?utm_term=.6601e4bed048 (last visited Oct. 29, 2018) [hereinafter Lamonthe, *Inside the Marines' New Mission in Afghanistan*]; see also Dan Lamonthe, "The Taliban is in the City:" Secretive Raids With U.S. Forces Launched to Stop Kabul Attacks, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/news/checkpoint/wp/2018/03/14/the-taliban-is-in-the-city-secretive-raids-by-u-s-forces-among-the-options-used-to-stop-attacks-in-kabul/?utm_term=.08dd90fd998c (last visited Oct. 29, 2018) (reporting that the Taliban is active in Kabul and that the United States is assisting Afghan security forces in dealing with them); Amir Shah, *An Explosion in Afghanistan's Capital Has Killed a Young Girl and Wounded Six Others*, TIME (Mar. 2, 2018), available at <http://time.com/5182429/kabul-explosion-kills-one/> (last visited Oct. 29, 2018) (stating that "Kabul has recently seen a spate of large-scale militant attacks by the Taliban and also the Islamic State group, whose affiliate in Afghanistan has grown stronger since it emerged in 2014.").

55. *Taliban Addresses "the American People" in Rambling Letter*, CBS NEWS (Feb. 14, 2018), available at <https://www.cbsnews.com/news/rambling-taliban-letter-addresses-the-american-people/> (last visited Dec. 23, 2018).

56. See Lamonthe, *Inside the Marines' New Mission in Afghanistan*, *supra* note 54 ("U.S. commanders say that the most likely path to declaring victory is reaching

conveyed messages to Taliban political representatives in Qatar, urging the group to join talks with the Afghan government,” who later extended a peace offer in late February and early March of 2018.⁵⁷ Despite their own February letter, however, the Taliban have since rebuffed this offer from the Afghan government.⁵⁸

Thus, if Syria and Afghanistan remain active fronts on America’s war on terror—and leaving aside for the moment less active locations of deployed American troops in advisory roles—⁵⁹ it seems as if a major policy shift away from non-state actor focused, counter-terror operations and towards addressing state rivals may be a bit premature. This is due to the fact that American forces are still very much fully engaged in the fight against terror in both Syria and Afghanistan. Therefore, where should the United States look to make up the difference between the hard power it has and the hard power it needs to simultaneously fight the war on terror and pivot to address the great power threats of Russia and China?

B. America’s Retreat From International Leadership

Next, if the 2018 NDS includes global instability as a justification for change in national focus towards countering great power rivalries, it is important to consider the status of America’s own posture in the international community over the course of the last several decades to get a better sense of how China and Russia became resurgent state rivals.⁶⁰ Indeed, attempting to actually apply international legal structures to

a political settlement with the Taliban.”); *see also* Taliban Addresses “the American People” in *Rambling Letter*, *supra* note 55.

57. *See* Pennington, *supra* note 40.

58. *Id.*

59. *See* Searcey & Schmitt, *supra* note 25.

60. *Cf.* 2018 NDS SUMMARY, *supra* note 1 at 2; Karl Vick, *Donald Trump Is Turning Davos Into a Globalist Throwdown*, TIME (Jan. 25, 2018), available at <http://time.com/5118046/donald-trump-davos/> (last visited Oct. 29, 2018). *See generally* Roger Cohen, *Trump’s World and the Retreat of Shame*, N.Y. TIMES (Mar. 9, 2018), available at <https://www.nytimes.com/2018/03/09/opinion/trump-despots-human-rights.html?rref=collection%2Fcolumn%2FRoger%20Cohen&action=click&contentCollection=Opinion&module=Collection®ion=Marginalia&src=me&version=column&pgtype=article> (last visited Oct. 29, 2018) (stating that:

France and Britain convene an emergency meeting of the Security Council and press for enforcement of last month’s Resolution 2401, calling for an immediate cessation of hostilities [in Eastern Ghouta, a suburb of Damascus, the last rebel-held enclave close to the Syrian capital]. In this effort, the United States is nowhere, silent, AWOL, as President Vladimir Putin and his Syrian sidekick do their worst. The message to Moscow is clear: . . . America does not care about Syria, or war crimes, or human rights. Russian cynicism and American absence produce disaster.).

American activities these days is admittedly often a subject with little practical effect outside the realm of academia.⁶¹ There are many reasons for this, including:⁶² (1) that as a general proposition, international legal paradigms often lack enforcement mechanisms;⁶³ (2) the United States' general trend away from being strictly bound by international law and treaties, and its habit of attaching Reservations, Understandings, and Declarations (RUDs) in part ostensibly to account for the nuances of the American governmental system;⁶⁴ (3) the tendency of American courts to read international legal obligations narrowly;⁶⁵ (4) America's reluctance to be subject to international institutions;⁶⁶ (5) general Federalism concerns;⁶⁷ and (6) an apparently persistent belief in American exceptionalism both with regard to America's place in the world order⁶⁸ and in

61. See, e.g., John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 15 (2000) (arguing that international law is not really "law").

62. See, e.g., Sean D. Murphy, *The United States and The International Court of Justice: Coping With Antinomies*, 291 *U.S. & INT'L CTS. & TRIBUNALS*, 1, 1-3 (2008) (describing the inevitable tensions of American interaction within the international sphere, specifically the United States' relationship with the ICJ).

63. But see Frederic L. Kirgis, *Enforcing International Law*, 1 *AM. SOC'Y'L OF INT'L L.* (1996), available at <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law> (last visited Oct. 29, 2018).

64. See Willem van Genugten, *The United States' Reservations to the ICCPR: International Law Versus God's Own Constitution*, in *THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY* 35-46 (Monique Castermans-Holleman et al. eds., 1998) (describing the history of the United States' reservations to the International Convention on Civil and Political Rights (ICCPR)); see also M.S., *Why the Sheriff Should Follow the Law*, *THE ECONOMIST* (May 23, 2017), available at <https://www.economist.com/blogs/democracyinamerica/2014/05/america-and-international-law> (last visited Oct. 29, 2018).

65. E.g., *Sale v. Haitian Ctr. Council Inc.*, 509 U.S. 155, 182 (1993).

66. See Ben Cardin, *The South China Sea Is the Reason the United States Must Ratify UNCLOS*, *FOR. POL'Y* (July 13, 2016), available at <http://foreignpolicy.com/2016/07/13/the-south-china-sea-is-the-reason-the-united-states-must-ratify-unclos/> (last visited Oct. 29, 2018); see also Harold Hongju Koh et al., *Trump's So-Called Withdrawal From Paris: Far From Over*, *JUST SEC.* (June 2, 2017), available at <https://www.justsecurity.org/41612/trumps-so-called-withdrawal-paris/> (last visited Oct. 29, 2018) (describing President Bush's act of "unsigned" the Rome Statute compared to President Trump's attempt to withdraw from the Paris climate accords).

67. See generally *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that only self-executing treaties or treaties that are implemented via statute are enforceable as the law of the land in the United States).

68. See generally Harold H. Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479 (2003).

matters that pertain to the application of constitutional law in American affairs.⁶⁹

This current state of affairs, which can fairly be described as an American withdrawal from the international world order,⁷⁰ is likely a far different outcome than what that world order's architects had in mind. After the end of World War II until around 1980, U.S. presidents of both parties "midwived international institutions that gave every nation a stake in keeping peaceful and stable a world that had America at its center."⁷¹ So, what changed?

In answering this question, it is helpful to look at American international relationships by examining two actions: (1) America's refusal to ratify the United Nations Convention on the Law of the Sea ("UNCLOS"),⁷² and (2) the American Reservations, Understandings, and Declarations attached to the International Convention on Civil and Political Rights ("ICCPR"). This is not to say that there are no other ways to examine this issue but, strategically, the U.S. treatment of UNCLOS and the ICCPR, in particular, signals to the international community that the United States is less interested than it should be in international leadership; thus, creating a vacuum for others to fill. Tactically, the United States' stance on these two international instruments weakens its position in trying to counter both the rising dragon of China and the dying bear of Russia.

1. America's Persistent Refusal to Sign and Ratify UNCLOS

"The United Nations Convention on the Law of the Sea [UNCLOS] is a comprehensive attempt to deal with a wide variety of issues concerning the high seas and territorial and coastal areas including ownership,

69. See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1 (2010) (denying petition for rehearing en banc to determine the role of international law-of-war principles in interpreting AUMF). "The idea that international norms hang over domestic law as a corrective force to be implemented by courts is not only alien to our case law, but an aggrandizement of the judicial role beyond the Constitution's conception of the separation of powers." *Id.* at 4 (Brown, J., concurring). "[I]nternational norms outside of those explicitly incorporated into our domestic law by the political branches are not part of the fabric of the law enforceable by federal courts . . ." *Id.* at 6.

70. See Stewart M. Patrick, *China and Trump May Bury the Liberal International Order*, DEF. ONE (Mar. 25, 2018), available at <http://www.defense-one.com/ideas/2018/03/china-and-trump-threaten-bury-liberal-international-order/146937/?oref=acemail> (last visited Oct. 31, 2018) (noting that "[t]he United States, for its part, is a weary titan, no longer willing to bear the burdens of global leadership, either economically or geopolitically.").

71. Vick, *supra* note 60.

72. See generally U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

resource exploitation, and passage rights.”⁷³ “After more than a decade of detailed and intense international discussions, UNCLOS codified the existing rules of the sea and adopted them on December 12, 1982.”⁷⁴ The convention entered into force in 1994 and, as of this writing, 168 nations, including both Russia and China, ratified or acceded to its terms.⁷⁵

“Today, [UNCLOS] is the globally recognized regime dealing with all matters relating to the law of the sea.”⁷⁶ It includes provisions that codify, articulate, or clarify the international law on territorial limitations, navigational rights, establishment of exclusive economic zones, provisions on extracting resources from the continental shelf, and governs the protection of marine life, amongst many other subjects.⁷⁷ Furthermore, it includes a powerful dispute resolution provision at article 286.⁷⁸ UNCLOS’ requirement that “its parties consent to arbitration or [the peaceful] adjudication of all disputes concerning the interpretation of application of the Convention” is an extraordinary provision which counters the default international norm of requiring state consent to arbitration.⁷⁹ The provision’s champions, led by an American, intended this “compulsory and binding” dispute resolution mechanism as a means of “promoting stability and discouraging unilateralism.”⁸⁰ Importantly though, this binding arbitration provision allows States to exempt their militaries from its reach.⁸¹

73. Jay M. Zitter, Annotation, *Construction and Application of United Nations Convention on the Law of the Sea—Global Cases*, 21 A.L.R. Fed. 2d 109 (2007).

74. Sean Patrick Mahard, *Blackwater’s New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea*, 47 VAND. J. TRANSNAT’L L. 331, 343 (2014).

75. See *United Nations Convention on the Law of the Sea of 10 December 1982: Overview and Full Text*, U.N.: OCEANS & L. OF THE SEA (Mar. 28, 2018), available at http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (last visited Nov. 1, 2018) (providing a “table of ratifications/accessions, etc. (pdf format)” which shows how many States have ratified or acceded to the Treaty’s terms).

76. *Id.*

77. Maggie Goodlander, *Is the United States Ready to Approve the Law of the Sea Treaty?*, COUNCIL ON FOR. REL. (July 19, 2007), available at <https://www.cfr.org/background/united-states-ready-approve-law-sea-treaty> (last visited Nov. 1, 2018).

78. See B.H. Oxman, *United States of America*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AT 30: REFLECTIONS 129 (2013).

79. *Id.*

80. *Id.*

81. Stewart M. Patrick, *(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty*, THE ATLANTIC (June 10, 2012), available at <https://www.theatlantic.com/international/archive/2012/06/-almost-everyone->

Despite significant efforts by U.S. delegations in drafting the entire convention and several near misses at ratification,⁸² the United States neither signed⁸³ nor ratified UNCLOS⁸⁴ primarily because “[t]he United States, along with several other industrialized states, took issue with aspects of the treaty (Part XI) which dealt with deep seabed resources beyond national jurisdiction.”⁸⁵ The U.S. objection to the creation of the International Seabed Authority (“ISA”), which contained the potential to redistribute sea bed mining royalties, was addressed by a follow-up negotiation, again led by America, which resulted in a parallel agreement, the Agreement to the Implementation of Part XI,⁸⁶ that established a permanent U.S. seat on the ISA.⁸⁷ This seat has always been and still remains vacant. However, despite this follow up negotiation in which the United States essentially lobbied for and built in an ISA veto, the United States cannot claim its seat until it becomes a party to UNCLOS.⁸⁸ Traditional complaints that U.S. accession to UNCLOS would negatively impact U.S. sovereignty and security seemingly also prevented signature and ratification, despite both broad and deep bipartisan support from the Executive Branch and U.S. military over the last 30 years.⁸⁹

Today, the United States relies on President Reagan’s Oceans Policy Statement⁹⁰ and his National Security Decision Directive 83 as support

agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/ (last visited Nov. 1, 2018).

82. *See id.* (writing that the “United States was the principal force behind the negotiation of UNCLOS”).

83. *See Multilateral Treaties Deposited with the Secretary-General*, Ch. XXI: Law of the Sea, § 6, at 4 (2009), available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> (last visited Oct. 29, 2018) (showing that the United States has not signed UNCLOS).

84. Roncevert G. Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), available at <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/> (last visited Nov. 1, 2018).

85. *Id.*

86. *See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, U.N., available at http://www.un.org/depts/los/convention_agreements/texts/unclos/closindxA-gree.htm (last visited Nov. 1, 2018).

87. Patrick, *supra* note 81. *Cf.* Almond, *supra* note 84.

88. *See* Cardin, *supra* note 66; *see also* Goodlander, *supra* note 77.

89. *See* Glenn M. Sulmasey & Chris Tribolet, *The United Nations Convention on The Law of the Sea*, in NATIONAL SECURITY LAW IN THE NEWS: A GUIDE FOR JOURNALISTS, SCHOLARS AND POLICYMAKERS 145, 155-56 (Paul Rosenzweig et al. eds., 2012).

90. *See generally* Statement on United States Oceans Policy, AM. PRESIDENCY PROJECT, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=41036> (last visited Nov. 2, 2018) (providing President Reagan’s Oceans Policy Statement).

for the idea that, while not a party to UNCLOS, the United States considers the Treaty as reflective of the current state of customary international law as it relates to the law of the sea.⁹¹ “But custom and practice are far more malleable and subject to interpretation” than an actual treaty.⁹² Without U.S. accession to UNCLOS, and most importantly its direct participation in its deliberative bodies like the International Tribunal for the Law of the Sea (“ITLOS”), Commission on the Limits of the Continental Shelf, and the ISA,⁹³ “[o]ther states may soon push the Law of the Sea into new, antithetical directions” in spite of U.S. interests.⁹⁴

2. Eviscerating the ICCPR Through Reservations, Understandings, and Declarations (“RUDs”)

“The ICCPR is an early United Nations treaty which ‘guarantees a broad spectrum of civil and political rights.’”⁹⁵ “While many Americans are aware of endogenous civil and political rights stemming from the Bill of Rights and the Anglo-American legal tradition, many citizens may not realize that the United States is a party to the [ICCPR].”⁹⁶

The ICCPR grew out of the United Nations Commission on Human Rights, and “[o]n December 16, 1966, the United Nations General Assembly unanimously adopted the ICCPR.”⁹⁷ It entered into force on March 23, 1976 and enjoys broad acceptance, with 74 signatories and 168 parties.⁹⁸

President Carter signed the ICCPR on behalf of the United States in 1977 and the U.S. Senate ratified the ICCPR in 1992 to further two goals articulated by the Senate Committee on Foreign Relations: (1) a demonstrated commitment to protecting human rights; and (2) participation in the Human Rights Committee, so as to monitor global human rights

91. See Nat'l Sec. Decision Directive No. 83, *United States Oceans Policy: Law of the Sea and Exclusive Economic Zone (C)*, WHITE HOUSE (Mar. 10, 1983), available at <https://fas.org/irp/offdocs/nsdd/nsdd-83.pdf> (last visited Nov. 2, 2018).

92. Patrick, *supra* note 81.

93. See Almond, *supra* note 84.

94. Patrick, *supra* note 81.

95. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 1, 1 (2005).

96. Timothy G. Joseph, *A Brief History of the International Covenant on Civil and Political Rights*, PENN STATE J. OF INT'L AFF. (Dec. 3, 2015), available at <http://sites.psu.edu/jlia/a-brief-history-of-the-international-covenant-on-civil-and-political-rights/> (last visited Oct. 28, 2018).

97. *Id.*

98. See *id.*

compliance.⁹⁹ In its ratification, the Senate attached “five reservations, five understandings, four declarations, and one proviso,” which essentially “rendered the treaty powerless under domestic law.”¹⁰⁰

The ICCPR in its natural state is broad and far reaching in scope.¹⁰¹ Among its enumerated rights are self-determination,¹⁰² right to life,¹⁰³ right to liberty and security of person,¹⁰⁴ right to compensation for unlawful detention,¹⁰⁵ freedom of thought, conscience, and religion,¹⁰⁶ freedom of opinion,¹⁰⁷ right to peacefully assemble,¹⁰⁸ right to freedom of association,¹⁰⁹ rights of the family,¹¹⁰ right to participate in the public process,¹¹¹ and equal protection under the law.^{112, 113}

The United States’ RUDs are categorized in four primary ways: (1) the preservation of distinctive Constitutional rights that exceed the protections of the ICCPR; (2) disagreements over defined terms, which may be discussed in existing U.S. statutes or the Constitution; (3) the idea that America sometimes supports the general concepts behind certain rights, but does not wish to be held to international standards pertaining to those rights; and (4) a double standard centered on American exceptionalism which results in the perception that different rules should apply for Americans as compared to those of the rest of the world.¹¹⁴

Of the four categories, it is most helpful for this paper to focus on the last two, both in the context of human rights treaties, like the ICCPR, and as general maxims that pertain to international relations. In reality, the two are closely related and can be simplified to one classification: the

99. Ash, *supra* note 95, at 1, 2.

100. *Id.* at 3, 11.

101. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited Oct. 23, 2018) [hereinafter ICCPR].

102. *Id.* art. 1.

103. *Id.* art. 6.

104. *Id.* arts. 9-11.

105. *Id.*

106. ICCPR, *supra* note 101, art. 18.

107. *Id.* art. 19.

108. *Id.* art. 21.

109. *Id.* art. 22.

110. *Id.* arts. 23-24.

111. ICCPR, *supra* note 101, art. 25.

112. *Id.* art. 26.

113. Ash, *supra* note 95, at 5.

114. *Id.* at 9-14.

American exceptionalism-driven double standard of international norm application and compliance.

“[T]he perception that the United States applies one standard to the world and another to itself sharply weakens America’s claim to lead globally through moral authority.”¹¹⁵ This is critically important as America is currently a global hegemon, whose “commitment to its allies . . . [as] a leader of a phalanx of nations all of which are committed to democracy and the rule of law . . . is key to [maintaining] its global hegemony” in the face of those revisionist nations, like Russia and China, who would challenge it.¹¹⁶ As discussed in a bit more detail below, America keeps this “phalanx” together largely through the administration of “soft power,” and as such, this double standard diminishes the United States’ ability to wield this key component of diplomacy.¹¹⁷ Further, “by opposing global rules, the United States can end up undermining the legitimacy of the rules themselves . . . at precisely the moment when it needs those rules to serve its own national purposes.”¹¹⁸

C. *Welcome to the Gray Zone*

Both China and Russia are masters of operating in the “gray zone” of statesmanship, and it is a combination of this mastery and the United States’ recognition of the effectiveness of these tactics that increased the visibility of the threat China and Russia pose to the United States.¹¹⁹

“Gray zone conflict is best understood as activity that is coercive and aggressive in nature, but that is deliberately designed to remain below the threshold of conventional military conflict and open interstate war.”¹²⁰ The state employing gray zone tactics often does so gradually by asymmetrically leveraging the full spectrum of tools of statecraft—military, economic, diplomatic, and informational.¹²¹ This purposefully gradual approach results in a series of relatively small gains that, while troublesome to the target state or perhaps the world, do not rise to such a sufficient level to either warrant or legally justify international or

115. Koh, *supra* note 68, at 1487.

116. Eric Engle, *Trump’s Foreign Policy: Realist Economic Nationalism*, 14 LOY. U. CHI. INT’L L. REV. 91, 117-18 (2016).

117. See Koh, *supra* note 68, at 1487.

118. *Id.*

119. See generally Brands, *supra* note 21; MAZARR, *supra* note 21; MAZARR, MASTERING THE GRAY ZONE, *supra* note 21; Schmitt, *supra* note 21.

120. Brands, *supra* note 21.

121. See MAZARR, *supra* note 21.

unilateral armed response.¹²² In short, States that employ gray zone tactics “eat away at the status quo one nibble at a time.”¹²³

Scholar Michael Mazarr suggests several characteristics of gray zone conflict, in that they are activities conducted by so-called revisionist states¹²⁴ challenging the existing world order through actions that: (1) pursue political objectives through cohesive integrated campaigns; (2) employ mostly nonmilitary or kinetic tools; (3) strive to remain under key escalatory or red line thresholds to avoid outright conventional conflict; and (4) move gradually toward its objectives rather than seeking conclusive results in a specific period of time.¹²⁵

“By acting in . . . grey [sic] zones [States] make it difficult for other States to definitively name and shame the [acting State] as having committed an internationally wrongful act.”¹²⁶ This problem is compounded in non-authoritarian Western, liberal democracies, who both tend to strongly adhere to the rule of law and have socio-political environments with characteristics like rival political parties that participate in fair elections, free speech often supercharged with far-reaching internet access, and relatively open borders that make asymmetric gray zone operations very tempting to employ for a revisionist state, looking to challenge the existing international order.¹²⁷

III. The Rising Dragon and the Dying Bear

A. *The Rising Dragon: Chinese Gray Zone Activities in the South China Sea*

1. *Factual Background*

“The complexity of maritime and territorial disputes in the South China Sea is nothing short of mind-numbing . . . [in that] [t]hey involve six countries—Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam—hundreds of tiny land features, and a body of international law

122. See Corri Zoli, *The Changing Role of Law in Security Governance: Post 9/11 “Gray Zones” and Strategic Impacts*, 67 SYRACUSE U. L. REV. 613, 622 (2017) (“[G]ray zone approaches achieve political gains without triggering formal response processes—or even recognition of the nature of such actions—and succeed in shielding conflict actors from the risks or costs that such escalation would usually bring.”).

123. Brands, *supra* note 21.

124. See *id.* (noting that revisionist States are “those actors that seek to modify some aspect of the existing international environment”).

125. MAZARR, *supra* note 21.

126. See Schmitt, *supra* note 21, at 2.

127. *Id.* at 3.

that is both contested and complicated to interpret.”¹²⁸ A fully detailed discussion exceeds the scope of this paper, as literally not just books, but volumes of books have been written on the subject.¹²⁹ For purposes here though, a brief factual synopsis, coupled with an overview of the relevant UNCLOS provisions, should suffice to tease out the issues at play.

As a threshold matter, “China, a party to UNCLOS, rejects U.S. interpretations of the treaty’s freedom of navigation provisions, and continues to assert outlandish claims to control over virtually the entire South China Sea.”¹³⁰ At its most basic, the thrust of the issue in the South China Sea revolves around Chinese maritime claims, which are no doubt grounded on a combination of factors, including that nation’s perception of historical claims,¹³¹ its need for access to potential living marine¹³² and natural resources,¹³³ and its desire to address regional security concerns.¹³⁴

In short, “[t]he Chinese have reached into their ancient past to justify the conversion of maritime frontiers, over which they had little control, into maritime borders over which they would [seek to] be able to exercise

128. Gregory B. Poling, *The South China Sea in Focus: Clarifying the Limits of Maritime Dispute*, CSIS (July 2013), available at https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130717_Poling_South-ChinaSea_Web.pdf (last visited Oct. 30, 2018).

129. See *id.*; see generally THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES (Leszek Buszynski & Christopher B. Roberts, eds., 2015); NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA (2012); THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION OR CONFLICT-MAKING SOVEREIGNTY CLAIMS? (C.J. Jenner & Tran Truong Thuy, eds., 2016); NALANDRA ROY, THE SOUTH CHINA SEA DISPUTES: PAST, PRESENT, AND FUTURE (2016); MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES (Yann-juei Song & Keyuan Zou, eds., 2014); POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA (Tran Truong Thuy & Le Thuy Trang, eds., 2015); ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA (Shicun Wu & Keyuan Zou, eds., 2016).

130. Patrick, *supra* note 81; see also Emily Rauhala, *China to U.S.: It's Your Fault We Are in the South China Sea*, WASH. POST (Jan. 22, 2018), available at https://www.washingtonpost.com/world/china-to-us-its-your-fault-we-are-in-the-south-china-sea/2018/01/22/1bc25b72-ff3e-11e7-93f5-53a3a47824e8_story.html?utm_term=.f01958baf33b (last visited Oct. 29, 2018); Christina Zhao, *China Says "Reckless" U.S. to Blame for Military Buildup in South China Sea*, NEWSWEEK (Jan. 22, 2018), available at <http://www.newsweek.com/china-blasts-us-recklessly-making-trouble-and-threatens-more-military-build-786457> (last visited Oct. 29, 2018).

131. See HONG, *supra* note 129, at 62-71.

132. *Id.* at 71-74.

133. *Id.* at 74-78.

134. *Id.* at 78-82.

full sovereignty and control.”¹³⁵ Yet, “China’s attempt to cite ancient records as a basis for sovereignty over all the South China Sea finds little support in international law.”¹³⁶

Specifically, “[o]ne of the most difficult issues impacting upon sovereignty claims and disputes in the [South China Sea] is the ‘dotted’ or the ‘nine dotted line’ found on Chinese maps dating back to 1947.”¹³⁷ “[A]lso known as the ‘U-Shaped line’ . . . China[, at times], claims ownership and historic rights to islands, reefs, shoals, banks, and waters within the nine-dotted line.”¹³⁸ If China prevails in capitalizing on its assertion of the nine-dotted line marking the edge of its empire it would “extend its jurisdiction some one thousand nautical miles from its mainland, so as to command the virtual Mediterranean or maritime heart of Southeast Asia, with far-reaching consequences for the strategic environment.”¹³⁹

Interestingly, there are at least four ways to interpret this “line.”¹⁴⁰ First, everything between the line and mainland China is “indisputably” Chinese territory.¹⁴¹ Next, the line establishes the Chinese reach of its Exclusive Economic Zone and continental shelf.¹⁴² Third, the line may represent a claim on all of the land features within the boundaries of the line.¹⁴³ And fourth, the line could represent the outer limit to historic fishing and seabed claims.¹⁴⁴ The Chinese never explained the line, and in true embrace of the “gray zone” tend to simply pick a post-hoc justification and use the ambiguity to justify whatever action they are challenged on at the time.¹⁴⁵

135. THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES, *supra* note 129, at 2.

136. *Id.* at 6.

137. ROY, *supra* note 129, at 12.

138. *Id.* at 13.

139. CHINESE ECONOMIC REFORM: THE IMPACT ON SECURITY 142 (Gerald Segal & Richard Y. Hang eds., 1996).

140. Gregory Poling, *US Interests in the South China Sea*, in POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA 67 (Tran Truong Thuy & Le Thuy Trang eds., 2015).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See Pham Lan Dung & Nguyen Ngoc Lan, *Some Legal Aspects of the Philippines-China Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea*, in POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA, *supra* note 140 (noting that “[n]o official explanation has been provided to date on the legal basis or the claim that China is seeking with the line. China’s claim

In addition to the challenges posed by the Chinese assertion of the existence of the nine-dotted line as some sort of significant maritime border, China also took to building out installations, and essentially creating land in the middle of the ocean, ostensibly as a mean of buttressing its claims of sovereignty over rocks and reefs.¹⁴⁶ “The U.S. estimates China has added 3,200 acres of land on seven features . . . over the past three years.”¹⁴⁷ China has constructed installations on the Spratly Islands, some 500 miles from the coast of China and Fiery Cross reef, nearly 750 miles away from the mainland.¹⁴⁸ “The new islands allow China to harness a portion of the Sea for its own use that has been relatively out of reach until now”¹⁴⁹ and extends their ability to project military force into the heavily disputed region.¹⁵⁰

The United States’ interests in the region generally do not intervene with territorial disputes between the six affected nations mentioned above.¹⁵¹ “[O]wnership over individual [natural] features has little impact on US security concerns or strategic thinking.”¹⁵² Nor is the United States particularly interested in the region’s disputed resources.¹⁵³ The United States, however, is firmly committed to protecting its long-term regional allies in the South China Sea and in preserving the post-WWII

based on [it] is still largely undefined and unformulated.”); see also HONG, *supra* note 129, at 68.

146. See Eleanor Ross, *How and Why China Is Building Islands in the South China Sea*, NEWSWEEK (Mar. 29, 2017), available at <http://www.newsweek.com/china-south-china-sea-islands-build-military-territory-expand-575161> (last visited Oct. 31, 2018); see also Emily Rauhala & Olivier Laurent, *Stunning New Pictures Show the Scope of Chinese Building in the South China Sea*, WASH. POST (Feb. 7, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/02/07/stunning-new-pictures-show-the-scope-of-chinese-building-in-the-south-china-sea/?utm_term=.e7f8f0263fcf (last visited Oct. 31, 2018).

147. *Id.*

148. *Id.*

149. Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Oct. 27, 2015), available at <https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html> (last visited Oct. 30, 2018).

150. See Tom O’Connor, *China Reveals Its New Russian Jets Flying Over Secret Military Bases in Pacific*, NEWSWEEK (Feb. 8, 2018), available at <http://www.newsweek.com/china-reveals-new-russian-jets-flying-over-secret-military-bases-pacific-801709> (last visited Oct. 30, 2018).

151. See POLING, *supra* note 140, at 61-62.

152. *Id.*

153. *Id.* at 62-63 (writing that “any oil discovered in the South China Sea would presumably enter the global spot market just like any other petroleum drilled for export around the world”).

international norm favoring the peaceful settlement of disputes.¹⁵⁴ The United States is also keenly interested in allowing its military full freedom of navigation on the high seas within the region, a concept that is codified in UNCLOS,¹⁵⁵ but repeatedly challenged by China, often without legal basis.¹⁵⁶ Finally, and despite not being a party to UNCLOS, the United States is ostensibly interested in making sure that Chinese maritime claims are in accord with recognized international legal standards.¹⁵⁷

Yet, the United States let the Chinese proceed with their excessive maritime claims and island construction efforts without resorting to much beyond political statements, and what the U.S. Navy refers to as Freedom of Navigation Operations (“FNOP”).¹⁵⁸ Recently, CNN reported on the U.S. destroyer, *USS Mustin*’s operations nearby, within 12 nautical miles, to Mischief Reef, a disputed land form claimed by both China and the Philippines, but home to a Chinese-built outpost.¹⁵⁹

154. *Id.* at 63-64.

155. See UNCLOS, *supra* note 72, art. 87.

156. See Christina Zhao, *China Warns Trump Administration Will “Suffer Complete Humiliation” If Washington Continues to Provoke Beijing*, NEWSWEEK (Jan. 23, 2018), available at <https://www.newsweek.com/china-warns-trump-administration-will-suffer-complete-humiliation-if-788149> (last visited Oct. 28, 2018).

157. See POLING, *supra* note 140, at 66-74.

158. See Cid Standifer, *A Brief History of U.S. Freedom of Navigation Operations in the South China Sea*, USNI NEWS (July 2, 2017), available at <https://news.usni.org/2017/05/29/brief-history-us-freedom-navigation-operations-south-china-sea> (last visited Oct. 28, 2018); see also Justin Wright, Bryan Bender, & Philip Ewing, *Obama Team, Military at Odds Over South China Sea*, POLITICO (July 31, 2015), available at <https://www.politico.com/story/2015/07/barack-obama-administration-navy-pentagon-odds-south-china-sea-120865> (last visited Oct. 28, 2018); Emily Rauhala, *The South China Sea Fell Off Trump’s Radar Last Year; He May Have to Pay Attention in 2018*, WASH. POST (Jan. 1, 2018), available at https://www.washingtonpost.com/world/asia_pacific/the-south-china-sea-fell-off-trumps-radar-this-year-he-may-have-to-pay-attention-in-2018/2018/01/01/b7c9a27a-eb1e-11e7-956e-baea358f9725_story.html?utm_term=.68e23ce16181 (last visited Oct. 28, 2018); Hannah Beech, *U.S. Aircraft Carrier Arrives in Vietnam, With a Message for China*, N.Y. TIMES (Mar. 4, 2018), available at <https://www.nytimes.com/2018/03/04/world/asia/carl-vinson-vietnam.html> (last visited Oct. 28, 2018); Ben Brimelow, *The US Is Considering Sending Heavily Armed Marines to Asia to Counter China*, BUS. INSIDER (Feb. 9, 2018), available at <http://www.businessinsider.com/us-considering-marine-expeditionary-units-asia-china-2018-2> (last visited Oct. 28, 2018); Damien Sharkov, *The U.S. Is Sending 1,587 U.S. Marines to Australia in a Direct Threat to China*, NEWSWEEK (Mar. 23, 2018), available at <http://www.newsweek.com/us-marines-launch-historic-drill-risks-angering-china-858101> (last visited Oct. 28, 2018).

159. See Ryan Browne, Sereitie Wang, & Ben Westcott, *US Destroyer Sails Close to Contested Island in South China Sea*, CNN (Mar. 23, 2018), available at

Many scholars believe that “[t]he United States’ call on all parties concerned in the South China Sea to handle their territorial and maritime disputes in accordance with [UNCLOS] has been weakened by its own failure to become a party to the treaty.”¹⁶⁰ It is simply “more difficult for the United States to protect its interests given that it is not yet a party to the treaty” and accession will no doubt “greatly enhance the role and credibility of the United States in the South China Sea.”¹⁶¹

The United States could certainly use a stronger position in addressing Chinese claims in the South China Sea, especially because China continues to build out installations to support its “indisputable sovereignty” over a huge swath of the South China Sea despite a ruling by the Permanent Court of Arbitration in The Hague in 2016 adverse to Chinese interests.¹⁶²

2. *Relevant Legal Issues and UNCLOS*

UNCLOS is truly a comprehensive treaty regime stating that:

[t]he disputes and conflicts contained in the [South China Sea] cover almost every aspect of UNCLOS, e.g., maritime delimitation, historic title, territorial sovereignty, use of force, military activities, fishing marine scientific research, freedom of navigation, marine environment protection, and deep seabed mining.¹⁶³

That said, there are several key UNCLOS provisions that, given the factual summary above, will aid in understanding the current state of the law as it relates to Chinese activities—specifically, maritime claims in the South China Sea. First, as a general proposition, coastal states can exert varying degrees of control over bordering waters. Distance is determined via the creation of “baselines” and extended seaward.¹⁶⁴ Twelve nautical miles mark the limit of territorial seas. Coastal states retain extensive power to regulate and jurisdiction to prescribe within their

<https://www.cnn.com/2018/03/23/asia/south-china-sea-us-drills-intl/index.html> (last visited Oct. 28, 2018).

160. Yann-huei Song, *Possibility of US Accession to the LOS Convention and its Potential Impact on State Practices and Maritime Claims in the South China Sea*, in MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES, *supra* note 129, at 77.

161. *Id.* at 78.

162. See Simon Denyer & Emily Rauhala, *Beijing’s Claims to South China Sea Rejected By International Tribunal*, WASH. POST (July 12, 2016), available at https://www.washingtonpost.com/world/beijing-remains-angry-defiant-and-defensive-as-key-south-china-sea-tribunal-ruling-looms/2016/07/12/11100f48-4771-11e6-8dac-0c6e4acce5b1_story.html?utm_term=.4e421c38d525 (last visited Oct. 28, 2018).

163. HONG, *supra* note 129, at 3.

164. See UNCLOS, *supra* note 72, arts. 5, 7, 14.

territorial sea, which for most intents and purposes is treated as an extension of terrestrial sovereignty.¹⁶⁵ The contiguous zone and coastal states' ability to regulate becomes a bit more limited between 12 and 24 miles—confined to matters of the customs, immigration, and sanitation.¹⁶⁶

UNCLOS also establishes the concept of an exclusive economic zone (EEZ),¹⁶⁷ where a coastal state retains exclusive rights to the resources on and under the sea within that zone. The EEZ can extend out as far as 200 nautical miles from the baseline.¹⁶⁸ This includes both living marine resources and energy resources located on or in the sea bed of the EEZ.¹⁶⁹ It also establishes a continental shelf, which can extend out to 350 nautical miles from baseline¹⁷⁰ and gives the coastal state exclusive right to explore and exploit non-living natural resources or authorize the exploration or exploitation of such resources.¹⁷¹

Archipelagic States get their own set of rules for establishing baselines¹⁷² and islands. In general, these specific rules for Archipelagic States can serve to establish extended sovereign reach. UNCLOS' island regime is codified at Part VIII, which consists exclusively of Article 121. It reads:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. *Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf* (emphasis added).¹⁷³

UNCLOS also includes a provision for artificially constructed islands.¹⁷⁴ It reads in relevant part, “[a]rtificial islands, installations and structures do not possess the status of islands. They have no territorial

165. *Id.* arts. 2-4.

166. *Id.* art. 33.

167. *Id.* Part V.

168. *Id.* art. 57.

169. UNCLOS, *supra* note 72, art. 56.

170. *Id.* art. 76.

171. *Id.* art. 77.

172. *Id.* Part IV.

173. *Id.* art. 121.

174. UNCLOS, *supra* note 72, art. 60(8).

sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”¹⁷⁵

Finally, UNCLOS exempts warships from the jurisdiction of a coastal state that is not the flag state of the warship.¹⁷⁶ It establishes a right of innocent passage for warships through the territorial seas of a coastal state, which essentially allows the warship to navigate, but does not allow it to conduct defense operations.¹⁷⁷ Seaward of the territorial sea is known as the high seas, and there warships are free to engage in whatever operations they would like as a matter of international law.¹⁷⁸

Given these rules and the geography of the South China Sea, it is easy to see how regional tensions can be elevated. First, there are overlapping claims to resources within established EEZs. Disputed claims over islands can serve to extend one state's EEZ into another's. Further, China has repeatedly challenged U.S. warships and aircraft to identify themselves within claimed or disputed Chinese territorial claims outside of the normal 12-mile territorial sea. This violates the general concept of freedom of the seas, and depending upon the location of the challenges, the specific UNCLOS provisions pertaining to warship immunity¹⁷⁹ and coastal state rights and duties within the EEZ.¹⁸⁰ Finally, despite the language of UNCLOS as it pertains to artificially constructed islands, the Chinese island construction efforts seem largely intended to establish the land forms in question as being able to sustain human habitation or economic life as a bald means of establishing new baselines and corresponding territorial seas, contiguous zones, EEZs, and continental shelves.

All the while, these activities are slowly developing or if such activities are aggressive, they may not be so aggressive as to justify the use of force in response.¹⁸¹ They are also multi-tiered. Along with the island

175. *Id.* Part I, ¶. 8.

176. *Id.* arts. 29-32.

177. *Id.* arts. 17-19, 21.

178. *See id.* Part VII.

179. *See* UNCLOS, *supra* note 72, art. 95.

180. *Id.* art. 58 (providing that:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms . . . of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.)

181. Brad Lendon, *Photos Show How Close Chinese Warship Came to Colliding With US Destroyer*, CNN (Oct. 4, 2018), available at <https://www.cnn.com/2018/10/02/politics/us-china-destroyers-confrontation-south-china-sea-intl/index.html> (last visited Oct. 29, 2018).

building and excessive territorial claims, the Chinese also employ strategic uncertainty vis-à-vis the nine-dashed line and non-traditional State resources, such as fishing fleets and “coast guards,”¹⁸² to establish or exercise their claims in the South China Sea. All classic “gray zone” tactics are consistent with a Chinese military doctrine that focuses on a multi-disciplinary approach to achieve national ends.¹⁸³

B. The Dying Bear: Russian Election Interference in the 2016 U.S. Presidential Election as a Gray Zone Activity

Russia is not China. In comparing the two, Russia is certainly a more potent nuclear power,¹⁸⁴ but is arguably a conventional military peer to China.¹⁸⁵ Compared to China, Russia’s economy is significantly weaker¹⁸⁶ and its population is smaller by an order of magnitude than that of China.¹⁸⁷ Furthermore, neither the trend lines of Russia’s economy nor its population seem to be changing soon. Russia’s ongoing economic troubles are especially likely concerning to Putin’s regime, as Putin draws

182. See Simon Denyer, *How China’s Fishermen Are Fighting a Covert War in the South China Sea*, WASH. POST (Apr. 12, 2016), available at https://www.washingtonpost.com/world/asia_pacific/fishing-fleet-puts-china-on-collision-course-with-neighbors-in-south-china-sea/2016/04/12/8a6a9e3c-fff3-11e5-8bb1-f124a43f84dc_story.html?utm_term=.7d42867a5f11 (last visited Oct. 30, 2018).

183. See MAZARR, *supra* note 21, at 5 (“[W]ar had evolved to using all means, including armed force or non-armed force, military and non-military, and lethal and non-lethal means to compel the enemy to accept one’s interests.” (quoting Chinese Colonels Qiao Liang and Wang Xiangsui)).

184. *Trump’s Nuclear Arsenal*, N.Y. TIMES (Oct. 26, 2017), available at <https://www.nytimes.com/interactive/2017/10/26/opinion/trump-nuclear-arsenal.html> (last visited Oct. 30, 2018) (reporting that Russia has 4,300 nuclear warheads as compared to China’s 270).

185. See *Comparison Results of World Military Strengths*, GLOB. FIREPOWER, available at <https://www.globalfirepower.com/countries-comparison-detail.asp?form=form&country1=china&country2=russia&Submit=COMPARE> (last visited Oct. 30, 2018).

186. *Compare Russia*, *The World Fact Book*, CIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html> (projecting a GDP of \$4 trillion in 2017 with a projected growth of 1.8% following a .2% decline in 2016) with *China*, *The World Fact Book*, CIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (projecting a \$23.12 trillion GDP in 2017 with projected growth of 6.8%).

187. *Compare Russia*, *The World Fact Book*, *supra* note 186 (reporting a population of 142+ million with a decline of .08% over the last year and a median age of 39.6 years) with *China*, *The World Fact Book*, *supra* note 186 (reporting a population of 1.39 billion with a .41% population growth and a median age of 37.4 years.).

a significant amount of his support from Russia's oligarchy.¹⁸⁸ Of course, "[Putin] has [also] been advertising his desire to restore Russia's lost glory since he became president in 2000,"¹⁸⁹ despite the metrics.

While Russia can certainly be aggressive regionally, as it demonstrated in Estonia in 2007, Georgia in 2008, and Crimea in 2014,¹⁹⁰ it simply does not have the resources to undertake a direct challenge to U.S. interests. This, however, does not mean Russia is completely without options to challenge the United States and its place in the international order.¹⁹¹

188. See HILL & GADDY, *supra* note 16, at 213-5; see also LILIA SHEVTSOVA, PUTIN'S RUSSIA 370 (Antonina W. Bouis trans., 2005); David Ignatius, *America Ignores Russia at Its Peril*, WASH. POST (Mar. 6, 2018), available at https://www.washingtonpost.com/opinions/global-opinions/america-ignores-russia-at-its-peril/2018/03/06/0fad7f52-218e-11e8-94da-ebf9d112159c_story.html?utm_term=.79fd56ee698b (last visited Oct. 30, 2018); see generally Gardiner Harris, *Trump Administration Imposes New Sanctions on Putin Cronies*, N.Y. TIMES (Apr. 6, 2018), available at <https://www.nytimes.com/2018/04/06/us/politics/trump-sanctions-russia-putin-oligarchs.html> (last visited Oct. 29, 2018) (providing that:

[t]he Trump administration imposed new sanctions on seven of Russia's richest men and 17 top government officials on Friday in the latest effort to punish President Vladimir V. Putin's inner circle for interference in the 2016 election and other Russian aggressions. The sanctions are designed to penalize some of Russia's richest industrialists, who are seen in the West as enriching themselves from Mr. Putin's increasingly authoritarian administration.);

John Hudson, Josh Dawsey, & Shane Harris, *Trump Administration to Impose Fresh Sanctions Against Russia*, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/world/national-security/trump-administration-to-impose-fresh-sanctions-against-russia/2018/04/04/bc09e0b8-3851-11e8-b57c-9445cc4dfa5e_story.html?utm_term=.6a2834015c5 (last visited Oct. 30, 2018).

189. See Ignatius, *supra* note 188.

190. See e.g., HILL & GADDY, *supra* note 16, at 367 (Estonia), 395-7 (Georgia and Crimea); see also Linda Kinster, *How to Survive a Russian Hack*, THE ATLANTIC (Feb. 2, 2017), available at <https://www.theatlantic.com/international/archive/2017/02/russia-disinformation-baltics/515301/> (last visited Oct. 30, 2018) (describing Russia's information operations in Estonia in 2007 in response to the government's intention to relocate the "Bronze Soldier of Tallinn." The article continues that "[i]n the years that followed, Russia refined its disruptive techniques in the invasions of Georgia in 2008, and Ukraine in 2014, in an effort to distance both countries from NATO and reassert Russian political control.").

191. See Andrew Higgins, *Pushing Further Into Africa, Russia Signs a New Military Accord*, N.Y. TIMES (Aug. 21, 2018), available at <https://www.nytimes.com/2018/08/21/world/europe/russia-central-african-republic-military-accord.html> (last visited Oct. 30, 2018) (describing Russian efforts to establish strategic partnerships on the African continent); see also HILL & GADDY, *supra* note 16, at 395; Mark Galeotti, *Putin Finally Went Too Far*, DEFENSE ONE (Mar. 27, 2018), available at <http://www.defenseone.com/ideas/2018/03/putin-finally-went-too-far/146990/?oref=acemail> (last visited Oct. 30, 2018) (reporting that "[f]or years

Indeed, President Putin often speaks about how technological advancement contains world changing potential and how it is a national imperative that Russia fully leverage new technological capabilities to meet its ends. In a recent speech, he said:

The speed of technological progress is accelerating sharply. It is rising dramatically. Those who manage to ride this technological wave will surge far ahead. Those who fail to do this will be submerged and drown in this wave.

Technological lag and dependence translate into reduced security and economic opportunities of the country and, ultimately, the loss of its sovereignty. This is the way things stand now.¹⁹²

Therefore, it should be no great surprise that,

Russian efforts to influence the 2016 US presidential elections represent the most recent expression of Moscow's longstanding desire to undermine the US-led liberal democratic order . . . undermined public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.¹⁹³

1. Factual Background: What We Know Today About Russia's "Gray Zone" U.S. Election Interference Operations

a. The Context

The USA prefers to follow the rule of the strongest and not by the international law. They are convinced that they have been chosen and they are exceptional, that they are allowed to shape the destiny of the world, that it is only them that can be right. They act as they please. Here and there they use force against sovereign states, set up coalitions in accordance with the principle: who is not with us is against us. *Vladimir Putin's*

now, Putin's calculation has been that the West is strong but lacking in unity and will, allowing a scrappy Russia willing to bend and break the rules of the international order to assert its place as a global player"); *see generally*, Edith M. Lederer, *UN Rejects Russian Attempt to Condemn US Aggression in Syria*, WASH. POST (Apr. 14, 2018), available at https://www.washingtonpost.com/world/europe/un-rejects-russian-attempt-to-condemn-us-aggression-in-syria/2018/04/14/5260e08a-4012-11e8-955b-7d2e19b79966_story.html?utm_term=.73ac29bfldee (last visited Oct. 30, 2018) (reporting on the failed attempts by the Russian ambassador to the UN to condemn the U.S./U.K./French air strike against Syrian chemical weapons infrastructure, in response to yet another Syrian use of chemical weapons).

192. *Presidential Address to the Federal Assembly* (Mar. 1, 2018), available at <http://en.kremlin.ru/events/president/news/56957> (last visited Oct. 30, 2018); *see generally*, David D. Kirkpatrick & Ron Nixon, *U.S.-U.K. Warning on Cyberattacks Includes Private Homes*, N.Y. TIMES (Apr. 16, 2018), available at <https://www.nytimes.com/2018/04/16/world/europe/us-uk-russia-cybersecurity-threat.html> (last visited Oct. 30, 2018) (reporting on the latest cyber threat from Russia).

193. *Assessing Russian Activities and Intentions in Recent US Elections*, OFF. OF THE DIR. OF NAT'L INTELLIGENCE: NAT'L INTELLIGENCE COUNCIL (Jan. 6, 2017), available at https://www.dni.gov/files/documents/ICA_2017_01.pdf (last visited Nov. 5, 2018) [hereinafter ICA Report].

*Address to the Russian Assembly following the referendum on the annexation of Crimea, 18 March, 2014*¹⁹⁴

The above statement from Vladimir Putin sets the stage for Russia's activities regarding the 2016 U.S. presidential election and is a far cry from his "Americans, we are with you!" response to the terror attacks on September 11, 2001.¹⁹⁵ Indeed, "Putin was the first foreign leader to call President George W. Bush [after the attacks], hoping to impress on him that the [United States and Russia] were now allies in the struggle against [Islamic] terrorism," of which Russia was quite familiar due to its actions in Chechnya.¹⁹⁶

In 2003, however, the United States once again undercut an international institution (that it itself had championed the creation of) by circumventing the United Nations Security Council, and a likely Russian veto, in undertaking the invasion of Iraq.¹⁹⁷ This both humiliated Putin, reminding him that to the West, "Russian objections carried no weight," and highlighted to him that "[u]nder the guise of promoting democracy and human rights . . . [e]ven the open use of military force was now fair game."¹⁹⁸

Most importantly, it brought into focus the new, post-Soviet world order, where one superpower reigned, which Putin described in 2007 as both "unacceptable" and "ineffective," and that as a result, it was time to

194. Preface, *RUSSIA MILITARY POWER*, *supra* note 20; *see generally* James Kitfield, *The "Day-After" Problem: What's Next After the Iran Deal*, *YAHOO* (Apr. 6, 2018), *available at* <https://www.yahoo.com/news/day-problem-whats-next-trump-tears-iran-deal-163416302.html> (last visited Oct. 30, 2018) (postulating on the likely impact of a unilateral withdrawal of the Iranian nuclear agreement by the United States) (quoting Kori Schake, the deputy director-general of the International Institute for Strategic Studies in London, that:

[If the United States leaves] the agreement, the Europeans are likely to work with the Iranians, Russians, and Chinese to try to preserve it. 'And their perception will be that it is not just Iran, but increasingly the United States that is destabilizing the international order and needs to be contained.')

195. SHEVTSOVA, *supra* note 188, at 205.

196. Julia Ioffe, *What Putin Really Wants*, *THE ATLANTIC* (Jan/Feb 2018), *available at* <https://www.theatlantic.com/magazine/archive/2018/01/putins-game/546548/> (last visited Oct. 30, 2018).

197. *See, e.g.*, Hikaru Yamashita, *The Iraq War, the United Nations Security Council, and the Legitimacy of the Use of Force*, 6 *NIDS SEC. REPORTS* 38, 73, 77-92 (2005), *available at* http://www.nids.mod.go.jp/english/publication/kiyo/pdf/bulletin_e2005_2.pdf (last visited Oct. 29, 2018) (providing an excellent run down of the international effort in the lead up to the U.S. invasion of Iraq in March 2003).

198. Ioffe, *supra* note 196.

“rethink the entire architecture of global security.”¹⁹⁹ Putin’s Russia now strived to ensure that the “United States can never again unilaterally maneuver without encountering friction—and, most importantly, that it can never, ever depose him.”²⁰⁰

It was this latter factor that likely contributed to the motivation behind the Russian interference into the 2016 American presidential elections. America’s continued preference for unilateral international action provided an excuse for his own. Putin could not help but pay heed to U.S. attempts to democratize nations within the traditional sphere of Russian influence via European and U.S. funded Russian non-governmental organizations such as the Organization for Security and Cooperation in Europe and National Endowment for Democracy.²⁰¹ Some of these NGOs were closely associated with the so-called color revolutions, “[t]he Rose Revolution in Georgia, the Orange Revolution in Ukraine, the Tulip Revolution in Kyrgyzstan.”²⁰² So, it should be of no surprise that Putin believed them to be “vulgar instrument[s] of the foreign policy of interests of one country[, the United States],” and that Moscow and his own rule was likely in the cross hairs.²⁰³ As a result, he ordered the expulsion of USAID from Russia in 2012 and banned the National Endowment for Democracy in 2015.²⁰⁴ He also likely ordered covert cyber action, specifically targeting the American electoral process in the 2016 Presidential election, which continues to reverberate through the American body politic to this day.²⁰⁵

199. *Id.*; see also Thom Shanker & Mark Landler, *Putin Says U.S. Is Undermining Global Stability*, N.Y. TIMES (Feb. 11, 2007), available at <http://www.nytimes.com/2007/02/11/world/europe/11munich.html> (last visited Oct. 27, 2018); Andrew Higgins, *It’s No Cold War, But Relations With Russia Turn Volatile*, N.Y. TIMES (Mar. 26, 2018), available at <https://www.nytimes.com/2018/03/26/world/europe/russia-expulsions-cold-war.html> (last visited Oct. 27, 2018) (“[F]rom the Kremlin’s perspective, it is the United States that first upended previous [international] norms . . . [and] Russia . . . does not like the rules of the American-dominated order that have prevailed since then, and wants to change them.”) (internal quotes removed).

200. Ioffe, *supra* note 196.

201. *See id.*

202. *Id.*; see also HILL & GADDY, *supra* note 16, at 305-07.

203. Shanker & Landler, *supra* note 199.

204. Ioffe, *supra* note 196.

205. *But see* Madison Park, *Putin: Maybe Jews or Minorities Behind US Election Interference*, CNN (Mar. 12, 2018), available at <https://www.cnn.com/2018/03/12/politics/putin-comment-jews-russian-minorities/index.html> (last visited Oct. 28, 2018) (essentially denying responsibility for ordering the widespread and pervasive cyber activities targeting the 2016 American presidential election).

b. The Interference

America's intelligence community believes with relatively high confidence that Russia took affirmative action to influence the 2016 American Presidential election and likely, Russian President Vladimir Putin order this himself.²⁰⁶ We also know special counsel Robert Mueller uncovered enough information to support the Department of Justice's indictments covering several Russians and three businesses.²⁰⁷ Thus, a brief synopsis of the timeline is helpful in understanding the legal issues as they relate to Russian gray zone activities targeting the United States' presidential electoral process.²⁰⁸

For Russia, the story begins all the way back in July of 2013 when the "Internet Research Agency LLC" registered as a corporation with the Russian government.²⁰⁹ Later on in April 2014, the Agency formed a "department known as the 'translator project' to focus on operations via social media."²¹⁰ By May, Moscow apparently "developed a strategy with the goal of interfering in the 2016 [Presidential] election" and sow general discontent in the United States.²¹¹

In the United States, the story generally (and publicly) begins in May 2016, when the Director of National Intelligence, James Clapper, announced at a House Intelligence Committee hearing that there were growing cyber threats against U.S. presidential campaigns.²¹² On June 14,

206. Miller, Nakashima, & Entous, *supra* note 14; *see also* ICA Report, *supra* note 193.

207. Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), available at <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html> (last visited Oct. 27, 2018); *see also* Mark Mazzetti & Katie Benner, *12 Russian Agents Indicted in Mueller Investigation*, N.Y. TIMES (July 13, 2018), available at <https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html?smid=nytcore-ios-share> (last visited Oct. 27, 2018); Kara Scannell, David Shortell, & Veronica Stracqualursi, *Mueller Indicts 13 Russian Nationals Over 2016 Election Interference*, CNN (Feb. 17, 2018), available at <https://www.cnn.com/2018/02/16/politics/mueller-russia-indictments-election-interference/index.html> (last visited Oct. 27, 2018).

208. *See* Matthew Nussbaum, *The Definitive Trump-Russia Timeline of Events*, POLITICO (Mar. 3, 2017), available at <https://www.politico.com/trump-russia-ties-scandal-guide/timeline-of-events> (last visited Oct. 28, 2018); *see also* Schmitt, *supra* note 21.

209. Nussbaum, *supra* note 208.

210. *Id.*

211. *Id.*

212. *Id.* *See also* Darren Goode, *Clapper: Cyber Threats Against Presidential Campaigns Are Growing*, POLITICO (May 18, 2016), available at

2016, the Democratic National Committee (“DNC”) announced that it had been compromised by what it believed were Russian computer hackers.²¹³ On July 22, 2016, WikiLeaks published nearly 20,000 e-mails from the DNC.²¹⁴ U.S. intelligence services believe WikiLeaks has long been linked with the Russian government.²¹⁵ On July 25, 2016, the FBI waded in and announced its investigation of the hack,²¹⁶ as a growing consensus formed amongst U.S. intelligence agencies that Russia was behind the DNC breach.²¹⁷ In August 2016, widely followed Russian-controlled Twitter accounts posted false allegations of voter fraud in North Carolina, a key electoral battleground state. At the same time, Russian operatives, using a fake U.S. alias, “pa[id] a U.S. person to wear a costume of Secretary Clinton in a prison uniform at a Florida rally,” and posed as activists to hold a number of rallies supporting candidate Trump.²¹⁸ The Russian organization behind these activities was operating as early as April 2016, by purchasing politically charged advertisements in opposition to candidate Secretary Clinton,²¹⁹ and we would later learn that the Russian “fake news” machine extended beyond Twitter to both Facebook and Tumblr.²²⁰

<https://www.politico.com/story/2016/05/james-clapper-presidential-cyber-threats-223321> (last visited Oct. 29, 2018).

213. See Nussbaum, *supra* note 208.

214. *Id.*

215. Kathryn Watson, *How Did WikiLeaks Become Associated With Russia?* CBS NEWS (Nov. 15, 2017), available at <https://www.cbsnews.com/news/how-did-wikileaks-become-associated-with-russia/> (last visited Oct. 29, 2018); see also Kevin Poulsen & Spencer Ackerman, *Exclusive: ‘Lone DNS Hacker’ Guccifer 2.0 Slipped Up and Revealed He Was a Russian Intelligence Officer*, THE DAILY BEAST (Mar. 22, 2018), available at <https://www.thedailybeast.com/exclusive-lone-dnc-hacker-guccifer-20-slipped-up-and-revealed-he-was-a-russian-intelligence-officer> (last visited Oct. 29, 2018) (“Guccifer 2.0, the “lone hacker” who took credit for providing WikiLeaks with stolen emails from the Democratic National Committee, was in fact an officer of Russia’s military intelligence directorate (GRU).”).

216. See Watson, *supra* note 215.

217. See David E. Sanger & Eric Schmitt, *Spy Agency Consensus Grows That Russia Hacked D.N.C.*, N.Y. TIMES (July 26, 2016), available at https://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html?_r=0 (last visited Oct. 28, 2018).

218. Philip Bump, *Timeline: How Russian Trolls Allegedly Tried to Throw the 2016 Election to Trump*, WASH. POST (Feb. 16, 2018), available at https://www.washingtonpost.com/news/politics/wp/2018/02/16/timeline-how-russian-trolls-allegedly-tried-to-throw-the-2016-election-to-trump/?utm_term=.3e01e9946f03 (last visited Oct. 24, 2018).

219. Nussbaum, *supra* note 208.

220. See Rob LeFebvre, *Tumblr Confirms 84 Russian Accounts Were Used to Spread Disinformation*, ENGADGET (Mar. 23, 2018), available at

The *Washington Post* then broke a story on September 5, 2016 noting that “U.S. intelligence and law enforcement agencies are investigating . . . a broad covert Russian operation in the United States to sow public distrust in the upcoming presidential election and in U.S. political institutions.”²²¹ That same day, President Obama met with President Putin at the G-20 conference in China, and reportedly told the Russian president “to cut it out, [or] there were going to be serious consequences if he did not.”²²² In the months that followed, Russian organizations became extremely active on social media, both through posts or by purchasing thousands upon thousands of advertisements on various social media spaces.²²³ In November 2016, the American people elected Donald Trump as President.²²⁴

“Despite the dire warnings [of high level Presidential advisors], there were no meltdowns in the United States’ voting infrastructure on Nov. 8, no evidence of hacking related fraud, crashing of electronic ballots, or manipulation of vote counts.”²²⁵ Regardless, the United States expelled over 30 Russian diplomats in response to their interference in the 2016 U.S. Presidential election.²²⁶ On February 16, 2018, the United States Justice Department also issued indictments against 13 Russians who “stole the identities of American citizens, posed as political activists

<https://www.engadget.com/2018/03/23/tumblr-confirms-84-russian-accounts-disinformation/> (last visited Oct. 24, 2018).

221. Dana Pries, Ellen Nakashima, & Tom Hamburger, *U.S. Investigating Potential Covert Russian Plan to Disrupt November Elections*, WASH. POST (Sept. 5, 2016), available at https://www.washingtonpost.com/world/national-security/intelligence-community-investigating-covert-russian-influence-operations-in-the-united-states/2016/09/04/aec27fa0-7156-11e6-8533-6b0b0ded0253_story.html?utm_term=.590ff639c307 (last visited Oct. 24, 2018).

222. Mark Landler & David E. Sanger, *Obama Says He Told Putin: “Cut It Out” on Hacking*, N.Y. TIMES (Dec. 16, 2016), available at <https://www.nytimes.com/2016/12/16/us/politics/obama-putin-hacking-news-conference.html> (last visited Oct. 24, 2018).

223. See Nussbaum, *supra* note 208; see also *The Social Media Ads Russia Wanted Americans to See*, POLITICO (Nov. 1, 2017), available at <https://www.politico.com/story/2017/11/01/social-media-ads-russia-wanted-americans-to-see-244423> (last visited Oct. 24, 2018).

224. See, e.g., Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), available at <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html> (last visited Oct. 24, 2018).

225. Miller, Nakashima, & Entous, *supra* note 14.

226. See Rhonda Schaffler, *U.S. Expels 35 Russian Diplomats for Interference in Presidential Election*, THE STREET (Dec. 29, 2016), available at <https://www.thestreet.com/video/13938814/u-s-expels-35-russian-diplomats-over-interference-in-presidential-election-says-official.html> (last visited Oct. 25, 2018).

and used the flash points of immigration, religion and race to manipulate a campaign in which those issues were already particularly divisive.”²²⁷ As a result of the indictments, we know today that Russia favored a clear candidate,²²⁸ hacked the DNC and released tens of thousands of potentially damaging E-mails through WikiLeaks, and engaged in a large scale and relentless social engineering operation via social media and advertisements, all done together with the ostensible intention to place a proverbial thumb on the scales of history.²²⁹

Scholar Michael Schmitt believes that the hack of the DNC “epitomized” gray zone strategy,²³⁰ the likes of which have apparently been Russia’s preference for international engagement for quite some time.²³¹

Since the denial-of-service attacks on Estonia in 2007 and the invasion of Georgia in 2008, Russia has used old and new forms of aggression to undermine our open societies and the foundations of international peace and stability. Estonia, Latvia, and Lithuania have all been targeted by Russia’s so-called hybrid warfare, a pernicious form of aggression that combines political, economic, informational, and cyber assaults against sovereign nations. Russia employs sophisticated strategies deliberately designed to achieve objectives while falling below the target state’s threshold for a military response. Tactics include infiltrating social media, spreading propaganda, weaponizing information, and using other forms of subversion and espionage.²³²

By all measures, the Russian use of cyber tools to exert influence over the 2016 Presidential election was a cohesive integrated campaign in furtherance of the Russian political objective of both denying the presidency to Secretary Clinton and sowing dissent and confusion amongst

227. See Apuzzo & LaFraniere, *supra* note 207; see also Scannell, Shortell, & Stracqualursi, *supra* note 207.

228. See Karoun Demirjian, *Intel Panel Republicans Seem to Back Away From Finding That Russia Was Not Trying to Help Trump*, WASH. POST (Mar. 13, 2018), available at https://www.washingtonpost.com/powerpost/intel-panel-republicans-seem-to-back-away-from-finding-that-russia-was-not-trying-to-help-trump/2018/03/13/7b4c9594-2716-11e8-874b-d517e912f125_story.html?utm_term=.810b27160d35 (last visited Oct. 25, 2018) (quoting Representative Michael Conway (R-Tex) that, “[i]t’s clear [Russian] officials were trying to hurt Hillary [Clinton] by interfering in the 2016 election.”).

229. See *id.*; see also Jens David Ohlin, *Did Russian Cyber-Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579, 1581-82 (2017).

230. Schmitt, *supra* note 21, at 2.

231. See General H. R. McMaster, National Security Advisor, Keynote Address at the Atlantic Council: 100 Years of U.S.-Baltic Partnership: Reflecting on the Past and Looking to the Future (Apr. 3, 2018), available at <http://www.atlantic-council.org/news/transcripts/us-national-security-advisor-lt-gen-h-r-mcmaster-russian-aggression-is-strengthening-our-resolve> (last visited Oct. 29, 2018).

232. *Id.*

the American electorate.²³³ Russia undertook this action without resort to kinetic tools, and by choosing not to actually tamper with voting roles, remained relatively limited, below the so-called “red line thresholds” which could have led to conventional conflict.²³⁴ It was gradual and indeed remains relatively sustained in its execution, as compared to a one-time event.²³⁵ It was also what many would consider as a covert action.²³⁶

2. Covert Action, Espionage, and the Relevance of Coercion

Understanding what a covert action is will help illuminate the threat posed by Russian election interference. With a few exceptions for traditional diplomatic, military and law enforcement actions, the United States generally defines “covert action” as “an activity or activities of the United States Government to *influence* political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”²³⁷ The United States defined covert action as a means to ensure appropriate notice and oversight to Congress, but in doing so, opened the door for scholars to debate what factually is or is not covered by the definition, seemingly *ad nauseum*.²³⁸

There is no parallel widely accepted international legal definition of covert action. One writer suggested as a broadly applied definition, “a spectrum of coordinated coercive measures, short of direct military assault, secretly exercised by one state in order to influence the sovereign

233. Cf. Apuzzo & LaFranier, *supra* note 207; Scannell, Shortell, & Stracqualursi, *supra* note 207; MAZARR, *supra* note 21.

234. Cf. Apuzzo & LaFranier, *supra* note 207; Scannell, Shortell, & Stracqualursi, *supra* note 207; MAZARR, *supra* note 21.

235. See Elizabeth Dwoskin, Craig Timberg, & Tony Romm, *Facebook's Russia Problem Won't Go Away. Hundreds More Accounts Purged on the Social Network*, WASH. POST (Apr. 3, 2018), available at https://www.washingtonpost.com/business/economy/facebook-says-there-were-more-russian-accounts-than-previously-acknowledged/2018/04/03/f26462f5-5715-4769-b887-29f80817f236_story.html?utm_term=.5de40caa306c (last visited Oct. 29, 2018) (reporting that as late as April 3, 2018 Facebook “removed more than 200 Facebook pages and Instagram accounts controlled by the Russian organization that had meddled in the U.S. 2016 presidential election . . . a sign that manipulation on Facebook continued months after [an earlier] purge.”); see also Eli Meixler, *Facebook Has Removed Hundreds of Accounts Linked to a Russia Troll Farm*, TIME (Apr. 4, 2018), available at <http://time.com/5227225/facebook-russia-troll-accounts/> (last visited Oct. 29, 2018).

236. See, e.g., Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 592-602 (2012) (tracing the history of definition of “covert action”).

237. 50 U.S.C. § 3093(e) (2017) (emphasis added).

238. See Chesney, *supra* note 236.

affairs of another.”²³⁹ Yet others would take issue with the idea that covert action, per se, rises to the level of “coercion,” as “an act is only coercive when it is intended to compel another state to behave in a manner other than how it normally would, or to refrain from taking an action it would otherwise take.”²⁴⁰ Importantly, “persuasion or propaganda does not qualify [as coercion], nor do actions that merely affect another state’s decision making processes.”²⁴¹

The existence of coercion becomes an important issue because of several international legal norms. International law is a law of custom²⁴² and one of the primary overarching norms is that actions which are not prohibited are allowed, *nullum crimen sine lege*.²⁴³ This so-called *Lotus* principle²⁴⁴ is somewhat controversial but remains widely accepted.²⁴⁵

Next, there is the idea that state sovereignty is sacrosanct and should be respected by other members of the international community.²⁴⁶ This norm is enshrined in the context of the U.N.’s reach in Article 2 of the United Nations Charter which states:

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. . . . Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter [except for those measures of enforcement as ordered by the Security Council under Chapter VII of the Charter].²⁴⁷

239. See generally *Legality of Covert Action under Contemporary International Law*, 1 BERKLEY LA RAZA L. J. 139 (2015).

240. Michael N. Schmitt & Andru Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT’L SEC. J. 349, 354 (2014).

241. *Id.*

242. See John P. Carlin, Detect, *Disrupt, Deter: A Whole-Of-Government Approach to National Security Cyber Threats*, 7 HARV. NAT’L SEC. J. 391, 421 (2016).

243. See *Nullem Crimen Sine Lege*, CORNELL: LEGAL INFO. INST., available at https://www.law.cornell.edu/wex/nullum_crimen_sine_lege (last visited Oct. 29, 2018).

244. See generally *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

245. See generally Craig Forcece, *Pragmatism and Principle: Intelligence Agencies and International Law*, 102 VA. L. REV. ONLINE 67 (2016), available at <http://www.virginialawreview.org/volumes/content/pragmatism-and-principle-in-intelligence-agencies-and-international-law> (last visited Oct. 29, 2018).

246. See generally Ohlin, *supra* note 229, at 1587-94.

247. U.N. Charter art. 2; see also Schmitt & Wall, *supra* note 240, at 353-54.

Further, the principle of non-intervention also applies directly to States.²⁴⁸ Indeed, “[s]temming from the principle of sovereignty, this prohibition [against using coercive means to intervene in the internal or external affairs of other states] has been recognized by the International Court of Justice (ICJ) as a fundamental norm of customary international law.”²⁴⁹

When you combine these two international norms, you end up with a clear prohibition on the threat or use of force or coercive means against the sovereignty of another state, but leave the door open for a host of activities short of the application or threat of force.²⁵⁰

This is largely a line drawing exercise, but it is why the coercive extent of an activity is such an important piece of the analysis—because of the direct relationship between the level of coerciveness in relation to what reasonably can be construed as a use of force.²⁵¹ Hence, the previously discussed “gray zone” which describes activities that are purposefully intended to be below the threshold of harm most States would consider force. This, in turn, limits the options available to those States with a strong belief in the adherence of the rule of law, to non-force responses.²⁵²

It is also why no international treaty explicitly prohibits espionage, an act that seemingly by definition requires the violation of state sovereignty, but uses means widely considered as short of reaching the threshold necessary to establish force.²⁵³ Covert action, of course, differs from espionage in that the former seeks to affirmatively influence, while the latter generally relates to more passive intelligence and information acquisition.²⁵⁴ Regardless, international law is silent “on countless low-visibility national security activities, including forms of intelligence collection, clandestine activities, [and] covert action” and as such, these

248. See Schmitt & Wall, *supra* note 240, at 353.

249. *Id.* at 353-54.

250. See Michael Jefferson Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 HARV. NAT'L SEC. J. 377, 398-408 (2014).

251. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, para. 205, 251 (June 27) [hereinafter *Nicaragua*].

252. See U.N. Charter, art. 51 (noting “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” *Armed attack* remains undefined in international law). *But see Nicaragua, supra* note 251 (discussing activities which may count as an armed attack).

253. See, e.g., Schmitt & Wall, *supra* note 240, at 362 (noting “[i]t is well accepted that espionage is not, it itself, a breach of international law.”).

254. See Forcese, *supra* note 245.

activities are not prohibited as a matter of international law, at least by those who abide by the *Lotus* principle.²⁵⁵

Both the principle of non-intervention and a variation on the *Lotus* principle have also been adopted in the cyber context, through the *Tallinn Manual 2.0*, a collection of burgeoning international norms aiming to provide some guidance and clarity in the highly dynamic cyber domain.²⁵⁶ The *Tallinn Manual 2.0* notes that the principle of state sovereignty applies in cyber space,²⁵⁷ that a State enjoys sovereign authority with regard to the cyberinfrastructure, persons, and cyber activities located within its territory,²⁵⁸ that it is likewise free to conduct cyber activities in its international relations, subject to any contrary rule of international law binding it,²⁵⁹ and that specifically, a State must not conduct cyber operations that violate the sovereignty of another state.²⁶⁰

This last proposed norm in the *Tallinn Manual 2.0* includes important explanatory details in its supporting comments. For instance, the panel of experts that generated the manual were split as to whether cyber espionage ran afoul of the proposed norm prohibiting the violation of sovereignty.²⁶¹ The experts also concluded that “when one State’s cyber operation interferes with or usurps the inherently governmental functions of another State” there is a violation of sovereignty,²⁶² but that propaganda operations would generally not be found to violate another State’s sovereignty, although they may violate other existing international norms.²⁶³

3. Does Election Interference Violate International Law?

As is the case with many legal questions, the answer here is that it depends because the facts matter. As a general proposition, though,

255. Adams, *supra* note 250, at 402-03.

256. Cf. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, 1, 11-86 (Michael Schmitt & Liis Vihul, eds., 2nd ed. 2017) [hereinafter TALLINN MANUAL 2.0].

257. *Id.* at 11-13 (Rule 1).

258. *Id.* at 13-16 (Rule 2).

259. *Id.* at 16-17 (Rule 3).

260. *Id.* at 17-27 (Rule 4).

261. TALLINN MANUAL 2.0, *supra* note 256, at 17-27 (Rule 4). Specifically, comment 7 notes that “[t]he majority took the position that [cyber espionage] violates the rule,” and comment 8 notes that “[a] few of the Experts were of the view that the extensive State practice of conducting espionage on the target State’s territory has created an exception to the generally accepted premise that non-consensual acidity attributable to a State while physically present on another’s territory violate[s] sovereignty.” *Id.*

262. *See id.* (specifically, comments 15-18).

263. *Id.* (specifically, comment 29).

“[p]artisan electoral interventions are a common phenomenon in world affairs.”²⁶⁴ Indeed, influencing and in some cases interfering with elections is a time-honored tool of American statecraft.²⁶⁵ “The [United States] has a long history of attempting to influence presidential elections in other countries—it’s done so 81 times [in 45 countries] between 1946 and 2000.”²⁶⁶

Proponents of American activities relating to foreign elections quickly point out that there is a marked difference between actions intended to make sure that elections are fair and that the will of the people is heard²⁶⁷ and activities purposely intended to confuse and sow discord, often through the employment of deception and “fake news.”²⁶⁸ In short, there is a difference between *influence* and *interference* and that difference lies in part on both the coercive nature of the activity in question²⁶⁹ and the motives of the actor engaged in the election activity.

Jens David Ohlin analyzes and describes several ways the Russian activities in the 2016 American Presidential could have violated international law, specifically international human rights law (“IHRL”)²⁷⁰ and the doctrine of state responsibility/non-interference. First, Ohlin frames the issue as “spying” and analyzes espionage through the lens of both the Law of Armed Conflict and the Right to Privacy, as articulated in the

264. Don H. Levin, *Sure the U.S. and Russia Often Meddle in Foreign Elections. Does It Matter?*, WASH. POST (Sept. 7, 2016), available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/07/sure-the-u-s-and-russia-often-meddle-in-foreign-elections-does-it-matter/?utm_term=.d8951fe90d13 (last visited Nov. 5, 2018).

265. See Ishaan Tharoor, *The Long History of the U.S. Interfering with Elections Elsewhere*, WASH. POST (Oct. 13, 2016), available at https://www.washingtonpost.com/news/worldviews/wp/2016/10/13/the-long-history-of-the-u-s-interfering-with-elections-elsewhere/?utm_term=.2450bf9e5249 (last visited Nov. 5, 2018).

266. Nina Agrawal, *The U.S. Is No Stranger to Interfering in the Elections of Other Countries*, L.A. TIMES (Dec. 21, 2016), available at <http://www.latimes.com/nation/la-na-us-intervention-foreign-elections-20161213-story.html> (last visited Nov. 5, 2018); see also Katrina vanden Heuvel, *On Russia, We Need More Reason and Less Frenzy*, WASH. POST (Feb. 27, 2018), available at https://www.washingtonpost.com/opinions/on-russia-we-need-more-reason-and-less-frenzy/2018/02/27/47003f60-1b14-11e8-9de1-147dd2df3829_story.html?utm_term=.a7073b03deac (last visited Nov. 5, 2018).

267. See Chad Vickery, *Address in The Global Law Scholars Symposium: Foreign Electoral Interference and International Law*, VIMEO (Mar. 7, 2018), available at <https://vimeo.com/282318416> (last visited Nov. 5, 2018).

268. See Apuzzo & LaFraniere, *supra* note 207; see also Scannell, Shortell, & Stracqualursi, *supra* note 207.

269. See, e.g., Ohlin, *supra* note 229, at 1588-93 (analyzing coercion).

270. *Id.*

ICCPR, as a manifestation of International Human Rights Law.²⁷¹ Of the two, and assuming for now the accuracy of Ohlin's espionage categorization of the Russian election interference activities, only the IHRL analysis pertaining to the ICCPR bears on this paper.²⁷²

Ohlin starts his ICCPR IHRL analysis by challenging the idea that espionage is truly not prohibited by international law.²⁷³ He buttresses his argument with Article 17 of the ICCPR, which says, "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attack on his honour [sic] and reputation."²⁷⁴ Thus, he argues that the ICCPR may have supplanted the customary international norm "allowing" espionage, because by its nature, espionage violates this right to privacy.²⁷⁵ Indeed, "[d]espite the fact that spying is a widespread or even universal tool of statecraft, the adoption of the ICCPR . . . may have outlawed the practice."²⁷⁶ He points out, however, "it is unclear whether the Article 17 right to privacy was meant to cover such transnational conduct" as the Russians engaged in with the 2016 American Presidential elections, and notes that there is also an issue with traditional and longstanding U.S. interpretation of the Treaty, which seeks to limit its extraterritorial application.²⁷⁷ Yet one more instance of the American retreat from international fora and regimes coming back to bite.

Ohlin then conducts a traditional state responsibility/sovereignty-based analysis with a long discussion on coercion.²⁷⁸ He ultimately concludes "[w]hile the Russian hacking was certainly corrosive to the proper functioning of a democracy, it is genuinely unclear whether it should count as coercive."²⁷⁹ Ohlin wraps up his sovereignty-based analysis by examining the Tallinn concept of illegal usurpation of a government function.²⁸⁰ Here he notes that, "[e]veryone agrees that had the Russian government tampered with the ballot boxes, or with electronic voting this would count as a violation of international law, because the *counting of votes* during an election is a paradigmatically 'governmental function'

271. *See id.* at 1582-86.

272. *Id.*

273. *Id.*

274. ICCPR, *supra* note 101, art. 17.

275. Ohlin, *supra* note 229, at 1583-85.

276. *Id.* at 1583.

277. *Id.* at 1584-86.

278. *Id.* at 1587-93.

279. *Id.* at 1593.

280. Ohlin, *supra* note 229, at 1593-94.

which in that case would be usurped by Russia.”²⁸¹ But, here the facts do not support such vote tampering.

Ohlin concludes his piece by suggesting that the Russian election activities may constitute a violation of the concept of self-determination.²⁸² “In political terms, the Russian hacking interfered with a key element of sovereignty, insofar as sovereignty is understood as a relational concept that connects the government with the will of the people.”²⁸³ This view requires a bit of uncoupling of traditional conceptions of both sovereignty and self-determination but generally stands scrutiny. After all, “[t]he election process is the ultimate expression of a people’s sovereign will . . . By illicit interference, the Russians influenced the election to produce the sovereign will of the Russian . . . government, . . . rather than the sovereign will of the American people” thereby violating “the right of the American people to self-determination.”²⁸⁴ He ends by admitting that there are some holes in his self-determination-based analysis in that it is difficult to actually ascertain the sovereign will of a people *ex ante* and that as previously noted, America itself can be said to have violated this norm through its own international election activities over the years.²⁸⁵ He neatly resolves the latter by noting that “it is important to distinguish between political interference in dictatorships and other illiberal systems versus interference in genuinely democratic elections. The former violates the principle of self-determination while the latter does not.”²⁸⁶

4. If Indeed Russian Election Interference Violated International Law, What are the Remedies?

If we extend Ohlin’s position and assume that Russia violated international law with its election interference, what could the United States do in response? One of the reasons that a gray zone tactic such as election interference is so effective is that it involves activities which generally do not rise to the level in which a hard power response would be internationally legal. The UN Charter fundamentally changed the international order by essentially making the resort to use of force illegal, but for situations authorized by the Security Council²⁸⁷ or in individual or collective

281. *Id.* at 1594.

282. *See* U.N. Charter art. 1, ¶ 2.

283. Ohlin, *supra* note 229, at 1594-95.

284. *Id.* at 1595-96.

285. *Id.* at 1596-97.

286. *Id.*

287. *See* U.N. Charter, art. 2.

self-defense to an armed attack.²⁸⁸ Even if Russia tampered with actual votes in the United States, it is unlikely that such action would justify the use of force in response.²⁸⁹ This also says nothing of the political risks of employing force against a nuclear power, with a relatively capable conventional military capability.²⁹⁰ After all, presuming that I am correct and that Russia is indeed rapidly declining in power, it is far from dead. So, the political calculus of employing armed force against them in response to election interference cannot be ignored.²⁹¹

Just because the resort to the use of force is not a realistic option, however, does not mean that a nation subject to a gray zone tactic like election interference is without options. International law has long recognized the concept of “countermeasures.”²⁹² Countermeasures are activities which would normally be banned by international law, but that which States may employ to check or counter another state or actor’s own targeted international law violation against them.²⁹³ There is also a requirement that countermeasures may only be used in response to an ongoing event and may not be legally employed retributively.²⁹⁴

Countermeasures are especially helpful tools in the cyber context,²⁹⁵ although there are some challenges applying the doctrine to cyber, not the least of which is the inherent difficulty in attributing action in that domain.²⁹⁶ Here, given the nature and scope of the 2016 election

288. *Id.* art. 51.

289. Compare *id.* with Nicaragua, *supra* note 251.

290. See *Comparison Results of World Military Strengths*, *supra* note 185; see generally RUSSIA MILITARY POWER, *supra* note 20; *A Colder War With Russia?*, N.Y. TIMES (Mar. 30, 2018), available at <https://www.nytimes.com/2018/03/30/opinion/a-colder-war-with-russia.html> (last visited Nov. 5, 2018) (highlighting that there is a large difference between the United States’ current relationship with Russia in that there is an absence of policy, procedural, and actual infrastructure in place to de-escalate potential conflict).

291. See *Comparison Results of World Military Strengths*, *supra* note 185; see generally RUSSIA MILITARY POWER, *supra* note 20; *A Colder War With Russia?*, *supra* note 290.

292. See Michael N. Schmitt, “Below the Threshold” Cyber Operations: The Countermeasures Response Option and International Law, 54 VA. J. INT’L L. 697, 700 (2014).

293. *Id.*

294. *Id.* at 701-04.

295. See Gary Corn, *Tallinn Manual 2.0—Advancing the Conversation*, JUST SEC. (Feb. 15, 2017), available at <https://www.justsecurity.org/37812/tallinn-manual-2-0-advancing-conversation/> (last visited Oct. 29, 2018).

296. *Id.* There are several aspects of the traditional rule of countermeasures (the successor to the non-forceful component of what used to be known as the law of reprisals) that do not accord easily with the dynamic environment of cyberspace. Among these are the strict notice requirement, the absence of anticipatory

interference, no such attribution difficulty exists in that it was quite clearly attributable to the Russian state and its security apparatus, if not ordered by Russian President Putin personally.²⁹⁷ It is unclear whether the United States employed countermeasures during the 2016 election cycle, but it is unlikely.²⁹⁸ The United States did, however, undertake several diplomatic remedies as discussed further below.²⁹⁹ Yet, Russian social engineering and cyber activities persist,³⁰⁰ so the United States may be conducting ongoing cyber operations today targeting Russia as a countermeasure to Russia's own ongoing activity. To date though, none have been publicly reported on.

"Naming and shaming" is another potential response to a gray zone tactic like election interference. In the context of cyber espionage, the

countermeasures, and the absence of a collective remedy as in the case of collective self-defense. For purposes of the present example, a key limitation on the availability of this self-help remedy is that, also unlike self-defense, countermeasures cannot be invoked as a justification for actions taken against non-state actors. *Id.*

297. See ICA Report, *supra* note 193, at ii.

298. See, e.g., Miller, Nakashima, & Entous, *supra* note 14 (providing detailed reporting on the Obama administrations attempt to counter the Russian election interference).

299. *But see id.* (reporting that "Obama also approved a previously undisclosed covert measure that authorized planting cyber weapons in Russia's infrastructure, the digital equivalent of bombs that could be detonated if the United States found itself in an escalating exchange with Russia").

300. Erin Griffith, *Pro-Gun Russian Bots Flood Twitter After Parkland Shooting*, WIRED (Feb. 15, 2008), available at <https://www.wired.com/story/pro-gun-russian-bots-flood-twitter-after-parkland-shooting/> (last visited Nov. 5, 2018); see also Catherine Garcia, *Russian Bots on Twitter Are Really Trying to Make #SchumerShutdown Happen*, THE WEEK (Jan. 21, 2018), available at <http://theweek.com/speedreads/749973>

[/russian-bots-twitter-are-really-trying-make-schumersshutdown-happen](http://russian-bots-twitter-are-really-trying-make-schumersshutdown-happen) (last visited Nov. 5, 2018) (reporting on Russian "bots" pushing an agenda during the early January 2018 government shutdown debates); Max de Haldevang, *Russian Twitterbots Blaming the Shutdown on Democrats*, QUARTZ (Jan. 22, 2018), available at <https://qz.com/1185452/government-shutdown-russian-bots-are-helping-republicans-blame-democrats-with-schumersshutdown/> (last visited Nov. 5, 2018); Jessica Rosenworcel, *Russians Hacking Our Public-Commenting System Too*, WASH. POST (Mar. 6, 2018), available at https://www.washingtonpost.com/opinions/russians-are-hacking-our-public-commenting-system-too/2018/03/06/fdf3dae-1d6a-11e8-b2d9-08e748f892c0_story.html?utm_term=.9e55cf9d7d42 (last visited Nov. 5, 2018) (reporting on about 500,000 comments on the pending U.S. net neutrality rule making originating from Russia). Cf. Geoff Brumfiel, *As An American Tragedy Unfolds, Russian Agents Sow Discord Online*, NPR (Feb. 16, 2018), available at <https://www.npr.org/sections/thetwo-way/2018/02/16/586361956/as-an-american-tragedy-unfolds-russian-agents-sow-discord-online> (last visited Nov. 5, 2018) (describing the influence of Russian "bots" in shaping American political discourse in the wake of the tragic school shooting in Parkland, FL).

United States continues to do this³⁰¹ and has done so in the past³⁰² via indictment. The Mueller indictments of 13 Russian nationals in response to their activities in support of the Russian election interference indicates that the United States is equally comfortable doing so in this context.³⁰³ “Naming and shaming” via indictment of foreign nationals quite unlikely to ever see the inside of an American court room has its detractors,³⁰⁴ but it does have the advantage of throwing a potentially deterring light on a nation’s attempted covert activity, can help shape domestic and international public opinion, and serves as an important signaling mechanism indicating that the targeted nation has enough information to attribute the sovereignty breaching activities of another.

Finally, diplomatic reprisals and unilateral economic sanctions are also available. For instance, the United States expelled 35 Russian diplomats and leveraged narrowly targeted, largely symbolic, economic

301. See Tal Kopan, *US Disrupts ‘Massive and Brazen’ Iranian Hacking Scheme, DOJ Says*, CNN (Mar. 23, 2018), available at <https://www.cnn.com/2018/03/23/politics/iranian-hackers-indicted-universities-government/> (last visited Nov. 5, 2018) (reporting on an “indictment unveiled by the Justice Department [on March 23, 2018 that] directly links the individuals charged with the hacks to the Iranian government, saying the perpetrators were working for Iran’s Islamic Revolutionary Guard Corps and other government clients”); see also Ellen Nakashima & Karen DeYoung, *Trump Administration Hits Iranian Hacker Network With Sanctions, Indictments in Vast Global Campaign*, WASH. POST (Mar. 23, 2018), available at https://www.washingtonpost.com/world/national-security/trump-administration-hits-iranian-hacker-network-with-sanctions-indictments-in-vast-global-campaign/2018/03/23/4481721c-2e16-11e8-8688-e053ba58f1e4_story.html?utm_term=.4f780c3c9b2f (last visited Nov. 5, 2018) (noting that:

[t]he Trump administration on Friday announced sanctions and criminal indictments against an Iranian hacker network it said was involved in ‘one of the largest state-sponsored hacking campaigns’ ever prosecuted by the United States, targeting hundreds of U.S. and foreign universities, as well as dozens of U.S. companies and government agencies, and the United Nations.).

302. See Press Release, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), available at <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor> (last visited Nov. 5, 2018); see also Kristen Eichensehr, *Deterrence by Indictment*, JUST SEC. (Mar. 24, 2016), available at <https://www.justsecurity.org/30205/deterrence-indictment/> (last visited at Nov. 5, 2018) (describing the indictment of Iranian nationals for cyber activities against the United States).

303. See Apuzzo & LaFraniere, *supra* note 207; see also Scannell, Shortell, & Stracqualursi, *supra* note 207.

304. See Jack Goldsmith, *The DNC Hack and (the Lack of) Deterrence*, LAWFARE (Oct. 9, 2016), available at <https://www.lawfareblog.com/dnc-hack-and-lack-deterrence> (last visited Nov. 5, 2018).

sanctions in response to the Russian election interference.³⁰⁵ The United States leveled a fresh set of economic sanctions targeting 19 people and five organizations in Russia on March 15, 2018,³⁰⁶ and the President reportedly considered an additional set in the first week of April, 2018.³⁰⁷ “Those targeted by the new sanctions may not travel into the United States . . . all their assets under U.S. jurisdiction are frozen . . . [and] U.S. individuals are barred from engaging in transactions with them.”³⁰⁸ The problem with reprisals, however, is that they can rapidly result in escalation, as was the case with Russia, who responded to the initial expulsion of their diplomats by ordering over 700 American diplomats and staff out of Russia.³⁰⁹

In short, while countermeasures present a potential, if not imperfect, avenue to respond to gray zone activities like election interference, they ultimately do a poor job preventing these activities in the first place.

IV. Recommendations

Young Clark Kent: “The world is too big, mom.”

Martha Kent: “Then make it small.”³¹⁰

This poignant dialogue from the recent Superman film, *Man of Steel*, brings into stark relief a key theme necessary to counter a rising China and a declining Russia’s challenges to America. America, a united America, must reverse recent trends away from globalism³¹¹ and look for ways

305. See Miller, Nakashima, & Entous, *supra* note 14.

306. Ellen Nakashima, *Trump Administration Hits Russian Spies, Trolls With Sanctions Over U.S. Election Interference, Cyberattacks*, WASH. POST (Mar. 15, 2018), available at https://www.washingtonpost.com/world/national-security/trump-administration-sanctions-russian-spies-trolls-over-us-election-interference-cyber-attacks/2018/03/15/3eaae186-284c-11e8-b79d-f3d931db7f68_story.html?utm_term=.db7b2a4ede52 (last visited Nov. 5, 2018).

307. See Hudson, Dawsey, & Harri, *supra* note 188.

308. Nakashima, *supra* note 306.

309. See Camila Domonoske, *Putin to Expel 755 U.S. Diplomats and Staff From Russia in Response to New Sanctions*, NPR (July 30, 2017), available at <https://www.npr.org/sections/thetwo-way/2017/07/30/540432397/putin-expels-755-u-s-diplomats-from-russia-in-response-to-new-sanctions-bill> (last visited Nov. 5, 2018); see also UK Official: *Russia Conduct ‘Hybrid Warfare’*, ASSOC. PRESS (Mar. 29, 2018) available at <https://www.wcjb.com/content/news/UN-chief-warns-of-new-Cold-War-approaching-478313663.html> (last visited Nov. 5, 2018) (providing a running update on the U.S., U.K., and Russian actions and reactions, fairly characterized as proportional countermeasures which commenced with the poisoning via nerve agent of a Russian ex-spy in Britain).

310. *MAN OF STEEL* (Warner Bros. 2013).

311. Compare Max Boot, *Three Cheers for Globalism!*, FOR. POL’Y (Oct. 6, 2017), available at <http://foreignpolicy.com/2017/10/06/three-cheers-for>

to make the world small.³¹² We can no longer afford to take for granted our place in the international order. The United States is “the nation that liberated death camps, rebuilt our enemies, inspires dissidents, welcomes refugees, secures the peace on every contested frontier and seizes the ‘burden and glory of freedom.’”³¹³ Today, as has long been the case, challenges are everywhere and the best way to address them is through unity of purpose and cooperation. International institutions and treaty regimes, like UNCLOS and the ICCPR, are the embodiment of both. Embracing them does not make the “[United States] a nation of ‘globalists;’ it makes [it] America.”³¹⁴ Likewise, America ignores them, challenges them, weakens them, and a great many of the 44 other Treaties and international agreements that are languishing in the Senate for advice and consent since 1945,³¹⁵ at its peril.

A. General

1. “America first does not mean America alone.”³¹⁶

The United States needs to remember how to be a leader in the international community once again. “Rather than seeking to impose ‘a

globalism/ (last visited Nov. 5, 2018) (touting the benefits to America of globalism and internationalism) with Peter Savodnik, *Putin Already Has Trump in a Soviet Sleeper Hold*, VANITY FAIR (Mar. 13, 2018), available at <https://www.vanityfair.com/news/2018/03/putin-already-has-trump-in-a-soviet-sleeper-hold> (last visited Oct. 29, 2018) (stating that:

[there are those in America who] think the old configurations are corrupt and un-American. They crave a battle royale with anyone they believe to be on the inside: the globalists and profiteers who have apparently made zillions off the backs of Real Americans—anyone who feels angry, Lilliputian, put upon. They think that what polite company refers to as the ‘liberal democratic order’ is a sham, and if the president is undermining it, that’s good because shams are bad.).

312. See Michael Gerson, *We Are Not Globalists; We’re Americans*, WASH. POST (Mar. 19, 2018), available at https://www.washingtonpost.com/opinions/we-are-not-globalists-were-americans/2018/03/19/2a117e26-2bb0-11e8-8ad6-fbc50284fce8_story.html?utm_term=.fbae1efedf73 (last visited Nov. 5, 2018) (“[T]he postwar preeminence of the United States has been sustainable, not only because of our military power but also because the global order we shaped is not a zero-sum game”).

313. *Id.* (quoting President John F. Kennedy).

314. *Id.*

315. See Almond, *supra* note 84.

316. Adem Edleman, *Trump to Davos: “America First Does Not Mean America Alone,”* NBC NEWS (Jan. 26, 2018), available at <https://www.nbcnews.com/politics/donald-trump/trump-tells-davos-crowd-america-first-does-not-mean-america-n841306> (last visited Nov. 5, 2018). But see Peter Beinart, *The Rise of Right-Wing Foreign Policy in America*, THE ATLANTIC (Mar. 15, 2018), available at <https://www.theatlantic.com/international/archive/2018/03/trumps-foreign-policy-gop/555644/> (last visited Nov. 5, 2018) (reporting that outgoing Secretary of State

new American century' on the basis of . . . cynical unilateral violence, we must call for partnerships among nations based on mutual respect, tolerance, and the rule of law."³¹⁷ And, if we are indeed facing a return of great power rivalry, international institutions are intended as an important piece of the international system designed to prevent great power conflict. These international institutions serve as a pressure relief mechanism that can keep States from engaging in gray zone activities in the first place and may, in fact, keep those gray zone activities from becoming actual armed conflicts.³¹⁸ Further, acting unilaterally only spurs and incentivizes further unilateral action from other States—a dangerous trend when both China and Russia demonstrate a proclivity towards unilateral gray zone operations.³¹⁹ Finally, our consistent withdrawal from the fora and institutions that we worked so hard to create have, as a result, weakened those institutions to the point of general ineffectiveness which makes them unavailable to us should we need them to check aggression from elsewhere.³²⁰

With specific regard to China, the U.S. Senate's refusal to ratify UNCLOS puts the United States in a much weaker position to challenge both excessive Chinese maritime claims in general and viewed in a light least favorable to their activities and U.S. interests, a transparent attempt to convert the whole of the South China Sea into "internal waters" through the creation of an artificial series of archipelagic islands with

Rex Tillerson is likely the last gasp of "Hamiltonian" American foreign policy leaders, that favored diplomacy, containment of state rivals, and international institutions).

317. Engle, *supra* note 116, at 131-33.

318. See, e.g., Emilie M. Hafner-Burton & Alexander Montgomery, *Power Positions*, 50 J. OF CONFLICT RESOL. 3, 5 (2006) (writing that a great many scholars concur that international institutions reduce conflict).

319. MAZARR, *MASTERING THE GRAY ZONE*, *supra* note 21, at 79-96; see also Max Boot, *Russia's Been Waging War on the West for Years; We Just Haven't Noticed*, WASH. POST (Mar. 15, 2018), available at https://www.washingtonpost.com/opinions/russias-been-waging-war-on-the-west-for-at-least-a-decade-we-just-havent-noticed/2018/03/15/83926c78-2875-11e8-bc72-077aa4dab9ef_story.html?utm_term=.0148886e0386 (last visited Nov. 5, 2018) (noting that:

Russia has been waging war on the West for at least 10 years, and the West hasn't bothered to notice. This is not, to be sure, a conventional war, with Russian tanks invading Poland or Russian missiles hitting Pittsburgh. Moscow's kind of war is more subtle and yet all the more effective—precisely because it does not compel an overwhelming response.).

320. Ash, *supra* note 95, at 41 (writing that "because of the [United States'] unique position of power, exempting itself to international rules actually weakens the rules, which prevent[s] the [United States] from using them against other countries in the future"); see also Koh, *supra* note 68, at 1487.

which to reset their external baselines.³²¹ As for Russia, who remains not above good old-fashioned sabre rattling,³²² the occasional assassination,³²³ or combination thereof,³²⁴ the American evisceration of the ICCPR, through a record number of RUDs cuts off an avenue of relief³²⁵ from what is turning into persistent, if not constant, social engineering and influence operations targeting American political institutions.³²⁶

Leveraging all available tools of statecraft is a key component of gray zone activities.³²⁷ Certainly there is room to build or adjust conventional forces or hard power to counter gray zone attacks.³²⁸ But, it makes

321. See Cardin, *supra* note 66 (“[O]ur failure to ratify the treaty also undermines our ability to with our allies and partners in the South China Sea region [because] . . . it is difficult for the United States to rely on the treaty to determine” the issues in play in the region”).

322. See James Cameron, *Putin Just Bragged About Russia’s Nuclear Weapons; Here’s the Real Story*, WASH. POST (Mar. 5, 2018), available at https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/05/putin-claims-russia-has-invincible-nuclear-weapons-heres-the-story-behind-this/?utm_term=.1d2bdcdb79ec (last visited Nov. 5, 2018) (reporting on Russia’s most recent round of public statements trumpeting advanced hard power capabilities it may or may not have).

323. Cf. William Booth & Matthew Bodner, *Britain to Expel 23 Russian Diplomats After Ex-Spy Poisoning*, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/world/europe/britains-theresa-may-prepares-response-to-russian-spy-poisoning/2018/03/14/0a232d2c-26f5-11e8-a227-fd2b009466bc_story.html?utm_term=.19c56483ac0d (last visited Nov. 5, 2018); Williams Booth, *Theresa May: ‘Highly Likely’ Russia Responsible for Spy’s Poisoning By Nerve Agent*, WASH. POST (Mar. 12, 2018), available at https://www.washingtonpost.com/world/theresa-may-says-highly-likely-russia-is-responsible-for-spys-poisoning/2018/03/12/7baa6d22-25f4-11e8-a227-fd2b009466bc_story.html?utm_term=.7ff600129dbf (last visited Nov. 5, 2018); Adam Taylor, *Britain’s Expulsion of 23 Russian Diplomats Marks a Return to Cold War Ejections*, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/03/14/britains-expulsion-of-23-russian-diplomats-marks-a-return-to-cold-war-ejections/?utm_term=.47c914df017f (last visited Nov. 5, 2018).

324. See Alex Lockie, *Russia Responds With Veiled Nuclear, Death Threats to UK Nerve Agent Attack*, BUS. INSIDER (Mar. 14, 2018), available at <http://www.businessinsider.com/russia-uk-responds-nuclear-death-threats-nerve-agent-attack-2018-3> (last visited Nov. 5, 2018).

325. See Ohlin, *supra* note 229, at 1583-87.

326. See Miller, Nakashima, & Entous, *supra* note 14.

327. See MAZARR, *MASTERING THE GRAY ZONE*, *supra* note 21, at 43-52; see generally, HILL & GADDY, *supra* note 16, at 336-39 (describing Russian’s focus on leveraging all aspects of state power to meet its goals).

328. See generally Max Boot, *The United States Is Preparing for the Wrong War*, WASH. POST (Mar. 29, 2018), available at <https://www.washingtonpost.com/opinions/the-united-states-is-preparing-for-the-wrong-war/2018/03/29/0c0553ae-336b-11e8-8bdd->

no sense not to try to counter those initiatives with all available tools, especially, as I discuss below, diplomatic capacity,³²⁹ as well as full participation in applicable international treaty regimes and relevant international fora. If one thing is clear, it is that “the rules-based international order [created in large part by America] . . . has helped to keep the peace for over 60 years” and with care will continue to do so into the future.³³⁰ But it will take work and a present, not absent, America, if for no other reasons than adopting an internationalist posture helps shed light on state actions with questionable international legal justification, eases coalition building as a means to counter such activity, and can serve to isolate bad actors as international pariahs.³³¹ Simply put,

America must not retreat from global engagement . . . engagement is not an end in itself. It is a strategic tool to protect [the United States]. Without an engaged diplomatic component of national power, [the United States] weaken[s] our alliances, lose[s] credibility in the eyes of both our partners and our adversaries, and increase the likelihood of unnecessary and costly wars.³³²

cdb33a5eef83_story.html?utm_term=.257d17207bb9 (last visited Oct. 29, 2018) (summarizing both Russia’s gray zone activities and the U.S. military’s failure to develop the capacity and capabilities to effectively counter them).

329. See William J. Burns, *Putin Has Overplayed His Hand*, N.Y. TIMES (Mar. 31, 2018), available at <https://www.nytimes.com/2018/03/31/opinion/sunday/putin-trump-overplayed.html> (last visited Oct. 29, 2018) (arguing that the United States “should lead with diplomacy and demonstrate its enduring power and purpose. If [it does not] . . . [the United States will] perpetuate illusions about partnerships with [Russia] and the irrelevance of diplomacy—and waste” America’s advantages of strong international alliances and partnerships); see also Eric Levitz, *Tillerson’s Firing Brings America Closer to War With North Korea*, N.Y. MAG (Mar. 13, 2018), available at <http://nymag.com/daily/intelligencer/2018/03/tillersons-firing-brings-us-closer-to-war-with-north-korea.html> (last visited Oct. 29, 2018) (reporting on the impact of Secretary Tillerson’s removal and noting that “[h]e leaves the State Department demoralized and understaffed, in a moment when the United States is in dire need of diplomatic expertise”); Carol Morello, *More Than 200 Former Diplomats Are Alarmed at the State of American Diplomacy*, WASH. POST (Mar. 28, 2018), available at https://www.washingtonpost.com/world/national-security/nearly-200-former-diplomats-are-alarmed-at-the-state-of-american-diplomacy/2018/03/28/3f4ac510-32ac-11e8-8bdd-cdb33a5eef83_story.html?utm_term=.fc1b0cc41ec0 (last visited Oct. 29, 2018).

330. See MAZARR, MASTERING THE GRAY ZONE, *supra* note 21, at 127.

331. See generally *id.* at 126-138 (arguing five strategies to checking Gray Zone activity favored by both China and Russia: “(1) Set the Long-Term Trajectory: Make Sure Time is on Your Side, (2) Strengthen Institutions and Norms to Control Revisionist [Gray Zone] Tactics, (3) Decide Where Accommodation is Possible, (4) Build Forces, System, Technologies, Concepts, and Doctrine for a Gradualist Environment, (5) Punish Selected Revisionist Acts and Broadcast True Red Lines”).

332. Letter from Ambassador Frank Almaguer et al. to Senator Bob Corker, Chairman Senate For. Rel. Comm. and Robert Menendez, Ranking Member, Senate

2. “We must, indeed, all hang together, or most assuredly we shall all hang separately.”³³³

“America first” should also mean America before party.³³⁴ Domestic hyper-partisanship creates a national security issue because it fosters an environment hospitable for asymmetric, covert actions targeting democratic institutions³³⁵ and prevents the nation from acting in a cohesive, unified manner to address threats which require a unified response. “Indeed, gray zone techniques can properly be thought of [as] tools to take advantage of pre-existing political, social, or economic vulnerabilities rather than as efforts capable of achieving decisive results on their own.”³³⁶

Americans seemingly grow more politically divided by the day.³³⁷ “Public opinion remains more divided along partisan lines than along the lines of race, religion, age, gender, and educational background.”³³⁸ Most concerning, “[t]he vast majority of Republicans and Democrats, at 81 percent for both parties, say they have an unfavorable view of the other

For. Rel. Comm. (Mar. 21, 2018), available at <https://defenddiplomacy.org/sign-the-petition/> (last visited Oct. 29, 2018) [hereinafter Diplomacy Letter].

333. *Franklin’s Contributions to the American Revolution as a Diplomat in France*, U.S. HISTORY, available at <http://www.ushistory.org/valleyforge/history/franklin.html> (last visited Oct. 29, 2018) (quoting Benjamin Franklin).

334. See generally Jeremy W. Peters, *In a Divided Era, One Thing Seems to Unite: Political Anger*, N.Y. TIMES (Aug. 17, 2018), available at <https://www.nytimes.com/2018/08/17/us/politics/political-fights.html> (last visited Oct. 29, 2018); Michael D’Antonio, *Trump is Bringing Everyone Down to His Level*, CNN (Feb. 7, 2018), available at <http://www.cnn.com/2018/02/06/opinions/treasonous-cadette-bone-spurs-opinion-dantonio/index.html> (last visited Oct. 29, 2018).

335. See Christopher Paul & Miriam Matthews, *The Russian “Firehose of Falsehood” Propaganda Model*, RAND CORP. (2016), available at <https://www.rand.org/pubs/perspectives/PE198.html> (last visited Oct. 29, 2018) (noting that Russia has taken advantage when “high numbers of channels and messages and a shameless willingness to disseminate partial truths or outright fictions” are used to spread propaganda); see also Ben Guarino, *Fake News Spreads “Farther, Faster, Deeper” Than Truth, Study Finds*, WASH. POST (Mar. 8, 2018), available at https://www.washingtonpost.com/news/speaking-of-science/wp/2018/03/08/fake-news-spreads-farther-faster-deeper-than-truth-study-finds/?utm_term=.9c9f68acfe96 (last visited Oct. 29, 2018) (“By almost all metrics, false [social media] cascades outpaced true ones.”).

336. MAZARR, MASTERING THE GRAY ZONE, *supra* note 21, at 118.

337. See Clare Foran, *America’s Political Divide Intensified During Trump’s First Year as President*, THE ATLANTIC (Oct. 5, 2017), available at <https://www.theatlantic.com/politics/archive/2017/10/trump-partisan-divide-republicans-democrats/541917/> (last visited Oct. 29, 2018); see also Emma Green, *One Country, Two Radically Different Narratives*, THE ATLANTIC (July 17, 2018), available at <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-republican-democratic-voter/565328/> (last visited Oct. 29, 2018).

338. Foran, *supra* note 337.

side.”³³⁹ Even the mere concept of compromise seems an impossible task.³⁴⁰

The basic political norms of mutual toleration and restraint served American democracy for the better part of the last century.³⁴¹ Yet, these norms today appear to be weakening, creating extreme partisan polarization.³⁴² As a starting point, this polarization seems to be growing because of an apparent trust deficit—amongst ourselves³⁴³ and recently, our institutions.³⁴⁴ Trust is important because “[t]he lifeblood of democracy is a common understanding of the facts and information that we can use as a basis for negotiation and compromise When that goes away, the whole foundation of democracy gets shaken.”³⁴⁵ The absence of objective facts and rational discourse allows for foreign actors like Russia bent on sowing further discourse to drive dividing wedges into a nation’s populace.³⁴⁶

Further, hyper-partisanship makes the nation vulnerable to crisis when party politics makes it impossible to move with national purpose. China apparently has a long-term plan and its actions in the South China Sea are but one piece of that plan. In addition to its excessive South China Seas maritime claims, China is in the midst of undertaking an impressive

339. *Id.*

340. See generally Charles Lane, *Americans Used to Compromise All the Time*, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/opinions/national-unity-might-be-impossible-we-could-try-compromise-instead/2018/03/14/b8c0632c-279f-11e8-b79d-f3d931db7f68_story.html?utm_term=.99f5b9c7043b (last visited Oct. 29, 2018).

341. See generally Steven Levitisky & Daniel Ziblatt, *This Is How Democracies Die*, THE GUARDIAN (Jan. 21, 2017), available at <https://www.theguardian.com/us-news/commentisfree/2018/jan/21/this-is-how-democracies-die> (last visited Oct. 29, 2018).

342. *Id.*

343. See Nicholas Kristof, *You’re Wrong! I’m Right!*, N.Y. TIMES (Feb. 17, 2018), available at <https://www.nytimes.com/2018/02/17/opinion/sunday/liberal-conservative-divide.html> (last visited Oct. 29, 2018) (reporting that about the only thing Americans in 2018 agree on is the rending of our social fabric and arguing that today there are two Americas. “In each . . . people who inhabit the other are often perceived as not just obtuse but also dangerous. Half of Democrats and Republicans alike say in polls that they are literally afraid of the other political party.”).

344. See Uri Friedman, *Trust Is Collapsing in America*, THE ATLANTIC (Jan. 21, 2018), available at <https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/> (last visited Oct. 29, 2018).

345. *Id.* (quoting researcher David Bersoff).

346. See generally Paul & Matthews, *supra* note 335.

effort to create or improve infrastructure in Asia,³⁴⁷ Africa,³⁴⁸ and really throughout the world,³⁴⁹ that allows it to spread its influence³⁵⁰ while opening markets to its goods.³⁵¹ China is also in the process of

347. See Ismail Dilawar, *China's Flagship Port in Pakistan Shackled by Heavy Security*, BLOOMBERG (Feb. 26, 2018), available at <https://www.bloomberg.com/amp/news/articles/2018-02-26/china-s-flagship-port-in-pakistan-shackled-by-heavy-security> (last visited Oct. 29, 2018) (describing China's \$50 billion in infrastructure projects in Pakistan); see also Max Fisher & Audrey Carlsen, *How China Is Challenging American Dominance in Asia*, N.Y. TIMES (Mar. 9, 2018), available at <https://www.nytimes.com/interactive/2018/03/09/world/asia/china-us-asia-rivalry.html> (last visited Oct. 29, 2018).

348. See Laura Koran, *Why China's Footprint in Africa Worries the US*, CNN (Mar. 10, 2018), available at <https://www.cnn.com/2018/03/10/politics/china-africa-footprint-tillerson/> (last visited Oct. 29, 2018) ("Since the early 2000s, China has been investing heavily across Africa" in an attempt to further increase its world influence); see also Josh Rogin, *Can the Trump Administration Stop China From Taking Over a Key African Port?*, WASH. POST (Mar. 7, 2018), available at https://www.washingtonpost.com/news/josh-rogin/wp/2018/03/07/can-the-trump-administration-stop-china-from-taking-over-a-key-african-port/?utm_term=.9ac464ff95c8 (last visited Oct. 29, 2018) (reporting on a Chinese state controlled firm's efforts to take over the Doraleh Container terminal in Djibouti, which serves as a major import location for U.S. counter-terror operations on the whole of the African continent).

349. See Parag Khana, *Get Over Yourself, America*, POLITICO (Jan. 19, 2018), available at <https://www.politico.com/magazine/story/2018/01/19/get-over-yourself-america-216478?cid=apn> (last visited Oct. 24, 2018) (writing that "American officials speak about accommodating China's rise as if it were still up to them"); see also Alfonso Serrano, *China Fills Trump's Empty Seat at Latin America Summit*, N.Y. TIMES (Apr. 13, 2018), available at <https://www.nytimes.com/2018/04/13/opinion/china-trump-pence-summit-lima-latin-america.html> (last visited Oct. 24, 2018) (reporting on China's efforts to expand its influence into South America); Ting Shi, *China Infrastructure Push Reaches Arctic, Leaving Out U.S.*, BLOOMBERG (Jan. 28, 2018), available at https://www.bloomberg.com/news/articles/2018-01-28/china-infrastructure-push-reaches-arctic-further-isolating-u-s?utm_campaign=pol&utm_medium=bd&utm_source=applenews (last visited Oct. 24, 2018) (linking China's efforts at world-wide infrastructure improvement or creation as "the latest illustration of [China's] desire to play a greater global role as the U.S. turns more inward-looking").

350. See Kerry Brown, *The Security Implications of China's Belt and Road*, THE DIPLOMAT (Nov. 27, 2015), available at <https://thediplomat.com/2015/11/the-security-implications-of-chinas-belt-and-road/> (last visited Oct. 24, 2018); see also Shivshankar Menon, *The Unprecedented Promises—and Threats—of the Belt and Road Initiative*, THE WIRE (Apr. 24, 2017), available at <https://thewire.in/127579/the-unprecedented-promises-and-threats-of-the-belt-and-road-initiative/> (last visited Oct. 24, 2018).

351. See, e.g., Peng-fu Neo, *Foreword* to LIM TAI WI ET AL., CHINA'S ONE BELT ONE ROAD INITIATIVE ix (2016) (describing the historical basis and future plans of the Chinese initiative to open trade and influence routes throughout the globe).

developing true strategic military assets that will allow it to project force all over the globe,³⁵² but especially regionally,³⁵³ and positioned itself in both the Arctic³⁵⁴ and the Antarctic³⁵⁵ to take full advantage of new access

352. See Eric Baculinao, *These Chinese Military Innovations Threaten U.S. Superiority, Experts Say*, NBC NEWS (Feb. 17, 2018), available at <https://www.nbcnews.com/news/world/these-chinese-military-innovations-threaten-u-s-superiority-experts-say-n848596> (last visited Oct. 24, 2018); see also *China's Next Aircraft Carrier Will Be a Massive Leap Forward*, POPULAR MECHANICS (Jan. 19, 2018), available at <https://www.popularmechanics.com/military/navy-ships/a15392390/chinas-next-aircraft-carrier-002/> (last visited Oct. 24, 2018); Jeffrey Lin & P. W. Singer, *A Chinese Shipbuilder Accidentally Revealed Its Major Navy Plans*, POPULAR SCI. (Mar. 15, 2018), available at <https://www.popsci.com/china-nuclear-submarine-aircraft-carrier-leak> (last visited Oct. 24, 2018); Kyle Mizokami, *China's Second Aircraft Carrier Is Its Most Crucial Yet*, POPULAR MECHANICS (Dec. 11, 2017), available at <https://www.popularmechanics.com/military/navy-ships/a14408704/chinas-second-aircraft-carrier-is-its-most-crucial-yet/> (last visited Oct. 24, 2018); Scott Neuman, *China's Newest Aircraft Carrier, 'Type 001A,' Reportedly Begins Sea Trials*, NPR, (Aug. 28, 2018), available at <https://www.npr.org/2018/08/28/642493101/chinas-newest-aircraft-carrier-type-001a-reportedly-begins-sea-trials> (last visited Oct. 29, 2018); Brian Wang, *China's Next Aircraft Carrier Will Make Its Navy Distant Second Behind the USA*, NEXT BIG FUTURE (Jan. 21, 2018), available at <https://www.nextbigfuture.com/2018/01/chinas-next-aircraft-carrier-will-make-its-navy-distant-second-behind-the-usa.html> (last visited Oct. 24, 2018) (describing China's indigenous Type 001A air craft carrier).

353. See Myers, *supra* note 10; see also James Pearson & Greg Torode, *Exclusive: Satellite Images Reveal Show of Force by Chinese Navy in South China Sea*, REUTERS (Mar. 27, 2017), available at https://www.reuters.com/article/us-china-defence/exclusive-satellite-images-reveal-show-of-force-by-chinese-navy-in-south-china-sea-idUSKBN1H3135?utm_source=applenews (last visited Oct. 29, 2018); Jacqueline Williams, *Australia Shudders Amid Talk of a Chinese Military Base in Its Backyard*, N.Y. TIMES (Apr. 11, 2018), available at <https://www.nytimes.com/2018/04/11/world/australia/vanuatu-chinese-military-base.html> (last visited Oct. 29, 2018) (reporting on China's attempt to partner with the Vanuatu government to build an expeditionary Chinese military base well into the South Pacific off the east coast of Australia). "The prospect of a Chinese military base close to Australia in the South Pacific could provide a significant boost in Beijing's ability to project its power, and could also undermine the strategic dominance of Western powers in an area they have long effectively controlled." *Id.*

354. See Mia Bennett, *What Does China's Arctic Policy Actually Say*, MAR. EXECUTIVE (Jan. 28, 2018), available at <https://www.maritime-executive.com/editorials/what-does-china-s-arctic-policy-actually-say#gs.qWBcDAc> (last visited Oct. 29, 2018) (reporting that China, as a self-proclaimed "near-arctic nation" plans to "understand, protect, develop, and participate in the governance of the Arctic"); see also Charlotte Gao, *China Issues Its Arctic Policy*, THE DIPLOMAT (Jan. 26, 2018), available at <https://thediplomat.com/2018/01/china-issues-its-arctic-policy/> (last visited Oct. 29, 2018).

355. Compare Nengye Liu, *Demystifying China in Antarctica*, THE DIPLOMAT (Jun. 9, 2017), available at <https://thediplomat.com/2017/06/demystifying-china-in-antarctica/>

to resources caused by global climate change and the pending sunset of the relevant existing international treaty regime, respectively. China is also apparently quite happy to engage in regional trade agreements without the United States, so as to not have to account for U.S. interests and equities.³⁵⁶ Equally concerning, China's President Xi recently announced an end to his term limits, tilting the burgeoning super power more closely towards authoritarianism than it has been in recent years.³⁵⁷

"National unity may be beyond our reach, [but] national cohesion [should] not" be.³⁵⁸ If it is, we will likely reap what we sow.³⁵⁹ Russia is constantly pressing and China is playing the long game and their supposed counter-balance, the United States, cannot manage enough

antarctica/ (last visited Oct. 29, 2018) (reporting that China's ambitions in Antarctica should not cause concern) with Dan Southerland, *Does China Want to Explore Antarctica, or Exploit Its Resources*, RADIO FREE ASIA (Nov. 30, 2017), available at <https://www.rfa.org/english/commentaries/china-antarctica-11302017154333.html> (last visited Oct. 29, 2018) (reporting that some believe that China "has conducted undeclared military activities in Antarctica [in violation of the Antarctic treaty regime of which China is a party] is building a case for a territorial claim, and is engaging in military exploration there"). See also Nick Whigham, *Should We Be Concerned About a Challenge to Australia's Territorial Claim in Antarctica*, NEWS AU (Oct. 15, 2017), available at <https://www.news.com.au/technology/environment/conservation/should-we-be-concerned-about-a-challenge-to-australias-territorial-claim-in-antarctica/news-story/ad27325554ff70b7b0a0e7c5e1312c3a> (last visited Oct. 29, 2018) (reporting that Chinese aspirations in Antarctica are clear, as it has established its fifth installation on the continent and "is seen as a resource hungry nation in need of fossil fuels and minerals to feed its growing economy").

356. See Fisher & Carlsen, *supra* note 347 (noting that in the absence of America, traditional allies like Australia and Japan are "forging ahead without American leadership" in their interactions with China); see also Steven Mufson, *As Trump Imposes Tariffs, Allies Sign on to Free-Trade Pact—Without U.S.*, WASH. POST (Mar. 8, 2018), available at https://www.washingtonpost.com/business/economy/as-trump-imposes-tariffs-allies-sign-on-to-free-trade-pact—without-us/2018/03/08/bb068820-2301-11e8-badd-7c9f29a55815_story.html?utm_term=.35816f15c859 (last visited Oct. 29, 2018) ("The rest of the world is moving ahead without us." (quoting Michael Froman, U.S. negotiator of the Trans-Pacific Partnership, a massive trade agreement "that covers nearly 500 million people and more than 13 percent of global trade"))).

357. See Chris Buckley & Adam Wu, *Ending Term Limits for China's [President] Xi Is a Big Deal; Here's Why*, N.Y. TIMES (Mar. 10, 2018), available at <https://www.nytimes.com/2018/03/10/world/asia/china-xi-jinping-term-limit-explainer.html> (last visited Oct. 29, 2018).

358. Lane, *supra* note 340.

359. See 2 *Corinthians* 9:6 ("Whoever sows sparingly will also reap sparingly, and whoever sows generously will also reap generously.").

bipartisan support to stave off the specter of regular government shut downs³⁶⁰ or pass an annual budget.³⁶¹ This must change, or we may one day awake in a world where Russia manages to do real damage to our institutions and China, through a combination of gray zone tactics similar to those they are employing in the South China Sea, overt influence operations such as its “One Belt/One Road”³⁶² initiative, and ever-growing economic capacity and hard power capabilities drives that nation to supplant the United States as the world’s leader.

B. Specific

1. South China Sea: Reinvigorate America’s Soft Power

As a starting matter, the United States should ratify UNCLOS to maximize its international credibility, engage China from a position of international leadership, and fully leverage the Convention’s powerful dispute resolution provisions to address Chinese aggression in the South China Sea.³⁶³

Furthermore, the United States is still very much engaged in the global war on terror. This becomes critically important as America pivots to address the threat posed by great power conflict. While the U.S. military is largely unrivaled in the world today, it simply cannot be in all places at all times. We need like-minded partners to provide capacity and capabilities that we ourselves lack.³⁶⁴ This dynamic is compounded in the Pacific, where military forces must contend with the tyranny of distance.³⁶⁵ Thus, the United States will likely need to recognize that it must choose between the global war on terror and the threat of great power

360. See Shery Gay Stolberg & Thomas Kaplan, *Government Shutdown Ends After 3 Days of Recriminations*, N.Y. TIMES (Jan. 22, 2018), available at <https://www.nytimes.com/2018/01/22/us/politics/congress-votes-to-end-government-shutdown.html> (last visited Oct. 30, 2018).

361. See Press Release, U.S. House of Representatives Comm. on Appropriations, House Approves Budget and Emergency Supplemental Agreement (Feb. 9, 2018), available at <https://appropriations.house.gov/news/document-single.aspx?DocumentID=395097> (last visited Oct. 30, 2018) (describing the details of a continuing resolution and noting that the committee chair “look[ed] forward to working with our Senate counterparts to quickly negotiate and complete all [still pending] 12 full-year Appropriations bills”).

362. See generally LIM TAI WI ET AL, *supra* note 351.

363. See OXMAN, *supra* note 78.

364. See Julian Ku, *The British Are Coming to the South China Sea, and It’s About Time*, LAWFARE (Feb. 28, 2018), available at <https://www.lawfare-blog.com/british-are-coming-south-china-sea-and-its-about-time> (last visited Oct. 30, 2018) (reporting on the presence of the British Navy in the South China Sea to aid U.S. efforts in countering excessive Chinese maritime claims).

365. *Id.*

conflict, and as such, “curb current counterterrorism operations to support a longer-term strategy in Asia . . . [and correspondingly] free up necessary resources to increase U.S. military presence” and improve the capacity of U.S. regional partners, by “limiting—not expanding . . . U.S. military campaigns in [Syria,] Afghanistan and parts of Africa.”³⁶⁶

Most importantly, this hard power pivot needs to be supported by the force multiplying effects of American soft power, which the current administration has either ignored completely³⁶⁷ or actively sought to diminish.³⁶⁸ As of this writing, “[d]ozens of . . . key diplomatic jobs remain unfilled, including ambassadors to key U.S. allies such as Germany, Australia, and Saudi Arabia. More than two dozen ambassador posts are waiting for nominations to be put forward; nominees for more than a dozen others are waiting for confirmation.”³⁶⁹ The not-completely unexpected but comparatively sudden departure of the U.S. Secretary of State earlier this year further complicated the diplomatic vacuum at the State Department.³⁷⁰

366. Oriana Skylar Mastro & Ely Ratner, *China Is Gaining on the United States; What Are We Doing About It?*, POLITICO (Feb. 9, 2018), available at <https://www.politico.com/magazine/story/2018/02/09/china-united-states-donald-trump-216955?cid=apn> (last visited Oct. 30, 2018). *But see* Ryan Browne, *US Military Reveals New Firefight in Niger*, CNN (Mar. 15, 2018), available at <https://www.cnn.com/2018/03/15/politics/niger-firefight-december/index.html> (last visited Oct. 30, 2018) (reporting on the US military’s most recent African counterterrorism operation).

367. *See* Bill Faries & Mira Rojanasakul, *At Tillerson’s State Department, Seven of Nine Top Jobs Are Empty*, BLOOMBERG (Feb. 2, 2018), available at <https://www.bloomberg.com/graphics/2018-state-department-vacancies/> (last visited Oct. 30, 2018); *see also* John W. Schoen, *The State Department Is Riddled With Key Vacancies as Trump Seeks Nuclear Talks With North Korea*, CNBC (Mar. 13, 2018), available at <https://www.cnbc.com/2018/03/13/the-state-department-is-riddled-with-key-vacancies.html> (last visited Oct. 30, 2018).

368. *See* Benjamin Hart, *Trump on Unfilled State Department Jobs: “I Am the Only One That Matters,”* N.Y. MAG. (Nov. 3, 2017), available at <http://nymag.com/daily/intelligencer/2017/11/trump-on-unfilled-jobs-i-am-the-only-one-who-matters.html> (last visited Oct. 30, 2018) (quoting President Trump saying,

I’m a businessman, and I tell my people, ‘When you don’t need to fill slots, don’t fill them.’ But we have some people that I’m not happy with [at the State Department]. Lemme [sic] tell you, the one that matters is me. I’m the only one that matters, because when it comes to it, that’s what the policy is going to be.).

369. Schoen, *supra* note 367.

370. *See* Jeremy Diamond, *Inside Rex Tillerson’s Final Days as Secretary of State*, CNN (Mar. 13, 2018), available at <https://www.cnn.com/2018/03/13/politics/rex-tillerson-final-days/> (last visited Oct. 30, 2018); *see also* Ashley Parker et al., *Trump Ousts Tillerson, Will Replace Him as Secretary of State with CIA Chief Pompeo*, WASH. POST (Mar. 13, 2018), available at

The president signaled early on that military might, not diplomatic deftness, was his thing. Soft power was for the birds. This world view . . . has been expressed in a proposed cut of about 30 percent in the State Department budget as military spending soars; a push to eliminate some 2,300 jobs, the vacancy of many senior posts, including 20 of the 22 assistant secretary positions requiring Senate confirmation; unfilled ambassadorships—roughly 30 percent of the total—from Paris to New Delhi; and the brushoff of the department's input in interagency debate and in pivotal decisions.³⁷¹

This move away from diplomatic capacity is folly, for it is only through leveraging diplomacy *and* hard power that America can counter both gray zone tactics in general and China's aspirations of a new world order with itself at the fore.³⁷² "There is a lot that the military can do, but it is extraordinarily important that our diplomats, our Department of State, our other development agencies, and others are involved in this process as well," because if the United States does not integrate military objectives with soft-power capabilities, "we risk creating space for our adversaries to achieve their strategic aims."³⁷³

China is too big, its economy too strong, its influence too ascendant, and its growing military too capable for the United States to try and counter by itself. America needs allies to counter China and diplomatic soft power is the way to win them.

2. *Russian Election Interference: It is Time to Begin Considering a New International Norm Against Election "Interference"*

The mix of the last 50 years of globalism and technological advancement created a perfect storm that makes Western liberal democracies especially vulnerable to foreign interference in democratic processes. This is compounded through cyber capabilities that capitalize on the inherent

https://www.washingtonpost.com/politics/trump-ousts-tillerson-will-replace-him-as-secretary-of-state-with-cia-chief-pompeo/2018/03/13/30f34eea-26ba-11e8-b79d-f3d931db7f68_story.html?utm_term=.de42cc055071 (last visited Oct. 30, 2018). *But see* Zack Beauchamp, *Rex Tillerson Has Been Fired; Experts Say He Did Damage That Could Last "a Generation,"* VOX (Mar. 13, 2018), available at <https://www.vox.com/world/2018/3/13/16029526/rex-tillerson-fired-state-department> (arguing that many experts believe that outgoing Secretary of State Tillerson was essentially the worst thing to happen to the State Department, ever).

371. Roger Cohen, *The Desperation of Our Diplomats*, N.Y. TIMES (July 28, 2018), available at <https://www.nytimes.com/2017/07/28/opinion/sunday/trump-tillerson-state-department-diplomats.html> (last visited Oct. 29, 2018).

372. *See, e.g.*, Diplomacy Letter, *supra* note 332; *see also* Morello, *supra* note 329; Phil Klay, *Two Decades of War Have Eroded the Morale of America's Troops*, THE ATLANTIC (May 2018), available at <https://www.theatlantic.com/magazine/archive/2018/05/left-behind/556844/> (last visited Oct. 29, 2018).

373. Klay, *supra* note 372 (quoting General Joseph L. Votel, current CENTCOM Commander).

technological interconnectedness of the 21st century that give States a relatively cheap³⁷⁴ and hard-to-detect means with which to penetrate sovereign borders and spread propaganda and disinformation to huge numbers of people.³⁷⁵ For example, in the context of “fake news,” a tool employed by Russia against the United States in the 2016 Presidential election,

[b]y liking, sharing, and searching for information, social bots (automated accounts impersonating humans) can magnify the spread of fake news by orders of magnitude. By one recent estimate—that classified accounts based on observable features such as sharing behavior, number of ties, and linguistic features—between 9 and 15% of active Twitter accounts are bots Facebook estimated that as many as 60 million bots may be infesting its platform. They were responsible for a substantial portion of political content posted during the 2016 U.S. campaign, and some of the same bots were later used to attempt to influence the 2017 French election.³⁷⁶

This is a far cry from the days of print media and even radio broadcasts, where similar activities were comparatively limited in scope. Yet, international law recognized the threat posed to sovereign nations and a people’s right of self-determination, for example, by placing certain limits on radio broadcasts.³⁷⁷ People today, especially in comparatively economically well-off Western nations that tend to be democracies, carry around powerful computers with them in their pockets.³⁷⁸ They use these computers to interact with the world, and most importantly in this

374. See McMaster, *supra* note 231 (claiming that “Russia brazenly and implausibly denies its actions, and *we have failed to impose sufficient costs*”) (emphasis added); see generally *On His Way Out, McMaster Tells the Truth*, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/opinions/on-his-way-out-mcmaster-tells-the-truth-trump-should-listen/2018/04/04/7319ff08-3826-11e8-9c0a-85d477d9a226_story.html?utm_term=.26506cb1839c (last visited Oct. 29, 2018).

375. See David M. J. Lazer et al., *The Science of Fake News*, 359 SCI. 1094, 1095 (2018) (providing an excellent analysis on “[t]he rise of fake news” and its impact on “erosion of long-standing institutional bulwarks of information in the internet age”); see also Tania Lombrozo, *The Psychology of Fake News*, NPR (Mar. 27, 2018), available at <https://www.npr.org/sections/12.7/2018/03/27/597263367/the-psychology-of-fake-news> (last visited Oct. 28, 2018).

376. Lazer et al, *supra* note 375.

377. See generally UNCLoS, *supra* note 72, art. 109 (prohibiting unauthorized broadcasting from the high seas); Horace B. Robertson Jr., *The Suppression of Pirate Radio Broadcasting: A Test Case of the International System for Control of Activities Outside National Territory*, 45 DUKE J. L. AND CONTEMP. PROBS. 73, 76-83 (1982).

378. See *Riley v. California*, 134 S.Ct. 2473, 2489-92 (2014) (holding that cell phones, due in part to their ability to hold vast amounts of data, are different in kind than other possessions, and as such, those in the United States have a reasonable expectation of privacy in their contents).

context, get information.³⁷⁹ Further, people are growing more and more dependent on social media as a source of news information,³⁸⁰ which is particularly vulnerable, almost by design, to social engineering and propaganda operations.³⁸¹ The ease with which information flows has always been and remains a powerful tool of democracy. But this tool, at the same time, contains a powerful vulnerability, ripe for exploitation on many fronts.³⁸² Thus, it is of course no surprise that authoritarian States favor a top down, framing of “cyber-security” as the ability to control information within their own sovereign borders, as compared to the western state preference of a multi-lateral, bottom up, data-security focused model, which in turn makes these western States susceptible to gray zone, cyber-based intrusions from their more authoritarian rivals.³⁸³

379. *See id.*

380. *See* Elizabeth Grieco, *More Americans Are Turning to Multiple Social Media Sites for News*, PEW RES. CTR. (Nov. 2, 2017), available at <http://www.pewresearch.org/fact-tank/2017/11/02/more-americans-are-turning-to-multiple-social-media-sites-for-news/> (last visited Oct. 29, 2018).

381. *See* Benedict Carey, *How Fiction Becomes Fact on Social Media*, N.Y. TIMES (Oct. 20, 2017), available at <https://www.nytimes.com/2017/10/20/health/social-media-fake-news.html> (last visited Oct. 29, 2018) (providing that:

Executives from Facebook and Twitter will appear before congressional committees to answer questions about the use of their platforms by Russian hackers and others to spread misinformation and skew elections. During the 2016 presidential campaign, Facebook sold more than \$100,000 worth of ads to a Kremlin-linked company, and Google sold more than \$4,500 worth to accounts thought to be connected to the Russian government.);

see also Cecilia Kang, Nicholas Fandos, & Mike Isaac, *Tech Executives Are Confronted About Election Meddling, but Make Few Promises on Capitol Hill*, N.Y. TIMES (Oct. 31, 2017), available at <https://www.nytimes.com/2017/10/31/us/politics/facebook-twitter-google-hearings-congress.html> (last visited Oct. 29, 2018) (reporting that “The most pointed exchanges were aimed at Facebook, which acknowledged . . . that more than 126 million users potentially saw inflammatory political ads bought by a Kremlin-linked company, the Internet Research Agency”); Lazer et al., *supra* note 375; Lombrozo, *supra* note 375.

382. *See generally* *Day Two of Mark Zuckerberg’s Testimony*, N.Y. TIMES (Apr. 12, 2018), available at <https://www.nytimes.com/video/us/politics/100000005844655/watch-live-day-2-of-mark-zuckerbergs-testimony.html> (last visited Oct. 29, 2018) (providing video of Facebook CEO Mark Zuckerberg’s testimony before the U.S. Congress on the exploitation of massive amounts of Facebook user data); Cecilia Kang et al., *Mark Zuckerberg Testimony: Day 2 Brings Tougher Questioning*, N.Y. TIMES (Apr. 12, 2018), available at <https://www.nytimes.com/2018/04/11/us/politics/zuckerberg-facebook-cambridge-analytica.html> (last visited Oct. 29, 2018).

383. *See* Kristen E. Eischensehr, *The Cyber-Law of Nations*, 103 GEO. L. J. 317, 329 (2014) (describing competing visions of the cyber domain); *see also* Statement of Christopher Painter, Coordinator for Cyber Issues, U.S. Dep’t of State, Before the Subcommittee on East Asia, the Pacific, and International Cyber Security,

Traditional international legal remedies like countermeasures, sanctions, and indictments are reactive in nature and therefore, by themselves, insufficient to counter the threat to sovereignty and self-determination posed by far reaching, concerted election interference operations. Hard power also does not provide a credible deterrence, because in all but the most egregious circumstances, election interference would not likely rise to a level justifying the use of force in self-defense.

Thus, I propose that the United States, first through international custom³⁸⁴ and ultimately through the creation of a U.S.-led multi-lateral treaty or series of bi-lateral treaties, establish a new international legal norm against election interference. As a start, election interference should be expressly carved out from the norm that arguably permits espionage³⁸⁵ by requiring all election influence operations to be overt in nature. Second, this norm should distinguish between influence and interference by prohibiting the wide dissemination via any means of patently false or verifiably inaccurate information across sovereign borders.³⁸⁶ To the extent that the United States had engaged in this activity in the past, it should expressly renounce its future use.³⁸⁷ Finally, this norm would also optimally establish certain baseline characteristics of functioning and fair democracies as a means of identifying both especially vulnerable States and potentially repressive regimes, the latter of which, in an admitted deviation from the existing norm of sovereign equality,³⁸⁸ would enjoy less protection from presumptively legitimate democracy fostering activities. This relates to the second norm in that activities intended to limit or minimize access to the democratic process or those that are intended to sow confusion and dissent should be presumptively violative of

Hearing on International Cybersecurity Strategy: Deterring Foreign Threats and Building Global Cyber Norms, 114th CONG. (2016), available at https://www.foreign.senate.gov/imo/media/doc/052516_Painter_Testimony.pdf (last visited Nov. 5, 2018); see generally Michael Schmitt & Liis Vihul, *International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms*, JUST SEC. (June 30, 2017), available at <https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms/> (last visited Oct. 29, 2018) (taking to task authoritarian regimes like Cuba, Russia, and China for stonewalling the creation of even basic cyber norms).

384. See JEFFREY L. DUNNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, *INTERNATIONAL LAW NORMS, ACTORS, PROCESS* 78-81 (2nd ed. 2006) (describing the formation of customary international law through state practice and *opinio juris*).

385. See, e.g., Schmitt & Wall, *supra* note 240, at 362 (noting that “[i]t is well accepted that espionage is not, in itself, a breach of international law”).

386. See Lazer et al, *supra* note 375; see also Lombrozo, *supra* note 375.

387. See generally notes 264 & 265, *supra*.

388. See U.N. Charter art. 2 (1).

the norm, whereas those that enhance access to democratic processes would be likewise presumptively legal.³⁸⁹

V. Conclusion

The 2018 NDS remains a pivotal document in that it brought into focus what the Department of Defense considers as the primary threat vector to America—great power rivalry, specifically from China and Russia.³⁹⁰ This shift may in fact be premature considering the continuing nature of America's global war on terror, but it is serious and should not be ignored. This will necessarily force a choice between continuing the fight against terror at its current levels or re-leveraging American hard power and soft power tools to better focus on the threats posed by great power rivalry, specifically from China and Russia. Further, over the last 30 years, the United States may have increased its own vulnerability to great power rivals by moving away from the international institutions, treaties, and fora, many of which were first championed by the United States, and which, in part, were intended to serve as checks against future great power conflict. America's failure to sign and ratify UNCLOS and its unprecedented number of RUDs to the ICCPR are but two examples of this retreat from internationalism. There are many, many more.

America, in both China and Russia, has two revisionist nations who are certainly rivals if not potential adversaries. With China, America meets a rival on the rise and in Russia one in decline.³⁹¹ But, both nations have demonstrated a proclivity and aptitude for operating in the gray zone, as a means of asymmetrically countering America's status as a global hegemon. China's aspirations in the South China Sea threaten American regional influence and are simultaneously an end in of itself and a means as part of a broader strategy in which China can attempt to supplant the United States at the top of the world order. With Russia and its leadership interested in maintaining that nation's international relevance, checking perceived Western encroachment, and defending its own grip on domestic power, America must be vigilant against disruptive, technologically-based threats to its foundational institutions, like election interference operations, that seek to support a Russian zero-sum take on

389. See Vickery, *supra* note 267.

390. See 2018 NDS SUMMARY, *supra* note 1.

391. *C.f.* *Comparison Results of World Military Strengths*, *supra* note 185, *Russia*, *The World Fact Book*, *supra* note 186, and *China*, *The World Fact Book*, *supra* note 186.

international relations, specifically that a weakened United States/West is in Russia's best interests and vice versa.³⁹²

An America divided amongst itself and in retreat from internationalism only serves to assist both China and Russia in executing their gray zone tactics, and thus, the United States must work to reverse the largely political trends of the last thirty years so that it can effectively counter the rising dragon and dying bear and lead a peaceful and prosperous world in the 21st century.

392. See Rolf Mowatt-Larssen, *The Strategic Balance: A New US-Russian Zero Sum Game*, JUST SEC. (Oct. 17, 2016), available at, <https://www.justsecurity.org/33635/strategic-balance-u-s-russian-sum-game/> (last visited Oct. 29, 2018); see also Oliker, *supra* note 12; see generally HILL & GADDY, *supra* note 16, at 316 (writing that it has become Russia's strategy to "take every opportunity both to undermine American influence and to project Russian influence around the world").

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