

## ON COERCION IN INTERNATIONAL LAW

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*Coercion is both ubiquitous in international relations and unlawful under international law. Yet international law has neither defined coercion nor developed an adequate understanding of the nature, processes, and elements of coercion. This article addresses this gap in international law scholarship. It seeks to identify the legal threshold that distinguishes between unlawful acts of coercion and lawful policies and practices that states employ to pressure their adversaries or persuade their allies to alter their policies. To do so, this article examines the prohibition on intervention in the internal or external affairs of states, which is the principal rule of international law that governs coercion, and proposes a novel understanding of the content and elements of this cardinal rule of international law. It argues that violations of the prohibition on intervention consist of two elements: First, the pursuit of unlawful ends, and second, the use of unlawful (i.e. coercive) means to achieve unlawful ends. The ends of intervention are unlawful if it encroaches on the domaine réservé of a state, while the means of intervention are unlawful if a state uses coercive instruments. To identify the instruments of statecraft that are coercive, this article constructs a “coercion continuum” that consists of the following four categories: military coercion, economic coercion, cyber coercion, and political coercion. This article provides examples of unlawful practices and policies under each of these categories. Based on the two-pronged definition of unlawful intervention as the pursuit of unlawful ends through unlawful means, this article argues that violations of the prohibition on intervention are composite breaches of international law, which is an understudied category of violations of international law.*

## I. INTRODUCTION

Coercion is ubiquitous in an anarchic world.<sup>1</sup> All states, whether super powers or peripheral players, global hegemons or regional leaders, protect their security and pursue their interests by exercising coercion against their adversaries. None-

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1. See generally Helen Milner, *The Assumption of Anarchy in International Relations Theory: A Critique*, 17 REV. INT’L STUD. 67 (1991) (arguing that the international system is described as anarchic because it lacks a central law-making and law-enforcement authority that monopolizes the legitimate use of force).

theless, international law has not defined coercion. Although the International Court of Justice (ICJ) described coercion as the defining element and “the very essence” of unlawful intervention,<sup>2</sup> international judicial precedent and international law scholarship have not developed a definition, understanding, or conceptualization of coercion.<sup>3</sup> This article addresses this lacuna.

The principal rule of international law that governs the exercise of coercion in international relations is the prohibition on intervention in the internal or external affairs of states. Surprisingly, however, this cardinal rule of international law that is frequently invoked by states has received limited scholarly attention. On the other hand, violations of the prohibition on intervention and purported exceptions to this rule—such as humanitarian and pro-democratic intervention,<sup>4</sup> covert intervention and espionage,<sup>5</sup> cyber intervention,<sup>6</sup> and indirect intervention,<sup>7</sup>—have attracted far more attention than the prohibition on intervention itself. The lack of scholarly consideration of the prohibition on intervention and the preoccupation with its exceptions, combined with the fact that this rule is often the subject of rhetorical references in the political parlance of states, has led some scholars to conclude that the pro-

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2. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27) [hereinafter *Nicaragua Case*].

3. See Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579, 1581 (2017) (“Unfortunately, there is little in international law that outlines a complete theory of coercion . . .”).

4. E.g., Michael Byers & Simon Chesterman, *Changing Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 177, 178 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); David Wippman, *Defending Democracy Though Foreign Intervention*, 19 HOUS. J. INT’L L. 659, 660–62 (1997).

5. E.g., Thomas J. Jackamo, III, Note, *From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention*, 32 VA. J. INT’L L. 929, 938 (1992).

6. E.g., Marco Roscini, *World Wide Warfare – Jus ad Bellum and the Use of Cyber Force*, 14 MAX PLANCK Y.B. U.N. L. 85, 102–03 (2010).

7. E.g., Nigel D. White, *The Legality of Intervention Following the Nicaragua Case*, 9 INT’L REL. 535, 535 (1989).

hibition on intervention is of little substantive import and is “essentially hortatory in nature.”<sup>8</sup>

This article challenges this view. It remedies the lack of understanding of the content and contours of the prohibition on intervention, and develops a concept of coercion for international law. It traces the origins of the prohibition on intervention, outlines its scope, describes its doctrinal content, and proposes a novel understanding of the elements of this fundamental rule of international law. It defines unlawful intervention as the pursuit of unlawful ends through unlawful means. The ends (i.e. the purposes of intervention) are unlawful if a state impinges on the *domaine réservé* of another state. The *domaine réservé* is a concept that refers to areas of domestic or foreign policy in which a state has not undertaken international legal obligations. In other words, these are policy areas in which a state retains unfettered freedom of action.<sup>9</sup> The prohibition on intervention protects states against foreign intrusion into this realm where the liberty of states is intact and unencumbered by international legal obligations.

The means (i.e. the tools of intervention) are unlawful if a state employs coercive instruments of statecraft. To determine whether the instruments deployed by a state are coercive, and thus unlawful, this article constructs a concept of coercion for international law. Drawing on scholarship on coercive diplomacy in international relations and building on the philosophical literature of coercion, this article conceptualizes coercion as a bargaining strategy that states implement to compel their adversaries to alter their behavior. However, not all policies and practices intended to alter state behavior amount to coercion. Indeed, the principal challenge in defining and understanding coercion is the need to distinguish between coercion, which is unlawful, and pressure and persuasion, which are lawful and indispensable tactics of diplomacy.<sup>10</sup> This article over-

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8. Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT'L SECURITY J. 349, 355 (2014).

9. Alfred Verdross, *Domestic Jurisdiction Under International Law*, 3 U. TOL. L. REV. 119, 119 (1971).

10. See generally Penny Powers, *Persuasion and Coercion: A Critical Review of Philosophical and Empirical Approaches*, 19 HEC F. 125 (2007) (analyzing the distinctions between coercion and persuasion from philosophical and empirical approaches).

comes this challenge by developing a concept of coercion that is predicated on three central claims.

First, this article argues that coercion can be exercised through forceful or non-forceful means. This challenges understandings of coercion proposed by scholars of philosophy, international relations, and international law that define coercion as threatening or inflicting physical harm.<sup>11</sup> This approach—which equates coercion with the use of force—is legally unjustified and unrealistic from a policy perspective. In reality, the practice of coercion is not limited to the use of force. States pressure their friends and coerce their foes using military, economic, political, and more recently, cyber instruments of statecraft.<sup>12</sup> Moreover, in many cases, states employ combinations of these instruments as elements of a single strategy of coercion that is intended to shape and alter the behavior of their adversaries. Defining coercion as forceful compulsion is also incongruent with established legal standards. Despite initial differences between Western and non-Western states over the scope of the prohibition on intervention, an international consensus has emerged that coercive practices in violation of the prohibition on intervention are not limited to the use of force, but rather include non-forceful means such as economic and political instruments.

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11. See, e.g., Robert J. Art, *Introduction*, in THE UNITED STATES AND COERCIVE DIPLOMACY 3, 5 (Robert J. Art & Patrick M. Cronin eds., 2003) (“[C]oercive diplomacy is not meant to entail war, but instead employs military power short of war to bring about a change in a target’s policies or in its political makeup.”); DANIEL BYMAN & MATTHEW WAXMAN, THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT 3 (2002) (defining coercion as relying on “the threat of future military force to influence an adversary’s decision making but may also include limited uses of actual force”); Scott A. Anderson, *The Enforcement Approach to Coercion*, 5 J. ETHICS & SOC. PHIL. 1, 6 (2010) (“[C]oercion is best understood as one agent’s employing power suited to determine, through enforceable constraints, what another agent will or (more usually) will not do, where the sense of enforceability here is exemplified by the use of force, violence and the threats thereof to constrain, disable, harm or undermine an agent’s ability to act.”); Craig L. Carr, *Coercion and Freedom*, 25 AM. PHIL. Q. 59, 59 (1988) (citing various definitions that equate coercion with the threat or use of force).

12. Cf. KAREN A. FESTE, INTERVENTION: SHAPING THE GLOBAL ORDER xiii (2003) (defining intervention as “using economic leverage, diplomatic techniques, or military means to influence or control target states’ policies of governance”).

Second, this article rejects approaches that characterize an act as coercive on the basis of its *impact* and *intensity*.<sup>13</sup> To some scholars, an act is coercive if it is sufficiently intense to cause a state to modify its behavior or act against its will.<sup>14</sup> This consequentialist logic generates unworkable, subjective rules that, when applied, could lead to unreasonable results.<sup>15</sup> First, definitively demonstrating causation is exceedingly difficult in international relations. Second, applying this approach could mean that any form of pressure—however slight, whatever its nature, and regardless of its legality—could be considered coercive if it causes a state to alter its behavior. This risks condemning all diplomacy as coercive. This method, which defines coercion on the basis of its impact, could also lead to absurd outcomes. Patently unlawful behavior, such as an ultimatum, would be considered non-coercive if the target state fails to comply. Thus, the 1914 Austrian ultimatum to Serbia that was rejected and led to World War I,<sup>16</sup> the 1956 Anglo-French ultimatum during the Suez Crisis that Egypt rejected,<sup>17</sup> and the 1958 Soviet ultimatum during the Berlin Crisis that the United States and its allies rejected<sup>18</sup> would be considered non-coercive because they failed to cause the target state to

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13. For an example of this approach, see Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 441–45 (Sidney Morgenbesser et al. eds., 1969).

14. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 320 (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0] (“[A]n act is coercive so long as there is a causal nexus to an infringement on the internal or external affairs of the target State . . .”); Nicholas Tsagourias, *Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace*, EUR. J. INT’L L.: EJIL: TALK! (Aug. 26, 2019), <https://www.ejiltalk.org/electoral-cyber-interference-self-determination-and-the-principle-of-non-intervention-in-cyberspace/#more-17430> (“Coercion as the defining element of intervention implies compulsion in the sense that one state compels another state to take a particular course of action against its will.”).

15. See *infra* pp. 51–54.

16. HOLGER H. HERWIG, *THE FIRST WORLD WAR: GERMANY AND AUSTRIA-HUNGARY 1914-1918*, at 19 (2nd ed. 2014).

17. S. Ilan Troen, *The Protocol of the Sèvres: British/French/Israeli Collusion Against Egypt, 1956*, 1 ISR. STUD. 122, 127 (1996).

18. Hope M. Harrison, *Driving the Soviets up the Wall: A Super-Ally, a Super-power, and the Building of the Berlin Wall 1958-61*, 1 COLD WAR HIST. 53, 53–54 (2000).

modify its behavior in accordance with the demands of the threatening state.

Third, this article argues that, in exceptional circumstances, lawful measures such as offering inducements or withholding benefits may constitute coercion. States use instruments such as economic and military aid, financial support, preferential trade deals, and humanitarian assistance to induce states to alter their policies and modify their behavior. Generally, under international law, states retain the right to either offer or withdraw these benefits. In reality, however, coercion is often exercised through a strategy of carrots and sticks. Threats of harm and offers of benefit are intertwined in a single process of coercion. Thus, this article argues that it is impossible to disentangle the carrots from the sticks and evaluate the elements of a coercive strategy separately. Instead, this article proposes a novel method for testing the legality of practices, such as offering inducements or threatening harm, that are used to pressure states to alter their behavior, and for determining whether these practices constitute coercion. This method diverges from the approach that the ICJ applies.<sup>19</sup> Specifically, this article argues that acts of coercion that violate the prohibition on intervention in the internal or external affairs of states are a “composite breach” of international law. As explained below,<sup>20</sup> composite breaches are a category of violations of international law, the defining characteristic of which is that they consist of separate acts undertaken in furtherance of a single overarching purpose.<sup>21</sup> Therefore, the use of lawful measures—such as offers, benefits, or inducements—in combination with unlawful measures as part of an overall coercive strategy designed to interfere in a state’s *domaine réservé*, would constitute a composite breach of the prohibition on intervention.

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19. As explained throughout this article, in the *Nicaragua Case*, the ICJ opined on and tested the legality of each coercive act or policy that the United States employed against Nicaragua separately. This methodology, this article argues, is inappropriate given the composite nature of breaches of the prohibition on intervention.

20. See *infra* note 254 and accompanying text.

21. For a more general framework of continuing violations, see Joost Pauwelyn, *The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems*, 1995 BRIT. Y.B. INT’L L. 415.

In short, this article defines unlawful intervention as the exercise of coercion (i.e. the use of unlawful instruments of statecraft or a combination of lawful and unlawful instruments) to intervene in matters within the *domaine réservé* of a state. This is true regardless of the impact of the coercive measures on the coerced state or whether these measures are forceful or non-forceful. To provide a comprehensive understanding of coercion, this article also constructs what I call the “coercion continuum.” This includes four categories: military coercion, economic coercion, cyber coercion, and political coercion. Within each of these categories, this article identifies the instruments or policies that, if employed by a state, would constitute coercion.

The section on *military coercion* identifies wars of aggression, armed attacks, uses of force, and threats of force as forms of military coercion. On the other hand, demonstrations of force, such as acquiring and testing new weapons, constructing new military installations, and conducting troop movements and maneuvers, are military activities that states routinely use to generate pressure against other states. This section designates these as lawful military instruments of statecraft.

The *economic coercion* section discusses various practices, including total and partial boycotts, import and export controls, asset freezes and financial sanctions, granting or blocking assistance from international financial institutions and development organizations, the provision or withdrawal of economic aid, and the practice of primary and secondary sanctions. This section argues that, under general international law, none of these instruments of economic statecraft are unlawful. However, because violations of the prohibition of intervention are composite breaches of international law, this section argues that the use of these generally lawful economic measures could violate the prohibition on intervention if used in combination with other unlawful measures as part of an overall policy of unlawful intervention.

The section on *cyber coercion* differentiates between computer network attacks (CNA) and computer network exploitation (CNE). It argues that CNAs that cause physical destruction of sufficient gravity, scale, and effects violate the prohibition on the use of force, the prohibition on intervention, and the principle of state sovereignty. On the other hand, CNAs that interfere with the *domaine réservé* of a state without causing



physical destruction breach the prohibition on intervention and the principle of state sovereignty. However, a CNE that is intended to gain access to a state's computer networks to monitor and possibly exfiltrate information from those networks violates state sovereignty, but not the prohibition on intervention. The *cyber coercion* section also examines the legality of forms of information warfare such as psychological operations (PSYOPs). This section argues that black PSYOPs, which are information operations wherein an actor conceals or misrepresents its identity and disseminates misinformation to interfere in the *domaine réservé* of a state, are coercive and thus unlawful. On the other hand, white PSYOPs, wherein the identity of the actor is not concealed, are permissible forms of propaganda and lawful information operations.

The section on *political coercion* examines the legality of public criticism of foreign governments, public support of domestic opposition groups, and the recognition or withdrawal of recognition of foreign governments. It argues that criticizing the policies or positions of a foreign government, or expressing support for opposition groups, is generally lawful. On the other hand, while states retain discretion regarding whether and when to recognize a government of a foreign state, this section argues that premature recognition of a government that does not exercise effective control over the territory and population of a state constitutes coercion in violation of the prohibition on intervention.

Fully appreciating the nature, processes, and complexity of coercion is not possible through an exclusively abstract or theoretical discussion. In particular, the fact that states often exercise coercion against their adversaries through multiple instruments that are deployed in tandem over an extended period that involves cycles of escalation and de-escalation is best understood by examining real-life crises or situations in which states implemented policies intended to alter the behavior of other states. Therefore, this article commences in Part I with a description of three recent events in which states exercised pressure and engaged in coercion against their adversaries. These are the Russian intervention in the 2016 U.S. presidential election, the 2017 North Korean nuclear crisis, and the 2018 murder of *Washington Post* columnist Jamal Khashoggi. These events will provide a context for the subsequent discussion on coercion. This article will refer to and draw on these

cases to differentiate between lawful pressure and unlawful coercion. These events demonstrate the infinite variety of instruments of statecraft employed by states and show how the conduct of diplomacy often involves the deployment of myriad tools—many of which are lawful and some of which are unlawful—in strategies designed to shape the behavior of allies and adversaries.

Part II of this article outlines the origins and content of the prohibition on intervention and develops a concept of coercion for international law. It engages with philosophical views on coercion and builds on the literature on coercive diplomacy to propose an understanding of coercion as part of the prohibition on intervention. Finally, Part III is dedicated to the coercion continuum, which identifies and discusses the legality of four categories of coercive practices: military coercion, economic coercion, cyber coercion, and political coercion.

## II. TALES OF COERCION

### A. *The Russian Interference in the 2016 U.S. Presidential Election*

On June 16, 2015, Donald J. Trump announced what many thought was an “improbable quest for the Republican nomination” for the presidency of the United States.<sup>22</sup> Less than a year later, sixteen candidates had withdrawn from the Republican Party primaries, making Donald Trump, a real estate mogul and relative political novice, the Republican nominee in the 2016 U.S. presidential elections, in which he faced a seasoned political player: former Secretary of State, U.S. Senator from New York, and First Lady Hillary Clinton.<sup>23</sup> Following the election, the Office of the Director of National Intelligence (ODNI) issued a report based on investigations that the U.S. intelligence community launched on claims of Russian interference in the election that Donald Trump ultimately won. The report found that Russia conducted an “influence campaign” that sought to “undermine public faith in the US dem-

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22. Alexander Burns, *Donald Trump, Pushing Someone Rich, Offers Himself*, N.Y. TIMES (June 16, 2015), <https://www.nytimes.com/2015/06/17/us/politics/donald-trump-runs-for-president-this-time-for-real-he-says.html>.

23. Carl Bialik, *How the Republican Field Dwindled from 17 to Donald Trump*, FIVETHIRTYEIGHT (May 5, 2016), <https://fivethirtyeight.com/features/how-the-republican-field-dwindled-from-17-to-donald-trump>.

ocratic process, denigrate Secretary Clinton, and harm her electability and potential presidency,” and “aspired to help President-elect Trump’s election chances.”<sup>24</sup>

U.S. law enforcement agencies first detected Russian interference with the U.S. electoral process in the fall of 2015.<sup>25</sup> In September, the Federal Bureau of Investigation (FBI) informed the Democratic National Committee (DNC) that Russian hackers had gained access to one of their computers. Two months later, the FBI contacted the DNC again to report that one of their computers was transmitting information to Russia.<sup>26</sup> In February 2016, the Internet Research Agency (IRA), a Russian company that specializes in Internet-influencing operations and that is suspected of having ties to the Russian government, was reported to have instructed its employees to “use any opportunity to criticize Hillary and the rest (except Sanders and Trump—we support them).”<sup>27</sup> Among the instruments that the IRA and other Russian entities reportedly used to influence U.S. public opinion was the dissemination of posts of a political nature on social media platforms such as Facebook, which reportedly reached over 126 million users.<sup>28</sup> This political messaging included untrue or misconstrued information intended to undermine Secretary Clinton’s reputation, and posts and advertisements that disseminated and amplified divi-

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24. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, at ii (2017) [hereinafter ODNI], [https://www.dni.gov/files/documents/ICA\\_2017\\_01.pdf](https://www.dni.gov/files/documents/ICA_2017_01.pdf).

25. Tom Hamburger et al., *Democratic Party Sues Russia, Trump Campaign and WikiLeaks Alleging 2016 Campaign Conspiracy*, WASH. POST (Apr. 20, 2018), [https://www.washingtonpost.com/politics/democratic-party-files-lawsuit-alleging-russia-the-trump-campaign-and-wikileaks-conspired-to-disrupt-the-2016-campaign/2018/04/20/befe8364-4418-11e8-8569-26fda6b404c7\\_story.html](https://www.washingtonpost.com/politics/democratic-party-files-lawsuit-alleging-russia-the-trump-campaign-and-wikileaks-conspired-to-disrupt-the-2016-campaign/2018/04/20/befe8364-4418-11e8-8569-26fda6b404c7_story.html).

26. Jim Sciutto, *How One Typo Helped Let Russian Hackers In*, CNN: POLITICS (June 27, 2017), <https://www.cnn.com/2017/06/27/politics/russia-dnc-hacking-csr/index.html>.

27. April Glaser, *What We Know About How Russia’s Internet Research Agency Meddled in the 2016 Election*, SLATE (Feb. 16, 2018), <https://slate.com/technology/2018/02/what-we-know-about-the-internet-research-agency-and-how-it-meddled-in-the-2016-election.html>.

28. Will Oremus, *Congress Is Asking Facebook, Google, and Twitter All the Right Questions*, SLATE (Oct. 31, 2017), <https://slate.com/technology/2017/10/congress-is-finally-asking-facebook-twitter-and-google-the-right-questions.html>.

sive views on matters such as gun rights, race relations, immigration, and LGBT rights.<sup>29</sup>

By March 2016, political operatives in the United States, including DNC leadership, received hundreds of phishing e-mails. On March 19, John Podesta, the Chairman of the 2016 Hillary Clinton presidential campaign, received one particularly fateful e-mail, which warned Podesta that someone was trying to sign on to his Google account, and instructed him to follow a link to change his password.<sup>30</sup> Podesta's assistant forwarded this e-mail to the DNC information technology (IT) team to ensure that it was not an attempt to hack Podesta's account; however, in a response that some speculate may have "cost Clinton the election," the IT technician who reviewed the message wrote back that "this is a *legitimate* email" instead of an *illegitimate* e-mail, which led Podesta's assistants to click on the link and instantaneously grant Russian hackers access to a decade's worth of Podesta's e-mails.<sup>31</sup>

In April 2016, Russian entities penetrated and monitored activity on electronic servers that the DNC and Democratic Congressional Campaign Committee (DCCC) operated. The DNC IT staff detected evidence that the party's computers and servers had been hacked in April, a finding confirmed by U.S. intelligence agencies and CrowdStrike, a cybersecurity firm hired to investigate the situation, and which maintained that attacks were executed on two separate occasions by COZY BEAR and FANCY BEAR, groups suspected of having links to the Russian government.<sup>32</sup> Despite decommissioning 140 servers, rebuilding eleven servers, and removing and reinstalling software for 180 computers, at a cost of over one million dollars, the damage to the DNC was already done: Russian hack-

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29. Will Oremus, *Russian Operatives Bought U.S. Political Ads on Facebook. Here's Why That's a Big Deal.*, SLATE (Sept. 6, 2017), <https://slate.com/technology/2017/09/why-russian-operatives-buying-american-political-ads-on-facebook-is-such-a-big-deal.html>.

30. Kaveh Waddell, *Why Some People Think a Typo Cost Clinton the Election*, ATLANTIC (Dec. 13, 2016), <https://www.theatlantic.com/technology/archive/2016/12/why-some-people-think-a-typo-cost-clinton-the-election/510572>.

31. Eric Lipton et al., *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. TIMES (Dec. 13, 2016) (emphasis added), <https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html>; *id.*

32. Dmitri Alperovitch, *Bears in the Midst: Intrusion into the Democratic National Committee*, CROWDSTRIKE: BLOG (June 15, 2016), <https://www.crowdstrike.com/blog/bears-midst-intrusion-democratic-national-committee>.

ers had acquired e-mails, backup servers, transcripts of VOIP calls, chats, and troves of data, including opposition research.<sup>33</sup>

It was also alleged that during this period, members of the Trump campaign had begun communicating with individuals either associated with the Russian government or in contact with Russian officials. Investigations undertaken by Robert Mueller, the Special Counsel appointed by the U.S. Department of Justice to investigate any links or coordination between the Trump campaign and the Russian government,<sup>34</sup> revealed that George Papadopoulos, a foreign policy adviser to the Trump campaign, had established links with individuals claiming to have access to the Russian government.<sup>35</sup> Through these contacts, Papadopoulos discussed the effect that Trump's election would have on U.S.-Russian relations, and explored the possibility of arranging a meeting between Russian President Vladimir Putin and Trump; he also established contact with a "over-seas professor, Joseph Mifsud.<sup>36</sup> Mifsud introduced Papadopoulos to Russian individuals who were billed as conduits to senior Russian officials, and in late April 2016, during breakfast in a London hotel, Mifsud informed Papadopoulos that the Russians had "dirt" on Clinton in the form of "thousands of emails."<sup>37</sup> Then, in early May 2017, over drinks in the up-scale Kensington Wine Room in London, Papadopoulos shared the information about the Russian "dirt" with the Australian High Commissioner, who passed on the information to

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33. Brian Barrett, *DNC Lawsuit Reveals Key Details About Devastating 2016 Hack*, WIRED (Apr. 20, 2018), <https://www.wired.com/story/dnc-lawsuit-reveals-key-details-2016-hack>.

34. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html>.

35. Adam Goldman et al., *F.B.I. Sent Investigator Posing as Assistant to Meet with Trump Aide in 2016*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/politics/fbi-government-investigator-trump.html>.

36. Clare Hymes, *George Papadopoulos Asks for Probation for Lying to FBI*, CBS NEWS (Sept. 1, 2018), <https://www.cbsnews.com/news/george-papadopoulos-asks-for-probation-for-lying-to-fbi>.

37. Sharon LaFraniere et al., *How the Russia Inquiry Began: A Campaign Aide, Drinks and Talk of Political Dirt*, N.Y. TIMES (Dec. 30, 2017), <https://www.nytimes.com/2017/12/30/us/politics/how-fbi-russia-investigation-began-george-papadopoulos.html>.

his U.S. counterparts, thus spurring an FBI investigation into claims of Russian hacking of the Democratic Party.<sup>38</sup>

Meanwhile, starting in March and April 2016, and continuing until election night, a barrage of advertisements and postings allegedly launched by Russian entities appeared on social media. These advertisements, which often appeared as sponsored posts on Facebook and other social media websites, were purchased by accounts posing as real or fictitious Americans.<sup>39</sup> These posts attacked Hillary Clinton and tainted her record, especially regarding the attack on the U.S. Consulate in Benghazi. These advertisements also promoted divisive views on issues such as race relations, police brutality, religion, Islam, immigration, access to firearms, and the second amendment, and adopted positions perceived as favorable to or in line with the views of Donald Trump.<sup>40</sup> In May 2018, Democratic members of the U.S. House of Representatives Intelligence Committee released a collection of over 3,000 of these advertisements.<sup>41</sup> The following are examples of the dates, headlines, and content of these advertisements and posts.

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38. *Id.*

39. Alicia Parlapiano & Jasmine C. Lee, *The Propaganda Tools Used by Russians to Influence the 2016 Election*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/interactive/2018/02/16/us/politics/russia-propaganda-election-2016.html>.

40. Nick Penzenstadler et al., *We Read Every One of the 3,517 Facebook Ads Bought by Russians. Here's What We Found*, USA TODAY (May 11, 2018), <https://www.usatoday.com/story/news/2018/05/11/what-we-found-facebook-ads-russians-accused-election-meddling/602319002>; *The Social Media Ads Russia Wanted Americans to See*, POLITICO (Nov. 1, 2017), <https://www.politico.com/story/2017/11/01/social-media-ads-russia-wanted-americans-to-see-244423>.

41. Benjamin Siegel, *House Democrats Release Thousands of Russian-Linked Facebook Ads*, ABC NEWS (May 10, 2018), <https://abcnews.go.com/Politics/house-democrats-release-thousands-russian-linked-facebook-ads/story?id=55067581>.

2019]

ON COERCION IN INTERNATIONAL LAW

15

**Being Patriotic**

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 Like Page

Boston police shot and killed a man wearing body armor and wielding an assault rifle who critically injured two officers responding to a domestic disturbance call late Wednesday, according to Police Commissioner William Evans.

A gun battle raged at an East Boston home as a suspect, Kirk Figueroa, 33, of East Boston, critically injured two Boston police officers late on October 12. He was then shot and killed by other officers who ran into the home to drag out their wounded col... See More



**Being Patriotic**  
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Patricia Smith, a mother of Benghazi attack victim's made some statements this Thursday broadcast on Fox Business Network. She said there is "a special place in hell" for people like Hillary "and I hope she enjoys it there". Smith added in her interview: "I want Hillary to talk to me personally, and tell me why there was no security there, when they were asked for it. I know this, because I spoke to my son. That day, he says he was really scared, because he saw the 17 ... See More



771 Reactions 99 Comments 304 Shares


 Like  Comment  Share



Instagram

american.veterans  
Sponsored

HILLARY ASKS "WHAT DIFFERENCE DOES IT MAKE?"




FOLLOW VETERANS\_US  
IF YOU KNOW THE DIFFERENCE

Learn More


♡ 💬 📌

american.veterans Killary Clinton will never understand what it feels like to lose the person you love for the sake of your country. Honoring the high cost ... more


Suggested Page

**Secured Borders**  
Sponsored

Every man should stand for our borders! Join!



**Secured Borders**  
News & Media Website  
135,301 people like this.

 Like Page

**Army of Jesus**  
Sponsored · 

 Like Page

Today Americans are able to elect a president with godly moral principles. Hillary is a Satan, and her crimes and lies had proved just how evil she is. And even though Donald Trump isn't a saint by any means, he's at least an honest man and he cares deeply for this country. My vote goes for him!

**SATAN: IF I WIN CLINTON WINS!**  
**JESUS: NOT IF I CAN HELP IT!**



**PRESS 'LIKE' TO HELP JESUS WIN!**

97 Reactions 15 Comments 29 Shares

 Like  Comment  Share

April 6, 2016: “You know, a great number of black people support us saying that #HillaryClintonIsNotMyPresident”

April 7, 2016: “I will say no to Hillary Clinton / I say no to manipulation”

April 19, 2016: “JOIN our #HillaryClintonForPrison2016”

May 10, 2016: “Donald wants to defeat terrorism . . . Hillary wants to sponsor it”

May 19, 2016: “Vote Republican, vote Trump, and support the Second Amendment!”

May 24, 2016: “Hillary Clinton Doesn’t Deserve the Black Vote”

June 7, 2016: “Trump is our only hope for a better future!”

July 20, 2016: “Ohio Wants Hillary 4 Prison”

August 4, 2016: “Hillary Clinton has already committed voter fraud during the Democrat Iowa Caucus.”

August 10, 2016: “We cannot trust Hillary to take care of our veterans!”

October 14, 2016: “Among all the candidates Donald Trump is the one and only who can defend the police from terrorists.”<sup>42</sup>

In May 2016, it seemed that entities allegedly associated with the Russian government exfiltrated large volumes of data from the DNC servers: On June 12, WikiLeaks founder Julian Assange revealed during a televised interview that his website had acquired and planned to publish e-mails that belonged or related to Hillary Clinton. A few days later, the *Washington Post* reported that Russian hackers had acquired information from the DNC, including opposition research on Donald Trump and e-mails from the Clinton campaign.<sup>43</sup> Donald Trump immediately issued a statement suggesting that the DNC hacked itself to “distract from the many issues facing their deeply flawed candidate and failed party leader.”<sup>44</sup> The next day, June 15, a hacker using the moniker Guccifer 2.0 announced that he was solely responsible for hacking the DNC servers and for

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42. *Russia-Trump Inquiry: Full Text of Muller’s Indictment*, BBC News (Feb. 16, 2018), <https://www.bbc.com/news/world-us-canada-43091945>; *The Social Media Ads Russia Wanted Americans to See*, *supra* note 40.

43. *2016 Presidential Campaign Hacking Fast Facts*, CNN (May 2, 2019), <https://www.cnn.com/2016/12/26/us/2016-presidential-campaign-hacking-fast-facts/index.html>.

44. Louis Nelson, *Trump Accuses DNC of ‘Hacking’ Its Own Oppo Research on Him*, POLITICO (June 15, 2016), <https://www.politico.com/story/2016/06/donald-trump-opposition-224397>.

exfiltrating the Clinton campaign e-mails.<sup>45</sup> U.S. websites such as *Gawker* and *The Smoking Gun* disseminated e-mails and documents acquired by Guccifer 2.0.<sup>46</sup> The ODNI report released after the presidential election stated, however, that Guccifer 2.0 was a front for operations undertaken by Russian intelligence against the Democratic Party and the Clinton campaign.<sup>47</sup> Further, in June 2017, the website DCleaks—which, coincidentally, or perhaps, revealingly, was registered on April 19, the day following the April 18 hack of the DNC servers—went live and began publishing e-mails leaked from the DNC, as well as messages from other e-mail accounts, including the email accounts of North Atlantic Treaty Organization (NATO) commanders and the U.S. military’s United States European Command.<sup>48</sup>

On July 22, the eve of the Democratic National Convention, WikiLeaks published 20,000 e-mails from accounts belonging to DNC officials, revealing that party leadership had conspired to undermine Secretary Clinton’s opponent for the Democratic nomination for presidency, Senator Bernie Sanders.<sup>49</sup> This prompted the DNC Chairwoman, Representative Debbie Wasserman Shultz, to resign.<sup>50</sup> On July 27, while campaigning in Florida, Donald Trump said: “Russia, if you’re listening, I hope you’re able to find the 30,000 emails that are missing . . . I think you will probably be rewarded mightily by

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45. Tal Kopan, *DNC Hack: What You Need to Know*, CNN: POLITICS (June 21, 2016), <https://www.cnn.com/2016/06/21/politics/dnc-hack-russians-guccifer-claims/index.html>.

46. Thomas Brewster, *Russian Hackers Targeted Hillary Clinton Campaign Google Accounts*, FORBES (June 16, 2016), <https://www.forbes.com/sites/thomasbrewster/2016/06/16/russian-hackers-hillary-clinton-google-gmail-attacks/#c0edd7039c7d>.

47. ODNI, *supra* note 24, at 2–3.

48. Elliot Hannon, *Russian Hackers Reportedly Tried “DC Leaks” Site to Leak Emails Before Moving on to WikiLeaks*, SLATE (Aug. 11, 2016), <https://slate.com/news-and-politics/2016/08/russian-hackers-tried-dc-leaks-site-for-emails-before-wikileaks.html>.

49. Theodore Schleifer & Eugene Scott, *What Was in the DNC Email Leak?*, CNN: POLITICS (July 25, 2016), <https://www.cnn.com/2016/07/24/politics/dnc-email-leak-wikileaks/index.html>.

50. Jonathan Martin & Alan Rappeport, *Debbie Wasserman Shultz to Resign from D.N.C. Post*, N.Y. TIMES (July 24, 2016), <https://www.nytimes.com/2016/07/25/us/politics/debbie-wasserman-schultz-dnc-wikileaks-emails.html>.

our press.”<sup>51</sup> That same day, Russian hackers reportedly targeted servers used by Hillary Clinton’s private office for the first time.<sup>52</sup>

In mid-August 2016, Roger Stone, an acquaintance and adviser of Donald Trump, tweeted that John Podesta would soon go “through his ‘time in the barrel,’” a claim that echoed assertions that he made on several occasions to have been in contact with both Guccifer 2.0 and Julian Assange.<sup>53</sup> WikiLeaks also initiated contact with Donald Trump Jr., Donald Trump’s eldest son. Just before midnight on September 20, 2017, Trump Jr. received messages from WikiLeaks, which included a suggestion that the Trump campaign “comment on/push” a quote attributed to Clinton that she called for conducting a drone strike against WikiLeaks; Trump Jr. also inquired about rumors of a new set of leaks that WikiLeaks was due to publish.<sup>54</sup>

On the morning of Friday, October 7, 2017 the United States officially accused Russia of interfering in the ongoing presidential election campaign: A statement from the Director of National Intelligence and the Department of Homeland Security asserted that the hacks and leaks of the previous weeks and months were “intended to interfere with the U.S. election process,” and added: “We believe, based on the scope and sensitivity of these efforts, that only Russia’s senior-most officials could have authorized these activities . . . .”<sup>55</sup> Shortly afterward, reporters released a recording of Donald Trump in

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51. Ashley Parker & David E. Sanger, *Donald Trump Calls on Russia to Find Hillary Clinton’s Missing Emails*, N.Y. TIMES (July 27, 2016), <https://www.nytimes.com/2016/07/28/us/politics/donald-trump-russia-clinton-emails.html>.

52. Michael S. Schmidt, *Trump Invited the Russians to Hack Clinton. Were They Listening?*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/trump-russia-clinton-emails.html>.

53. Matthew Rosenberg & Maggie Haberman, *Trump Adviser Had Twitter Contact with Figure Tied to Russians*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/politics/roger-stone-trump-adviser-russia.html>.

54. Sophie Tatum, *Donald Trump Jr. Releases Exchanges with WikiLeaks*, CNN: POLITICS (Nov. 14, 2017), <https://www.cnn.com/2017/11/13/politics/wikileaks-donald-trump-jr-2016-election/index.html>.

55. David E. Sanger & Charlie Savage, *U.S. Says Russia Directed Hacks to Influence Elections*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html>.

which he bragged that his fame and fortune enabled him to behave inappropriately towards women.<sup>56</sup> This recording, which came to be known as the Access Hollywood tape, caused a major crisis for the Trump campaign, with major Republican figures calling on their party's nominee to drop out of the race for the presidency.<sup>57</sup>

Hours after that damaging revelation, WikiLeaks published thousands of e-mails acquired from John Podesta's e-mail account, and continued to publish these leaks up through the eve of the election.<sup>58</sup> These e-mails revealed the connections between Hillary Clinton and Wall Street; detailed aspects of the financial dealings of the Clinton Foundation; included references to her disconnect from the middle class; outlined similarities between her and Florida's Republican Governor Jeb Bush's views on the economy; and listed ideas for attacking Senator Bernie Sanders.<sup>59</sup> Although these leaks did not reveal unlawful acts, they diverted attention from the Access Hollywood tape scandal that was racking the Trump campaign. Further, they provided the Republican candidate with political fodder with which to describe and deride Clinton as an elitist establishment figure who was detached from normal Americans, a political message that resonated with some voters in the American heartland.<sup>60</sup>

In addition to electronic hacks, strategically timed leaks, and divisive political messaging by anonymous actors and un-

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56. *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

57. David Jackson, *Trump's Groping Comments Leave Campaign in Crisis*, USA TODAY (Oct. 8, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/10/08/trump-women-video-billy-bush-republicans/91782340>.

58. David Smith, *WikiLeaks Emails: What They Revealed About the Clinton Campaign's Mechanics*, GUARDIAN (Nov. 6, 2016), <https://www.theguardian.com/us-news/2016/nov/06/wikileaks-emails-hillary-clinton-campaign-john-podesta>.

59. Kyle Cheney & Sarah Wheaton, *The Most Revealing Clinton Campaign Emails in WikiLeaks Release*, POLITICO (Oct. 7, 2016), <https://www.politico.com/story/2016/10/john-podesta-wikileaks-hacked-emails-229304>.

60. See Thomas Frank, *Forget the FBI Cache; the Podesta Emails Show How America Is Run*, GUARDIAN (Oct. 31, 2016), <https://www.theguardian.com/commentisfree/2016/oct/31/the-podesta-emails-show-who-runs-america-and-how-they-do-it> (providing insight into how Americans in the heartland felt about the perceived elitism of Clinton).

identified entities, Russia deployed various traditional media tools, especially the television channel Russia Today, in its efforts to interfere with the 2016 U.S. presidential election. Russia Today is, according to one scholar, “[t]he most visible face of Russian propaganda in the United States.”<sup>61</sup> The ODNI report of January 7, 2017, highlighted Russia Today’s consistently negative coverage of Hillary Clinton, its support of Donald Trump’s campaign, and its portrayal of Trump’s election as a “vindication of [Russian President] Putin’s advocacy of global populist movements . . . and the latest example of Western liberalism’s collapse.”<sup>62</sup> Russia Today also propagated false and denigrating information about the Democratic candidate, such as programming that accused her of corruption and suggested that she had connections to Islamic extremist groups, including ISIS; this and other Russia Today programming were often republished on right-wing groups’ websites and social media pages, which increased the dispersal and readership of Russia Today.<sup>63</sup>

#### B. *The 2017 North Korean Nuclear Crisis*

On January 1, 2017, Kim Jong-un, the Supreme Leader of North Korea, delivered his News Year’s Address to the nation. In addition to parading his country’s achievements in industry, mining, agriculture, and every other area of economic and social activity, Kim Jong-un declared that “our country achieved the status of a nuclear power, a military giant, in the East which no enemy, however formidable, would dare to provoke.”<sup>64</sup> Moreover, he announced that North Korea had “entered the final stage of preparation for the test launch of intercontinental ballistic missile [sic].”<sup>65</sup>

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61. Sarah Oates, *A Perfect Storm: American Media, Russian Propaganda*, 116 CURRENT HIST. 282, 283 (2017).

62. ODNI, *supra* note 24, at 4.

63. YOCHAI BENKLER ET AL., NETWORK PROPAGANDA 141–42, 163–64, 244 (2018).

64. Kim Jong-Un, Supreme Leader of North Korea, 2017 New Year’s Address (Jan. 1, 2017), [https://www.ncnk.org/sites/default/files/KJU\\_2017\\_New\\_Years\\_Address.pdf](https://www.ncnk.org/sites/default/files/KJU_2017_New_Years_Address.pdf); Louise Moon, *Pentagon Rebukes North Korea over Claim It Will Test Missile that Could Reach US*, TELEGRAPH (Jan. 2, 2017), <https://www.telegraph.co.uk/news/2017/01/02/pentagon-rebukes-north-korea-claim-will-test-missile-could-reach>.

65. Kim Jong-Un, *supra* note 67.



The significance of this announcement was that, while North Korea had acquired nuclear weapons and conducted, by January 2017, several nuclear tests—the latest of which was on September 9, 2016<sup>66</sup>—it did not possess intercontinental ballistic missiles (ICBMs) capable of reaching the continental United States. Since its first missile tests in 1984, North Korea has developed short-range, medium-range, and intermediate-range ballistic missiles. While the operational capabilities of these missiles is not definitively known, it was assumed that North Korea had the missile technology to target South Korea and Japan.<sup>67</sup> After Kim Jong-un's ascent to power in Pyongyang, however, North Korea dramatically accelerated its missile research, development, and testing. While the previous two Supreme Leaders of North Korea, Kim Il-sung and Kim Jong-il had conducted fifteen and sixteen missile tests respectively, Kim Jong-un oversaw almost ninety missile tests from 2011 until late 2017.<sup>68</sup> Moreover, unlike his father and grandfather, who tested missiles almost exclusively from the Musudan-ri facility in northeastern North Korea, Kim Jong-un's tests were conducted from locations throughout the country, thus signaling the maneuverability of these military assets and, in turn, their increased ability to avoid destruction during preemptive or retaliatory attacks.<sup>69</sup>

By announcing that it was close to acquiring ICBMs capable of reaching the United States, North Korea threatened to alter the strategic balance in the region. North Korea's threats to the United States would not be limited to U.S. bases, assets, and allies in the region, but would extend to population cen-

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66. *N. Korea: Latest Test Brings Nuke Program to "Higher Level,"* CBS News (Sept. 9, 2016), <https://www.cbsnews.com/news/north-korea-says-it-conducted-another-nuclear-test>.

67. See Hans M. Kristensen & Robert S. Norris, *North Korean Nuclear Capabilities*, 2018, 74 BULL. ATOMIC SCIENTISTS 41, 42–44 (2018) (discussing North Korea's ICBM programs).

68. Joshua Berlinger, *North Korea's Missile Tests: What You Need to Know*, CNN (Dec. 3, 2017), <https://www.cnn.com/2017/05/29/asia/north-korea-missile-tests/index.html>.

69. See Shea Cotton, *Understanding North Korea's Missile Tests*, NUCLEAR THREAT INITIATIVE (Apr. 24, 2017), <https://www.nti.org/analysis/articles/understanding-north-koreas-missile-tests> ("Although North Korea's missile program originated with a few, often disparaged tests in an isolated corner of the country, it has evolved into an arsenal of delivery systems capable of deploying a credible nuclear threat.").

ters in North America, thus undermining the credibility of U.S. assurances of protection to its regional allies. As one analyst put it bluntly: “would Donald Trump trade Trump Tower for Seoul or Tokyo?”<sup>70</sup> It was, therefore, unsurprising that on January 2, 2017, President-elect Donald Trump tweeted: “North Korea just stated that it is in the final stages of developing a nuclear weapon capable of reaching parts of the U.S. It won’t happen!”<sup>71</sup>

Shortly after Donald Trump’s inauguration as the forty-fifth President of the United States, tensions began to rise on the Korean peninsula. Commercial satellite imagery indicated that North Korea was restarting a reactor designed to produce weapon-grade plutonium after suspending it in 2015. Then, on January 25, a senior North Korean diplomat declared that his country was prepared to test an intercontinental ballistic missile “at any time, at any place,” but added that “[o]ur measures to bolster our nuclear arsenal are all defensive in nature—to defend our sovereignty and to cope with the persistent nuclear blackmail and threats by the United States against our country.”<sup>72</sup> Several days later, U.S. Secretary of Defense, James Mattis, visited Seoul and Tokyo on his first overseas trip, which was intended to reassure U.S. allies after President Trump’s comments on the campaign trail cast doubt on the incoming President’s commitment to defend South Korea and Japan.<sup>73</sup> Secretary Mattis also reaffirmed the U.S. commitment to deploy the Terminal High Altitude Area Defense (THAAD) system, an advanced missile defense system, in South Korea;

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70. Jeffrey Lewis, *North Korea Is About to Test a Missile That Can Reach Trump Tower*, FOREIGN POL’Y (June 12, 2017), <https://foreignpolicy.com/2017/06/12/north-korea-is-about-to-test-a-missile-that-can-reach-trump-tower>.

71. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2017, 3:05 PM), <https://twitter.com/realDonaldTrump/status/816057920223846400>.

72. *North Korea Has Restarted Reactor to Make Plutonium, Fresh Images Suggest*, GUARDIAN (Jan. 27, 2017) <https://www.theguardian.com/world/2017/jan/28/north-korea-has-restarted-reactor-to-make-plutonium-fresh-images-suggest>; Bill Neely & Mark Hanrahan, *North Korea Ready to Test Fire ICBM ‘Any Time, Any Place’: Official*, CBS NEWS (Jan. 25, 2017), <https://www.nbcnews.com/news/world/north-korea-ready-test-fire-icbm-any-time-any-place-n712026>.

73. Michael R. Gordon & Choe Sang-Hun, *Jim Mattis, in South Korea, Tries to Reassure an Ally*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/world/asia/james-mattis-us-korea-thaad.html>.

Beijing opposed this, while Pyongyang described it as part of a plot for “preemptive attack on the North.”<sup>74</sup>

Days later, North Korea delivered on its threat to test a new missile. On February 12, while President Trump was hosting Japanese Prime Minister Shinzo Abe at his Mar-a-Lago Resort in Florida, North Korea fired the intermediate-range missile Pukguksong-2.<sup>75</sup> Compared to his usually bombastic rhetoric, President Trump’s response to this missile test was restrained. Standing next to his Japanese guest, the President read a twenty-three-word statement condemning the missile test and reaffirming U.S. support of Japan.<sup>76</sup> South Korean media also announced that the United States would bolster its military presence in region by deploying an additional nuclear submarine and F-22 stealth fighter formations in South Korea.<sup>77</sup>

On March 6, North Korea test-fired four more ballistic missiles that landed 200 nautical miles off the Japanese coast. While these were not the ICBMs that Kim Jong-un had boasted about during his New Year’s address, the range and trajectory of these missiles suggested that these tests were simulated attacks on U.S. bases in Japan.<sup>78</sup> These tests were also seen as a response to the 2017 U.S.-South Korean Foal Eagle exercises that commenced on March 1. While the United States described these exercises as “defensive in nature,”<sup>79</sup> Foal Eagle is widely considered “a rehearsal for the U.S.-Republic of Korea

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74. Bard Lendon, *North Korea Accuses US, South Korea of Plotting Nuclear Attack*, CNN (Feb. 3, 2017), <https://www.cnn.com/2017/02/03/asia/mattis-us-north-korea-thaad-missile-defense/index.html>.

75. *For the First Time Since Trump Took Office, N. Korea Fires Ballistic Missile*, CBS NEWS (Feb. 13, 2017), <https://www.cbsnews.com/news/north-korea-fires-missile-into-sea-south-koreas-military-says>.

76. Peter Baker, *Trump Responds to North Korean Missile Launch with Uncharacteristic Restraint*, N.Y. TIMES (Feb. 12, 2017), <https://www.nytimes.com/2017/02/12/us/politics/donald-trump-north-korea-missile.html>.

77. *U.S. to Send Strategic Assets to Military Drill with S. Korea*, YONHAP NEWS AGENCY (Feb. 14, 2017), <https://en.yna.co.kr/view/AEN20170214003600315>.

78. Ralph Ellis & Ben Westcott, *Missile Launch: Was North Korea Practicing to Strike US Bases in Japan?*, CNN (Mar. 7, 2017), <https://www.cnn.com/2017/03/06/asia/north-korea-missiles-kim-jong-un/index.html>.

79. Terri Moon Cronk, *U.S., South Korea Launch Annual Foal Eagle Exercise*, U.S. DEP’T DEF. (Mar. 3, 2017), <https://www.defense.gov/Newsroom/News/Article/Article/1102331/us-south-korea-launch-annual-foal-eagle-exercise>.

war plan, known as OPLAN 5015, which has been described as a pre-emptive strike against North Korea, including its leadership, as a retaliation for some provocation.”<sup>80</sup>

While President Trump did not publicly comment on this test, an anonymous administration official told reporters that the President described North Korea as the “greatest immediate threat” facing the United States.<sup>81</sup> It was also reported that the President’s national security aides reviewed various options to derail the North Korean missile program, including intensifying cyber operations that the previous administration, under President Barack Obama, initiated, and which were credited with an increase in the rate of failure of North Korean missile tests.<sup>82</sup>

During April and May 2017, North Korea tested several short-range and intermediate-range ballistic missiles, some of which failed shortly after launch, after which the U.N. Security Council, consistent with its responses to tests of the previous months, issued press statements condemning these tests and reaffirming North Korea’s obligations pursuant to Security Council resolutions to denuclearize and dismantle its missile program.<sup>83</sup> As with the previous tests since his inauguration, President Trump’s reaction to this round of missile tests was measured. Secretary of Defense Mattis stated that “[t]he presi-

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80. Jeffrey Lewis, *North Korea Is Practicing for Nuclear War*, FOREIGN POL’Y (Mar. 9, 2017), <https://foreignpolicy.com/2017/03/09/north-korea-is-practicing-for-nuclear-war>.

81. Jake Tapper et al., *Top Source: Trump Believes North Korea Is Greatest Threat*, CNN: POLITICS (Feb. 28, 2017), <https://www.cnn.com/2017/02/28/politics/north-korea-obama-trump-threat/index.html>.

82. David E. Sanger & William J. Broad, *Trump Inherits a Secret Cyberwar Against North Korean Missiles*, N.Y. TIMES (Mar. 4, 2017), <https://www.nytimes.com/2017/03/04/world/asia/north-korea-missile-program-sabotage.html>.

83. Press Release, Security Council, Security Council Press Statement on Democratic People’s Republic of Korea’s Ballistic Missile Launch, U.N. Press Release SC/12780-DC/3696 (Apr. 6, 2017); Press Release, Security Council, Security Council Press Statement on Democratic People’s Republic of Korea’s Ballistic-Missile Launch, U.N. Press Release SC/12801-DC/3698 (Apr. 20, 2017); Press Release, Security Council, Security Council Press Statement on Democratic People’s Republic of Korea’s Ballistic Missile Launches, U.N. Press Release SC/12821-DC/3704 (May 15, 2017); Press Release, Security Council, Security Council Press Statement on Democratic People’s Republic of Korea’s Ballistic Missile Launch, U.N. Press Release SC/12831-DC/3705 (May 22, 2017).

dent and his military team are aware of North Korea's most recent unsuccessful missile launch. The president has no further comment."<sup>84</sup> Vice President Mike Pence, however, used more bellicose language. Speaking from South Korea after visiting the demilitarized zone, the Vice President declared that "the era of strategic patience is over."<sup>85</sup>

On April 15, North Korea held a military parade to commemorate Kim Il-sung's birthday, otherwise known as "the Day of the Sun." During the parade, North Korea showcased some of the missiles that it had tested earlier in the year and during previous years, which were mounted on Transporter Erector Launchers, which are vehicles used to launch ballistic missiles.<sup>86</sup> This signaled the maneuverability of North Korea's ballistic missiles and its ability to preserve its nuclear second-strike capability. More importantly, at the end of the parade, previously unseen missiles that were widely assumed to be the ICBMs mentioned in Kim Jong-un's New Year's address were displayed.<sup>87</sup>

In late April 2017, in an interview marking his first hundred days in office, President Trump reflected on his strategy in North Korea. Recognizing that China enjoyed considerable influence with North Korea, the President signaled the possibility of declaring China a currency manipulator to induce Beijing to exercise pressure over North Korea, adding, "if I can use trade as a method to get China, because I happen to think that China does have reasonably good powers over North Korea . . . if China can help us with North Korea . . . that's worth making not as good a trade deal for the United States . . .

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84. Choe Sang-Hun et al., *North Korean Missile Launch Fails, and a Show of Strength Fizzles*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/15/world/asia/north-korea-missiles-pyongyang-kim-jong-un.html>.

85. Justin McCurry, *Mike Pence Warns North Korea: Do Not Test Trump's Resolve*, GUARDIAN (Apr. 16, 2017), <https://www.theguardian.com/world/2017/apr/17/mike-pence-north-korea-missile-nuclear-strategic-patience-is-over>.

86. Ankit Panda, *North Korea's 2017 Military Parade Was a Big Deal. Here Are the Major Takeaways*, DIPLOMAT (Apr. 15, 2017), <https://thediplomat.com/2017/04/north-koreas-2017-military-parade-was-a-big-deal-here-are-the-major-takeaways>.

87. *Id.*

right?”<sup>88</sup> Then, in a seemingly positive gesture towards Kim Jong-un, President Trump called the North Korean leader a “pretty smart cookie.”<sup>89</sup> In another interview the following month, President Trump did not rule out the possibility of direct talks with Kim Jong-un, saying, “I would speak to him, I would have no problem speaking to him.”<sup>90</sup>

By late June, President Trump’s hope that China would succeed in persuading North Korea to make concessions on its nuclear program had dissipated. Tweeting on the eve of a high-level U.S.-Chinese meeting, the President said: “While I greatly appreciate the efforts of President Xi & China to help with North Korea, it has not worked out. At least I know China tried!”<sup>91</sup> Days later, the U.S. Treasury announced the imposition of sanctions on the Bank of Dandong, a Chinese bank identified as operating as a conduit for illicit North Korean financial activity.<sup>92</sup>

On July 4, 2017, North Korea achieved a major milestone in its ballistic missile program. In what Kim Jong-un called an Independence Day gift to President Trump, North Korea successfully launched the Hwasong-14 ICBM.<sup>93</sup> While the exact capabilities of the missile were the subject of debate among experts, it was clear that North Korea had acquired the capability to target North America.<sup>94</sup> Twenty-four days later, on July 28, North Korea test-fired a second Hwasong-14 ICBM, which

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88. John Dickerson, *Full Transcript: President Donald Trump’s Interview with “Face the Nation,”* CBS NEWS (Apr. 30, 2017), <https://www.cbsnews.com/news/trump-interview-full-transcript-face-the-nation>.

89. *Id.*

90. Alan Rappeport, *Donald Trump Says He’s Willing to Talk Directly with Kim Jong-Un*, N.Y. TIMES (May 17, 2016), <https://www.nytimes.com/2016/05/18/us/politics/kim-jong-un-donald-trump.html>.

91. Donald J. Trump (@realDonaldTrump), TWITTER (June 20, 2017, 11:38 AM), <https://twitter.com/realdonaldtrump/status/877234140483121152>.

92. Press Release, U.S. Dep’t of the Treasury, Treasury Acts to Increase Economic Pressure on North Korea and Protect the U.S. Financial System (June 29, 2017), <https://www.treasury.gov/press-center/press-releases/Pages/sm0118.aspx>.

93. Choe Sang-Hun, *U.S. Confirms North Korea Fired Intercontinental Ballistic Missile*, N.Y. TIMES (July 4, 2017), <https://www.nytimes.com/2017/07/04/world/asia/north-korea-missile-test-icbm.html>.

94. Jeffrey Lewis, *Forget Alaska. North Korea Might Soon Be Able to Nuke New York.*, DAILY BEAST (July 6, 2017), <https://www.thedailybeast.com/forget-alaska-north-korea-might-soon-be-able-to-nuke-new-york>.

experts estimated had a range that covers most of the continental United States.<sup>95</sup>

A White House statement issued after the launch of these ICBMs called it a “reckless and dangerous action,” and affirmed that the United States “will take all necessary steps to ensure the security of the American homeland and protect our allies in the region.”<sup>96</sup> The principal target of President Trump’s ire after these tests was China. In a series of tweets and statements during press conferences in Warsaw and Hamburg, the President claimed that trade between China and North Korea grew by forty percent during 2017, and complained: “So much for China working with us – but we had to give it a try!” Later that month, the President escalated his rhetoric against China, tweeting: “I am very disappointed in China. Our foolish past leaders have allowed them to make hundreds of billions of dollars a year in trade, yet they do NOTHING for us with North Korea, just talk. We will no longer allow this to continue. China could easily solve this problem!”<sup>97</sup> On the ground, U.S. and South Korean forces responded to the North Korean tests by conducting live-fire exercises, which included test-firing the South Korean Hyunmoo II missile.<sup>98</sup>

On August 3, U.S. National Security Adviser General H.R. McMaster hinted at the possibility of “preventive war” that would “prevent North Korea from threatening the United

95. Michael Sheetz & Jeff Daniels, *More Than Half the Continental US Is Within Range of Latest North Korean Missile Test, Defense Experts Say*, CNBC (July 28, 2017), <https://www.cnbc.com/2017/07/28/half-the-continental-us-within-range-of-latest-north-korean-missile.html>.

96. Press Release, White House, Statement from the President on North Korea’s Second ICBM Launch (July 28, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-north-koreas-second-icbm-launch>.

97. Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2017, 4:35 PM), <https://twitter.com/realdonaldtrump/status/891442016294494209?lang=HR>; Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2017, 4:29 PM), <https://twitter.com/realdonaldtrump/status/891440474132795392>; Donald J. Trump (@realDonaldTrump), TWITTER (July 5, 2017, 4:21 AM), <https://twitter.com/realdonaldtrump/status/882560030884716544?lang=en>.

98. Carla Babb & Steve Herman, *US, South Korea Fire Missiles in Response to North Korea Ballistic Missile Launch*, VOICE AM. (July 28, 2017), <https://www.voanews.com/east-asia-pacific/us-south-korea-fire-missiles-response-north-korea-ballistic-missile-launch>.

States with a nuclear weapon,” and noted that “the president’s been very clear about it . . . he’s not gonna tolerate North Korea being able to threaten the United States. . . . It’s intolerable from the president’s perspective. So of course, we have to provide all options to do that. And that includes a military option.”<sup>99</sup> On August 5, acting under Chapter VII of the U.N. Charter, the U.N Security Council adopted Resolution 2371, which condemned the July 3 and 28 missile tests, determined that they constituted a threat to international peace and security, and strengthened sanctions against North Korea by imposing bans on exporting coal, iron and iron ore, lead and lead ore, and seafood.<sup>100</sup>

Then, on August 8, echoing President Truman’s warning that Japan would suffer “a rain of ruin” if it did not surrender during World War II, President Trump warned that North Korea would be exposed to “fire and fury” if it threatened the United States.<sup>101</sup> News sources reported that the President’s comments were neither vetted nor prepared, and that they took the national security staff by surprise, with one media outlet saying that “President Donald Trump went rogue.”<sup>102</sup> Hours after the President’s “fire and fury” comments, North Korea state media released a statement suggesting that it was considering plans to attack the U.S. territory of Guam and declared that “preemptive strike is no longer the monopoly of the US”<sup>103</sup> In response, President Trump said that his “fire and fury” comments were not “tough enough,” and warned that if

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99. Jason Le Miere, *U.S. Prepared to Launch 'Preventive War' Against North Korea, Says H.R. McMaster*, NEWSWEEK (Aug. 5, 2017), <https://www.newsweek.com/us-north-korea-war-mcmaster-646942>.

100. Previous resolutions had permitted the export of some of these items for “livelihood purposes.” *Chronology of Events: DPRK (North Korea)*, SECURITY COUNCIL REP., <https://www.securitycouncilreport.org/chronology/dprk-north-korea.php> (last updated Sept. 10, 2019).

101. Jeva Lange, *Trump’s ‘Fire and Fury’ Comment Was an Echo of Harry Truman’s Address After He Dropped the Atomic Bomb on Hiroshima*, WEEK (Aug. 9, 2017), <https://theweek.com/speedreads/717284/trumps-fire-fury-comment-echo-harry-trumans-address-after-dropped-atomic-bomb-hiroshima>.

102. Cecilia Vega et. al., *The Story Behind Trump’s ‘Fire and Fury’ Comments on North Korea*, ABC NEWS (Aug. 9, 2017), <https://abcnews.go.com/US/story-trumps-fire-fury-comments-north-korea/story?id=49119059>.

103. Zachary Cohen & Euan McKirdy, *North Korea Threatens Strike on Guam*, CNN: POLITICS (Aug. 9, 2017), <https://www.cnn.com/2017/08/08/politics/north-korea-considering-guam-strike-trump/index.html>.



North Korea continued to threaten the United States, “things will happen to them like they never thought possible.”<sup>104</sup> Continuing this “war of words,” a senior North Korean army officer described President Trump as “a guy bereft of reason,” and warned that “only absolute force can work on him.”<sup>105</sup> Further escalating his rhetoric, the next day the President tweeted: “Military solutions are now fully in place, locked and loaded, should North Korea act unwisely.”<sup>106</sup>

The signals from the Trump Administration were not uniformly belligerent. U.S. Secretary of State Rex Tillerson downplayed the danger of war and counseled Americans to “sleep well at night” during a refueling stop in Guam.<sup>107</sup> Later that month, Secretaries Mattis and Tillerson further reaffirmed this conciliatory message by coauthoring an op-ed in which they indicated that the U.S. objective in North Korea was denuclearization, not regime change, and expressed commitment to pursue that objective through diplomatic means.<sup>108</sup>

On September 3, North Korea undertook its sixth and most powerful nuclear test, which its government declared was a hydrogen bomb.<sup>109</sup> President Trump called the test “hostile and dangerous,” and when asked by reporters whether the United States would attack North Korea, the President responded: “we’ll see.”<sup>110</sup> The President’s harshest criticism,

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104. Nick Allen, *Donald Trump Says North Korea ‘Fire and Fury’ Warning Was ‘Not Tough Enough,’* TELEGRAPH (Aug. 10, 2017), <https://www.telegraph.co.uk/news/2017/08/10/donald-trump-says-north-korea-should-nervous>.

105. Jessica Estepa, *From the Armada to ‘Rocket Man’: A Brief History of Trump’s War of Words with North Korea*, USA TODAY (Sept. 22, 2017), <https://www.usatoday.com/story/news/politics/onpolitics/2017/09/22/armada-rocket-man-brief-history-trumps-war-words-north-korea/692376001>.

106. Krishnadev Calamur, *Trump Is ‘Locked and Loaded’ in a Nuclear Game of Chicken*, ATLANTIC (Aug. 11, 2017), <https://www.theatlantic.com/international/archive/2017/08/trump-locked-loaded-north-korea/536541>.

107. Conor Finnegan, *Tillerson: Americans Should ‘Sleep Well at Night’ Amid N. Korea Crisis*, ABC NEWS (Aug. 9, 2017), <https://abcnews.go.com/International/tillerson-americans-sleep-night-amid-korea-crisis/story?id=49111147>.

108. Jim Mattis & Rex Tillerson, *We’re Holding Pyongyang to Account*, WALL STREET J. (Aug. 13, 2017), <https://www.wsj.com/articles/were-holding-pyongyang-to-account-1502660253>.

109. Everett Rosenfeld, *How North Korea’s Latest Test Compares to Past Atomic Blasts*, CNBC (Sept. 4, 2017), <https://www.cnbc.com/2017/09/04/heres-just-how-powerful-north-koreas-nukes-have-grown.html>.

110. Javier E. David, *President Trump Says ‘We’ll See’ When Asked If He Would Launch a Strike Against North Korea*, CNBC (Sept. 3, 2017), <https://>

however, was not aimed at Pyongyang, but rather at Seoul, which he accused of appeasing North Korea.<sup>111</sup> President Trump's criticisms added to the signs of fissures in the U.S.-South Korean relationship. Reports that President Trump was planning to withdraw from the U.S.-South Korea Free Trade Agreement in the midst of the escalating crisis with North Korea in September 2017 displayed the divergence between Washington and Seoul, while South Korean leaders also expressed concern that President Trump's rhetoric could inadvertently lead to an armed confrontation on the peninsula, leading South Korea's President, Moon Jae-In, to reassure his country that "Mr. Trump has already promised to consult with South Korea and get our approval for whatever option they will take against North Korea."<sup>112</sup>

Moreover, in response to North Korea's nuclear detonation, President Trump announced on September 4 that the United States would consider ceasing trade with any country trading with North Korea, a claim that experts noted would "mean economic disaster for the United States," since North Korea's trading partners included Germany, Brazil, Mexico, and China, the top trading partner of the United States.<sup>113</sup> North Korea's sixth nuclear test also led to the adoption of U.N. Security Council Resolution 2375, which, for the ninth time, strengthened sanctions by imposing further restrictions on North Korean exports and restricting oil and gas imports to North Korea.<sup>114</sup>

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[www.cnbc.com/2017/09/03/president-trump-denounces-north-koreas-hostile-dangerous-weapons-test.html](http://www.cnbc.com/2017/09/03/president-trump-denounces-north-koreas-hostile-dangerous-weapons-test.html).

111. Glenn Thrush & Mark Landler, *Why Trump, After North Korea's Test, Aimed His Sharpest Fire at the South*, N.Y. TIMES (Sept. 3, 2017), <https://www.nytimes.com/2017/09/03/us/trump-north-south-korea-nuclear.html>.

112. Andray Abrahamian, *Trump Turns Kim Jong Un's Hopes into Achievable Goals*, 38 NORTH (Sept. 7, 2017), <https://www.38north.org/2017/09/aabrahamian090717>.

113. Paul Mozur, *Trump Can't Stop Trade with North Korea. But He Does Have Options.*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/business/trump-china-north-korea-trade.html>.

114. S.C. Res. 2375, ¶¶ 13–15 (Sept. 11, 2017); see also Julian Borger, *North Korea Sanctions: UN Security Council Unanimously Agrees New Measures*, GUARDIAN (Sept. 11, 2017), <https://www.theguardian.com/world/2017/sep/12/north-korea-sanctions-un-security-council-unanimously-agrees-new-measures> (providing additional context for this ninth resolution).

Seemingly undeterred, North Korea responded on September 14 by threatening to turn the United States into “ashes and darkness,” and declaring that the “four islands of the archipelago [i.e. Japan] should be sunken into the sea.”<sup>115</sup> The following day, North Korea test-fired another missile that overflew Japan’s northern island of Hokkaido.<sup>116</sup> This missile flew for 3,700 kilometers, crossing Japanese airspace and flying farther than the missile tested on August 29. This was also farther than the distance between North Korea and Guam, which demonstrated that Guam was now within range of Pyongyang’s missiles.<sup>117</sup>

During his first address to the U.N. General Assembly as U.S. President, Donald Trump described the North Korean regime as “depraved,” called Kim Jong-un a “little rocket man . . . on a suicide mission,” and promised to “totally destroy North Korea” if the United States is forced to defend itself or its allies.<sup>118</sup> Reacting to this verbal fusillade, Kim Jong-un called Donald Trump a “mentally deranged U.S. dotard” and likened the U.S. President to a “frightened dog.”<sup>119</sup> A statement by North Korea’s foreign minister then followed that described President Trump’s speech as a “declaration of war,” which is a common claim in North Korean vernacular,<sup>120</sup> and vowed to take “counter-measures, including the right to shoot down United States strategic bombers even when they are not yet

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115. Kim Hjelmggaard, *North Korea Threatens to ‘Sink’ Japan and Turn U.S. to ‘Ashes and Darkness,’* USA TODAY (Sept. 14, 2018), <https://www.usatoday.com/story/news/world/2017/09/14/north-korea-japan-no-longer-needed-exist-near-us/665002001>.

116. James Griffiths et al., *North Korea Launches Missile over Japan*, CNN: POLITICS (Sept. 15, 2017), <https://www.cnn.com/2017/09/14/asia/north-korea-missile-launch/index.html>.

117. Claire Phipps & Graham Russell, *North Korea: Ballistic Missile Launched over Japan – As It Happened*, GUARDIAN (Sept. 15, 2017), <https://www.theguardian.com/world/live/2017/sep/15/north-korea-launches-missile-over-japan-live-updates>.

118. Ali Vitali, *Trump Threatens to ‘Totally Destroy’ North Korea in First U.N. Speech*, NBC NEWS (Sept. 19, 2017), <https://www.nbcnews.com/politics/white-house/trump-un-north-korean-leader-suicide-mission-n802596>.

119. *Full Text of Kim Jong-Un’s Response to President Trump*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/world/asia/kim-jong-un-trump.html>.

120. Isaac Stone Fish, *The Long History of North Korea’s Declarations of War*, ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/international/archive/2017/09/kim-jong-un-trump-north-korea-nuclear-war/541032>.

inside the airspace border of our country.” However, the White House denied that the United States had declared war and reaffirmed its commitment to “peaceful denuclearization on the Korean peninsula.”<sup>121</sup>

North Korea conducted its final and most powerful missile test of the year on November 28, 2017, launching on a vertical trajectory the Hwasong-15 ICBM, which flew for 4,000 kilometers into space before crashing into the Sea of Japan, thus indicating that if launched on a flatter trajectory, this ICBM had a range of up to 13,000 kilometers, bringing the entire continental United States within its reach.<sup>122</sup> The launch, which came one week after the United States reinstated North Korea on the state sponsors of terror list,<sup>123</sup> elicited a muted response from President Trump, who promised, “we will take care of it.”<sup>124</sup> On the other hand, congressional leaders, such as Senator Lindsey Graham of South Carolina, warned that “[w]e’re heading toward a war if things don’t change . . . The president is not going to allow North Korea to have a nuclear weapon in their hands that can hit America . . . If we have to go to war to stop this, we will.”<sup>125</sup>

The final act of a tumultuous year was Kim Jong-un’s 2018 New Year’s address, in which he adopted a defiant tone against the United States and struck a conciliatory note towards South Korea. He asserted that North Korea had “completed its nuclear deterrent” against the United States, announced that he kept a “nuclear button” on his desk, and declared that North

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121. Julian Borger & Sabrina Siddiqui, *North Korea’s Foreign Minister: Trump Has Declared War on Our Country*, GUARDIAN (Sept. 26, 2017), <https://www.theguardian.com/world/2017/sep/25/north-koreas-foreign-minister-says-trump-has-declared-war-on-country>.

122. Julian Borger, *North Korea: Trump Threatens ‘Major Sanctions’ After Latest Missile Test*, GUARDIAN (Nov. 29, 2017), <https://www.theguardian.com/us-news/2017/nov/29/north-korea-trump-threatens-major-sanctions-after-latest-missile-test>.

123. Michael D. Shear & David E. Sanger, *Trump Returns North Korea to List of State Sponsors of Terrorism*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/politics/north-korea-trump-terror.html>.

124. Christina Wilkie, *Trump on North Korea Missile Launch: ‘We Will Take Care of It,’* CNBC (Nov. 28, 2017), <https://www.cnbc.com/2017/11/28/trump-on-north-korean-missile-launch-we-will-take-care-of-it.html>.

125. Cristiano Lima, *Graham: U.S. ‘Headed to War If Things Don’t Change’ with North Korea*, POLITICO (Nov. 28, 2017), <https://www.politico.com/story/2017/11/28/lindsey-graham-war-north-korea-267792>.

Korea was “open to” participating in the Pyeongchang Winter Olympics in South Korea.<sup>126</sup> The following year witnessed a significant de-escalation between the United States and North Korea, which began with meetings between Central Intelligence Agency (CIA) Director Mike Pompeo and culminated with the summit between President Trump and Kim Jong-un in Singapore on June 12, 2018.<sup>127</sup>

C. *The 2018 Murder of Washington Post Columnist  
Jamal Khashoggi*

On October 2, 2018, Jamal Khashoggi entered the Consulate General of Saudi Arabia in Istanbul, Turkey. He was never seen again. Jamal Khashoggi, a Saudi citizen and U.S. resident, was born in on October 13, 1958 to a prominent family of Turkish origins: His grandfather was the personal physician of King Abdul Aziz al-Saud, the founder of Saudi Arabia; his uncle was billionaire arms dealer Adnan Khashoggi, the world’s richest man in the early 1980s; and his second cousin was Dodi Fayed, who accompanied Princess Diana on the fatal car crash that took their lives.<sup>128</sup> Jamal Khashoggi was a leading Saudi journalist who began his career as a correspondent for several Saudi newspapers for which he covered the Soviet invasion of Afghanistan, the Gulf War, and other regional crises. His major journalistic break came when he published a series of interviews with al-Qaeda’s founder and leader Osama bin Laden in

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126. Ankit Panda, *3 Takeaways from Kim Jong-Un’s 2018 New Year’s Address*, DIPLOMAT (Jan. 1, 2018), <https://thediplomat.com/2018/01/3-takeaways-from-kim-jong-uns-2018-new-years-address>.

127. See *Chronology of U.S.-North Korean Nuclear and Missile Diplomacy*, ARMS CONTROL ASS’N, <https://www.armscontrol.org/factsheets/dprkchron> (last updated June 2019) (providing a detailed chronology of events in 2018).

128. *Death of Journalist Jamal Khashoggi: From Saudi Royal Insider to Open Critic*, STRAITS TIMES (Oct. 20, 2018), <https://www.straitstimes.com/world/middle-east/death-of-journalist-jamal-khashoggi-from-saudi-royal-insider-to-open-critic>; Heather Timmons, *What Does the US Owe Jamal Khashoggi?*, QUARTZ (Oct. 19, 2018), <https://qz.com/1428499/jamal-khashoggi-what-trump-owes-khashoggi-under-us-law-and-constitution>; Jake Wallis Simons, *Missing Saudi Journalist Jamal Khashoggi Is a Nephew of a Billionaire Arms Dealer and Second Cousin of Princess Diana’s Lover Dodi Fayed*, DAILY MAIL (Oct. 16, 2018), <https://www.dailymail.co.uk/news/article-6280767/Missing-Saudi-journalist-Jamal-Khashoggi-second-cousin-Princess-Dianas-lover.html>.

Afghanistan and Sudan.<sup>129</sup> As he rose to journalistic prominence, he was appointed on two separate occasions as Editor-in-Chief of Al-Watan, a liberal-leaning Saudi newspaper, but was subsequently fired for penning boundary-pushing articles that were considered “too progressive.”<sup>130</sup>

Jamal Khashoggi was closely associated with some members of the Saudi royal family. While serving as Saudi Ambassador to Britain and then the United States, Prince Turki al-Faisal hired Khashoggi to serve as a media adviser at these embassies. Not too long after hiring Khashoggi, Al-Faisal returned to Riyadh to head the Saudi intelligence agency, at which point Khashoggi returned to Saudi Arabia as well, where he was a frequent commentator on Saudi and Arab regional politics.<sup>131</sup> However, Khashoggi's fortunes began to turn in 2015. Saudi Arabia's King Salman ascended to the throne after his half-brother, King Abdullah, died on January 23, 2015. King Salman immediately appointed his son, Mohammed bin Salman (MbS), as Deputy Crown Prince, and then in June 2017, elevated him to Crown Prince and heir to the Saudi throne, putting the-then thirty-one-year-old prince firmly in control of the sinews of power in Saudi Arabia.<sup>132</sup>

MbS embarked almost immediately on “the most sweeping transformation in the kingdom's governance.”<sup>133</sup> He jettisoned the traditional caution of Saudi foreign policy,

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129. See Peter Bergen, *Jamal Khashoggi Was a Journalist, Not a Jihadist*, CNN (Oct. 22, 2018), <https://www.cnn.com/2018/10/22/opinions/khashoggi-was-journalist-not-jihadist-bergen/index.html> (presenting an interview with Khashoggi, in which he discussed his career and relationship with Bin Laden).

130. *Death of Journalist Jamal Khashoggi: From Saudi Royal Insider to Open Critic*, *supra* note 131.

131. See David Ignatius, *Jamal Khashoggi's Long Road to the Doors of the Saudi Consulate*, WASH. POST (Oct. 12, 2018), [https://www.washingtonpost.com/opinions/global-opinions/jamal-khashoggis-long-road-to-the-doors-of-the-saudi-consulate/2018/10/12/b461d6f4-cel1a-11e8-920f-dd52e1ae4570\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/jamal-khashoggis-long-road-to-the-doors-of-the-saudi-consulate/2018/10/12/b461d6f4-cel1a-11e8-920f-dd52e1ae4570_story.html) (discussing Khashoggi's career path).

132. Gerald Butt, *Mohammed bin Salman's Rise Marks Climax of Leadership Revolution*, BBC NEWS (June 21, 2017), <https://www.bbc.com/news/world-middle-east-40351927>.

133. David D. Kirkpatrick, *Saudi Crown Prince's Mass Purge Upends a Long-standing System*, N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/world/middleeast/saudi-crown-prince-purge.html>.

launched a war against Yemen,<sup>134</sup> and imposed, in concert with Bahrain, Egypt, and the United Arab Emirates, a blockade of Qatar.<sup>135</sup> MbS also announced his intention to build a futuristic \$500 billion city named NEOM,<sup>136</sup> and unveiled a comprehensive reform program titled Vision 2030 that was hailed as “nothing short of a societal revolution.”<sup>137</sup> Despite cultivating an image as a liberal reformer, it quickly became apparent that the young prince was implementing a zero-tolerance campaign against dissent.<sup>138</sup> As part of an effort to combat corruption, dozens of Saudi royals and business leaders, including seemingly untouchable princes like Al-Waleed bin Talal, were detained; in return for shelving corruption charges made against them, they were reportedly pressured into paying billions of dollars.<sup>139</sup> Attracting less press attention, however, was the arrest of tens, if not hundreds, of Saudi dissidents, political activists, human rights campaigners, and religious clerics who either opposed MbS’s consolidation of power or differed with his policies.<sup>140</sup>

One commentator who shed light on and criticized these practices was Jamal Khashoggi. In June 2017, after sensing that the already narrow margin of free expression in Saudi Arabia was tightening and fearing for his wellbeing, Khashoggi went into self-imposed exile in the United States, where he became

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134. See Ray Takeyh, *The New Saudi Foreign Policy*, COUNCIL FOREIGN REL., (Apr. 17, 2015), <https://www.cfr.org/expert-brief/new-saudi-foreign-policy> (describing the “new” Saudi foreign policy reflected by the war with Yemen).

135. Aaron David Miller & Richard Sokolsky, *Don’t Mind the Gulf*, FOREIGN AFF., (July 24, 2017), <https://www.foreignaffairs.com/articles/qatar/2017-07-24/dont-mind-gulf>.

136. Zahraa Alkhalisi, *Top Tech Execs Will Help Saudi Arabia Build Its Mega City of the Future*, CNN (Oct. 11, 2018), <https://www.cnn.com/2018/10/10/tech/neom-city-investors/index.html>.

137. KAREN ELLIOT HOUSE, SAUDI ARABIA IN TRANSITION 1 (2017).

138. Margherita Stancati & Summer Said, *Saudi Arabia Clamps Down as Crown Prince Consolidates Power*, WALL STREET J. (Sept. 13, 2017), <https://www.wsj.com/articles/saudi-arabia-clamps-down-as-crown-prince-consolidates-power-1505345008>.

139. Stephen Kalin & Katie Paul, *Saudi Arabia Says It Has Seized Over \$100 Billion in Corruption Purge*, REUTERS, Jan. 30, 2018, <https://www.reuters.com/article/us-saudi-arrests-corruption/saudi-arabia-says-it-has-seized-over-100-billion-in-corruption-purge-idUSKBN1FJ28E>.

140. Ahmed Al Omran & Simeon Kerr, *Saudi Security Forces Clamp Down on Dissent*, FIN. TIMES (Sept. 19, 2017), <https://www.ft.com/content/9038cb6c-9c51-11e7-8cd4-932067fbf946>.

a *Washington Post* columnist and critic of MbS's domestic and regional policies.<sup>141</sup>

On October 2, public concern about Jamal Khashoggi's wellbeing mounted as hours passed since he had entered the Saudi Consulate in Istanbul to complete routine consular services. When asked during an interview with Bloomberg about Khashoggi's whereabouts the following day, MbS said "my understanding is he entered and he got out after a few minutes or one hour. I'm not sure."<sup>142</sup> Meanwhile, speculation began to rise. Turkish officials insisted that Khashoggi was still inside the consulate, and some observers, including prominent members of the U.S. foreign policy elite like Elliot Abrams, expressed concern that Khashoggi was either being held incommunicado in the consulate or had been repatriated to Saudi Arabia.<sup>143</sup> Khashoggi's employer, the *Washington Post*, issued a statement that it "would be unfair and outrageous if he has been detained for his work as a journalist."<sup>144</sup>

On October 6, Turkey announced that its investigations indicated that Khashoggi was murdered inside the consulate, and released surveillance footage of Saudi operatives that were allegedly involved in the operation.<sup>145</sup> Turkish newspapers also reported that Khashoggi's body was dismembered and published flight paths and passenger manifests of two Saudi private airplanes that transported the Saudi team of hitmen to Istanbul.<sup>146</sup> Turkish sources then intimated that data from an

141. *Death of Journalist Jamal Khashoggi: From Saudi Royal Insider to Open Critic*, *supra* note 131.

142. Stephanie Flanders et al., *Saudi Crown Prince Discusses Trump, Aramco, Arrests: Transcript*, BLOOMBERG (Oct. 5, 2018), <https://www.bloomberg.com/news/articles/2018-10-05/saudi-crown-prince-discusses-trump-aramco-arrests-transcript>.

143. Elliott Abrams, *Where Is Jamal Khashoggi?*, COUNCIL ON FOREIGN REL. (Oct. 4, 2018), <https://www.cfr.org/blog/where-jamal-khashoggi>.

144. Kareem Fahim, *Friends Fear for Safety of Prominent Saudi Writer Jamal Khashoggi*, WASH. POST (Oct. 2, 2018), [https://www.washingtonpost.com/world/middle\\_east/friends-fear-for-safety-of-prominent-saudi-writer-jamal-khashoggi/2018/10/02/f4d1cfbc-c66a-11e8-9c0f-2ffaf6d422aa\\_story.html](https://www.washingtonpost.com/world/middle_east/friends-fear-for-safety-of-prominent-saudi-writer-jamal-khashoggi/2018/10/02/f4d1cfbc-c66a-11e8-9c0f-2ffaf6d422aa_story.html).

145. Ayse Wieting et al., *Turkish Media: Video Shows Team of Alleged Saudi Assassins*, ASSOCIATED PRESS, Oct. 10, 2018, <https://www.apnews.com/7c8d85ea776a4a62a026a6739d234e3e>.

146. Martin Chulov & Bethan McKernan, *Jamal Khashoggi: Details of Alleged Saudi Hit Squad Emerge*, GUARDIAN (Oct. 10, 2018), <https://www.theguardian.com/world/2018/oct/10/alleged-saudi-hit-squad-linked-to-jamal-khashoggi-disappearance>.



Apple Watch belonging to Khashoggi could assist in locating his remains.<sup>147</sup> Moreover, these sources indicated that they possessed recordings that proved that Khashoggi was interrogated, tortured, and murdered inside the consulate.<sup>148</sup> By October 10, reports surfaced that that Turkey had briefed U.S. and other Western officials about these recordings, and several news sources quoted unnamed Turkish officials who described the killing of Jamal Khashoggi in graphic detail.<sup>149</sup>

These were the first of a series of Turkish leaks, anonymous quotes, press releases, and official statements that kept the Khashoggi tragedy on the top of global news headlines for months, especially in the United States and other Western countries. While Turkey maintained that its motive was to investigate the case, its behavior was part of a strategy to exercise pressure on Saudi Arabia, embarrass MbS, undermine his reputation as a progressive reformer, and perhaps derail his ascent to the Saudi throne.<sup>150</sup> Turkey also sought to pressure Saudi Arabia into making concessions on political issues on which Ankara and Riyadh were at odds, but without causing an irreparable rupture in Turkish-Saudi relations.<sup>151</sup> These issues include the Saudi-led blockade against Qatar, which is a Turk-

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147. Orhan Coskun et al., *Apple Watch, Hired Jet, Mystery Vehicle Figure in Search for Missing Saudi Dissident*, REUTERS, Oct. 10, 2018, <https://www.reuters.com/article/us-saudi-politics-dissident-insight/apple-watch-hired-jet-mystery-vehicle-figure-in-search-for-missing-saudi-dissident-idUSKCN1MK1WY>.

148. Rachel Elbaum, *Turks Tell U.S. Officials They Have Recordings of Khashoggi Killing, Report Says*, NBC NEWS (Oct. 12, 2018), <https://www.nbcnews.com/news/world/turks-tell-u-s-officials-they-have-recordings-khashoggi-killing-n919466>.

149. Shane Harris et al., *Turks Tell U.S. Officials They Have Audio and Video Recordings That Support Conclusion Khashoggi Was Killed*, WASH. POST (Oct. 11, 2018), [https://www.washingtonpost.com/world/national-security/turks-tell-us-officials-they-have-audio-and-video-recordings-that-support-conclusion-khashoggi-was-killed/2018/10/11/119a119e-cd88-11e8-920f-dd52e1ae4570\\_story.html](https://www.washingtonpost.com/world/national-security/turks-tell-us-officials-they-have-audio-and-video-recordings-that-support-conclusion-khashoggi-was-killed/2018/10/11/119a119e-cd88-11e8-920f-dd52e1ae4570_story.html).

150. See Carlotta Gall, *In Khashoggi Disappearance, Turkey's Slow Drip of Leaks Puts Pressure on Saudis*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/world/europe/turkey-khashoggi-saudi-arabia.html> (describing Turkish leaks as a “remarkably effective” and “calculated media strategy”).

151. Cf. Nader Habibi, *How Turkey and Saudi Arabia Became Frenemies – and Why the Khashoggi Case Could Change That*, CONVERSATION (Oct. 17, 2018), <http://theconversation.com/how-turkey-and-saudi-arabia-became-frenemies-and-why-the-khashoggi-case-could-change-that-105021> (discussing sources of

ish ally; the status of the Muslim Brotherhood, which is affiliated with Turkish President Erdogan's Justice and Development Party, but which Saudi Arabia and its allies in Egypt and the United Arab Emirates have labelled as a terrorist organization; and relations with Iran, which is Saudi Arabia's nemesis, but which Turkey views as a regional power that should be engaged diplomatically.<sup>152</sup> President Erdogan also appears to have sought to leverage the public outcry over Khashoggi's death to rebalance U.S. policy in the region in Turkey's favor. Following the election of President Trump, the United States made Saudi Arabia, and especially MbS, the linchpin of its Middle East policy, which threatened to undercut Turkey's regional standing.<sup>153</sup> By tarnishing the Crown Prince's reputation, Turkey hoped to demonstrate that it is a more reliable partner for the United States.<sup>154</sup>

Turkey's strategy achieved some success. The evidence and lurid descriptions of Khashoggi's murder shared with Western governments and the media precipitated a political crisis for Saudi Arabia. U.S. Treasury Secretary Steven Mnuchin, other Western officials, and numerous business leaders boycotted an investment conference held in Saudi Ara-

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Turkish-Saudi tension and suggesting that "[t]he Turkish government is trying to balance multiple conflicting goals in the way it handles this crisis").

152. See Mustafa Akyol, *Khashoggi's Death Is Highlighting the Ottoman-Saudi Islamic Rift*, FOREIGN POL'Y (Oct. 17, 2018), <https://foreignpolicy.com/2018/10/17/khashoggi-was-the-victim-of-an-ottoman-saudi-islamist-war> (discussing Iran and Muslim Brotherhood); Benjamin Harvey & Asli Kandemir, *Khashoggi Murder Claim Gives Turkey Leverage Over Saudis and Trump*, BLOOMBERG (Oct. 15, 2018), <https://www.bloomberg.com/news/articles/2018-10-14/a-murder-claim-gives-turkey-leverage-over-saudi-and-trump-too> (discussing Iran and the Muslim Brotherhood); Mark Lowen, *Jamal Khashoggi Murder: What Is Turkey's Game with Saudi Arabia?*, BBC NEWS (Oct. 24, 2018), <https://www.bbc.com/news/world-europe-45963642> (referencing the Saudi stance toward Qatar, the Muslim Brotherhood and Iran as sources of conflict).

153. See Michael Hirsh, *The U.S.-Saudi Relationship: Too Faustian to Fail?*, FOREIGN POL'Y (Oct. 10, 2018), <https://foreignpolicy.com/2018/10/10/the-u-s-saudi-relationship-too-faustian-to-fail> (discussing Trump's relationship with the MbS).

154. See Borzou Daragahi, *Turkey May Seek to Reshape Relations Between US and Saudi Arabia Over Jamal Khashoggi's Disappearance*, INDEPENDENT (Oct. 17, 2018), <https://www.independent.co.uk/news/world/middle-east/turkey-us-saudi-arabia-jamal-khashoggi-missing-pompeo-erdogan-mbs-a8588351.html> ("Analysts speculate that backroom talks between the three countries are a possible attempt to reconfigure the relationship on Turkey's terms.").

bia. Britain, France, and Germany issued a joint statement demanding a full investigation of the matter, and even President Trump, a staunch supporter of Saudi Arabia, promised to “get to the bottom of it” and warned of “severe punishment” if it proved that the Saudi government was behind Khashoggi’s murder.<sup>155</sup> Members of Congress from both parties also issued severe condemnations of Saudi Arabia and MbS, and threatened to impose sanctions against Riyadh, with Senator Lindsey Graham even going as far as to declare that MbS “has got to go.”<sup>156</sup>

Eventually, Riyadh began to buckle. After days of denying involvement in Khashoggi’s disappearance and even threatening to use its oil reserves in response to any sanctions against it,<sup>157</sup> Saudi Arabia admitted on October 19 that Khashoggi died during an “accidental altercation” in the consulate.<sup>158</sup> It also announced the arrest of eighteen Saudis, including senior officials, some of whom were close associates of MbS.<sup>159</sup> Saudi Arabia’s Foreign Minister, a suave diplomat with many years of

155. Adam Forrest, *Jamal Khashoggi: Trump Warns of ‘Severe Punishment’ If Saudis Found Responsible for Journalist’s Death*, INDEPENDENT (Oct. 13, 2018), <https://www.independent.co.uk/news/world/americas/trump-jamal-khashoggi-missing-journalist-death-saudi-severe-punishment-turkey-embassy-a8582486.html>; Susan Heavey, *U.S. Treasury Secretary Mnuchin Withdraws from Saudi Conference*, REUTERS, Oct. 18, 2018, <https://www.reuters.com/article/us-saudi-politics-dissident-mnuchin/us-saudi-politics-dissident-mnuchin-withdraws-from-saudi-conference-idUSKCN1MS2GV>; *Jamal Khashoggi: UK, France and Germany’s Joint Statement in Full*, INDEPENDENT (Oct. 21, 2018), <https://www.independent.co.uk/news/uk/home-news/jamal-khashoggi-death-uk-statement-in-full-read-killing-saudi-arabia-france-germany-a8594896.html>.

156. Tucker Higgins, *Lindsey Graham Says Saudi Crown Prince Mohammed bin Salman ‘Has Got to Go,’ Calls for Royal Power Shuffle*, CNBC (Oct. 16, 2018), <https://www.cnbc.com/2018/10/16/lindsey-graham-says-saudi-crown-prince-bin-salman-has-got-to-go.html>.

157. See Press Release, Saudi Press Agency, General / Official Source: KSA Confirms Its Total Rejection of Any Threats and Attempts to Undermine It (Oct. 14, 2018), <https://www.spa.gov.sa/1827989> (“The Kingdom also affirms that if it receives any action, it will respond with greater action, and that the Kingdom’s economy has an influential and vital role in the global economy . . .”).

158. Euan McKirdy et al., *Jamal Khashoggi Died in Fistfight at Istanbul Consulate, Saudi Arabia Claims*, CNN (Oct. 20, 2018), <https://www.cnn.com/2018/10/19/world/saudi-arabia-khashoggi-intl/index.html>.

159. Ben Hubbard, *Saudi Arabia Says Jamal Khashoggi Was Killed in Consulate Fight*, N.Y. TIMES (Oct. 19, 2018) <https://www.nytimes.com/2018/10/19/world/middleeast/jamal-khashoggi-dead-saudi-arabia.html>.

service in Washington, admitted that Khashoggi's murder was a "grave mistake," but insisted that it was a "rogue operation" and an "aberration" that was undertaken without MbS's knowledge.<sup>160</sup>

Saudi Arabia's version of the events proved unpersuasive. President Erdogan gave a carefully worded statement that, while avoiding implicating King Salman, highlighted the obvious incongruities of the Saudi claim that Khashoggi was killed accidentally, and insisted that the murder was premeditated.<sup>161</sup> Western governments reacted to the Saudi account with similar incredulity and demanded the disclosure of the full facts of the case.<sup>162</sup> U.S. Senator Rand Paul of Kentucky declared that "[w]e should also halt all military sales, aid and cooperation immediately," while Senator Richard Blumenthal of Connecticut tweeted that the United States "must call for an international investigation that holds accountable all responsible—not just the Crown Prince's fall guys."<sup>163</sup> Even President Trump found the Saudi explanation hard to believe, saying that "[o]bviously there's been deception and there's been lies . . . [t]heir stories are all over the place."<sup>164</sup>

As pressure mounted, Saudi Arabia shifted its storyline again. On October 25, the Saudi public prosecutor issued a statement concluding that the "suspects in the incident had

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160. *Saudi Arabia Calls Jamal Khashoggi Killing a 'Grave Mistake,'* DEUTSCHE WELLE (Oct. 21, 2018), <https://www.dw.com/en/saudi-arabia-calls-jamal-khashoggi-killing-a-grave-mistake/a-45976954>.

161. Carlotta Gall & Richard Pérez-Peña, *Erdogan Says Saudis Planned Khashoggi's Killing in Turkey*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/world/europe/turkey-saudi-arabia-erdogan.html>.

162. Jamie Dettmer, *Saudi Khashoggi Admission Fails to Stem International Outrage*, VOICE AM. (Oct. 21, 2018), <https://www.voanews.com/middle-east/saudi-khashoggi-admission-fails-stem-international-outrage>.

163. Christal Hayes, *Lawmakers Say Saudi Explanation of Jamal Khashoggi's Death Doesn't Seem Credible*, USA TODAY (Oct. 19, 2018), <https://www.usatoday.com/story/news/politics/2018/10/19/jamal-khashoggi-congress-says-saudi-arabias-explanation-not-credible/1702034002>.

164. John Bacon, *Trump Cites 'Deception . . . and Lies' but Still Defends Saudi Prince over Jamal Khashoggi's Death*, USA TODAY (Oct. 21, 2018), <https://www.usatoday.com/story/news/world/2018/10/21/jamal-khashoggi-death-donald-trump-cites-lies-but-defends-saudis/1719586002>.

committed their act with a premeditated intention.”<sup>165</sup> Moreover, MbS admitted that Khashoggi’s murder was a “‘heinous’ crime” and a “very, very painful incident for all Saudis.”<sup>166</sup> MBS’s conciliatory tone and the Saudi Public Prosecutor’s statements did not lead Turkey to ease the pressure on Saudi Arabia. In trying to maintain the fine balance between pressuring MbS while avoiding damaging relations with Riyadh, President Erdogan declared on November 3 that Khashoggi’s murder was ordered by “the highest levels of the Saudi government,” but added that he did “‘not believe for a second’ that Saudi leader King Salman was to blame.”<sup>167</sup>

In Washington, a rift was growing between the Trump Administration and Congress. Despite the President condemning Khashoggi’s murder, ending U.S. refueling of Saudi aircraft flying sorties over Yemen, and imposing sanctions on Saudi individuals implicated in the case,<sup>168</sup> Trump Administration officials avoided criticizing MbS. Instead, they highlighted that U.S.-Saudi relations were vital to U.S. Middle East policy. Even after being briefed on the recording of Khashoggi’s torture and murder, and despite reports that the CIA had reached a “high confidence assessment” that MbS had ordered Khashoggi’s murder,<sup>169</sup> President Trump issued a statement siding with Riyadh and insisting that preserving U.S.-Saudi relations was necessary to contain Iran and to attract Saudi in-

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165. Alex Ward, *Saudi Arabia Admits Khashoggi’s Murder Was “Premeditated,”* Vox (Oct. 25, 2018), <https://www.vox.com/2018/10/25/18021986/saudi-arabia-jamal-khashoggi-premeditated-turkey-trump>.

166. John Deferios et al., *Saudi Crown Prince Calls Khashoggi Killing ‘Heinous’ After Inner Circle Is Implicated*, CNN (Oct. 24, 2018), <https://www.cnn.com/2018/10/24/middleeast/saudi-arabia-bin-salman-khashoggi-intl/index.html>.

167. *Khashoggi: Erdogan Says Top Levels of Saudi Government Behind Journalist’s Killing*, DEUTSCHE WELLE (Nov. 3, 2018), <https://www.dw.com/en/khashoggi-erdogan-says-top-levels-of-saudi-government-behind-journalists-killing/a-46140984-0>.

168. Julian E. Barnes & Edward Wong, *Trump Administration to Punish Saudis in Moves That Could Stop Tougher Acts by Congress*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/us/politics/trump-saudi-sanctions-refueling.html>.

169. Elise Labott et al., *CIA Concludes Saudi Crown Prince Ordered Jamal Khashoggi’s Death, Sources Say*, CNN: POLITICS (Nov. 17, 2018), <https://www.cnn.com/2018/11/16/politics/cia-assessment-khashoggi-assassination-saudi-arabia/index.html>.

vestment and arms purchases to the United States.<sup>170</sup> Meanwhile, congressional pressure on Saudi Arabia intensified. A bipartisan group of legislators “declared that the president’s statement was dishonest, morally blinkered and strategically obtuse.”<sup>171</sup> Also, five Republican senators threatened to block ongoing negotiations on the transfer of U.S. nuclear technology to Saudi Arabia,<sup>172</sup> and the Senate Foreign Relations Committee triggered an investigation under the Global Magnitsky Act to determine whether MbS had ordered Khashoggi’s murder.<sup>173</sup>

As the situation evolved, the Trump Administration sought to seize the opportunity of Riyadh’s vulnerability to extract political concessions. The United States reiterated its demands that Saudi Arabia accept a ceasefire in the conflict in Yemen and end its blockade of Qatar, which is a close U.S. ally; on the other hand, Saudi Arabia outlined its bottom line, which was that the King and Crown Prince are a “red line.”<sup>174</sup> Although President Erdogan failed to dislodge MbS from his position of preferred regional ally for President Trump, he succeeded in rehabilitating his image in Washington—which had been tarnished due to Turkey’s worsening human rights record—and in receiving concessions from the United States, which included conducting joint patrols with U.S. forces in northern Syria and initiating investigations into the U.S.-based

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170. Press Release, White House, Statement from President Donald J. Trump on Standing with Saudi Arabia (Nov. 20, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia>.

171. Michael Doran & Tony Badran, *Trump Is Crude. But He’s Right About Saudi Arabia.*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/opinion/trump-saudi-arabia-khashoggi.html>.

172. Josh Lederman, *GOP Senators Press Trump to Cut Off Nuclear Talks with Saudi Arabia*, NBC NEWS (Oct. 31, 2018), <https://www.nbcnews.com/politics/national-security/gop-senators-press-trump-cut-nuclear-talks-saudi-arabia-n926466>.

173. *Trump Asked to Determine Saudi Prince’s ‘Role’ in Khashoggi Murder*, BBC NEWS (Nov. 21, 2018), <https://www.bbc.com/news/world-us-canada-46285131>.

174. *Khashoggi Murder: Calls to Remove Saudi Crown Prince ‘a Red Line,’* BBC NEWS (Nov. 21, 2018), <https://www.bbc.com/news/world-middle-east-46295142>; *id.*

Turkish cleric, Fethullah Gulen, who was suspected of orchestrating the 2016 coup attempt in Turkey.<sup>175</sup>

### III. THE PROHIBITION ON INTERVENTION AND THE CONCEPT OF COERCION

Daily newscasts are replete with stories such as those recounted in Part I. These events provide examples of the infinite forms of pressure exercised by states in the furtherance of their interests. The challenge, however, is to determine the point at which pressure crosses the threshold of illegality to become a form of coercion. That is the question that this part considers.

This part discusses the origin, scope, and content of the prohibition on intervention, which is the principal rule of international law that regulates and prohibits the exercise of coercion in inter-state relations. It proposes a novel understanding of the structure and components of this foundational rule of international law. Specifically, it defines unlawful intervention as the pursuit of unlawful ends through unlawful means. The former—the unlawful ends—is exercising pressure on a state to make concessions on matters within its *domaine réservé*, which are policy areas in which the state has not undertaken international legal obligations, thereby retaining its freedom of action. The means are unlawful if a state employs coercive instruments to achieve its unlawful ends. As discussed below, both of these elements—the unlawful ends and the unlawful means—must be satisfied for an act to constitute a violation of the prohibition on intervention.

#### A. *The Prohibition on Intervention in the Internal or External Affairs of States*

The principal challenge facing any consideration of the prohibition on intervention is that this rule is riddled with definitional ambiguity and conceptual uncertainty. No precise definition of the term intervention has been developed, nor is there agreement regarding what constitutes “intervention.”<sup>176</sup>

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175. Carlotta Gall, *Erdogan Didn't Get All He Hoped for in Khashoggi Case, but His Stature Rises*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/world/middleeast/erdogan-khashoggi-trump.html>.

176. See Philip Kunig, *Prohibition of Intervention* MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law:epil/978019>

Moreover, in addition to “intervention,” indefinite terms such as “interference” and “subversion” are used interchangeably in judicial opinions, political parlance, and scholarly writing to refer to intervention.<sup>177</sup> Even “coercion,” which the ICJ called “the very essence” of intervention,<sup>178</sup> is a concept “laden with ambiguity, complexity, and elusive ingredients.”<sup>179</sup>

The terminological terrain is further complicated by the definitional and doctrinal confusion that persists regarding the most obvious forms of coercion. “War,” “aggression,” “armed attack,” “use of force,” “threats of force,” “invasion,” “threat to the peace,” “breach of the peace,” “enforcement measures,” and “sanctions” are terms that both policymakers and some treaties, such as the U.N. Charter, employ to describe acts of coercion, but that lack precise definitions.<sup>180</sup>

These definitional difficulties are not insurmountable, nor are they unique to the prohibition on intervention. Many rules of both international and domestic law, especially “standard-type norms,” are inherently ambiguous and can be understood and examined only when applied in concrete cases.<sup>181</sup> “Necessity,”<sup>182</sup> “proportionality,”<sup>183</sup> “scale and ef-

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9231690/law-9780199231690-e1434?print=pdf (last updated Apr. 2008) (outlining various formulations of intervention in international law).

177. See, e.g., John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes Against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT’L L. REV. 1, 24–25 (1995) (noting that the ILC used the term “interference” to describe acts constituting intervention, and considered materials that labelled the same as “subversion”).

178. *Nicaragua Case*, *supra* note 2, ¶ 205.

179. Peter Westen, “Freedom” and “Coercion”—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 558.

180. Cf. Jan Klabbbers, *Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What’s the Difference?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 488, 489 (Marc Weller ed., 2015) (“[Such terms] appear to be used interchangeably and rather indiscriminately, both in popular parlance and in professional legal discussions.”).

181. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 914–15 (2005) (noting that standard-type norms are inherently flexible norms, the application of which depends on circumstances).

182. JENS DAVID OHLIN & LARRY MAY, *NECESSITY IN INTERNATIONAL LAW* 2 (2016) (“[T]he concept of necessity has several distinct uses depending on the context. In this sense necessity is a cluster concept.”).



fects,”<sup>184</sup> “material breach,”<sup>185</sup> “fundamental change of circumstances,”<sup>186</sup> and “manifest violation of the U.N. Charter”<sup>187</sup> are examples of doctrines that do not stipulate readily enforceable “bright-line rules.”<sup>188</sup> Rather, these doctrines, like the prohibition on intervention, outline broad parameters of lawful behavior. However, even rules that are generally indeterminate have what H.L.A. Hart called “a core of settled meaning.”<sup>189</sup> In the following sections, this article highlights the core of settled meaning of the prohibition on intervention. It discusses its origins, scope and content, and articulates a two-pronged test to determine when the exercise of pressure violates the prohibition on intervention.

### 1. *The Doctrinal and Political Origins of the Prohibition on Intervention*

The prohibition on intervention is the international law version of “[t]he right to be let alone,” which U.S. Supreme

183. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 716 (2008) (“Proportionality . . . like beauty . . . exists only in the eye of the beholder.”).

184. Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, 54 HARV. INT’L L.J. 13, 22 (2012) (“Whether a cyber use of force qualifies as an armed attack depends on its ‘scale and effects.’”).

185. Frederic L. Kirgis, Jr., *Some Lingering Questions About Article 60 of the Vienna Convention on the Law of Treaties*, 22 CORNELL INT’L L.J. 549, 549 (1989) (“Article 60 of the Vienna Convention on the Law of Treaties [on material breaches to treaties] raises—or at least leaves unresolved—troublesome questions with respect to breaches.”).

186. Oliver J. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT’L L. 895, 895 (1967) (“[T]he existence, scope and modalities of such a right [to terminate treaties due to fundamental changes of circumstances] remain controversial and perplexing.”).

187. Sean D. Murphy, *Aggression, Legitimacy and the International Criminal Court*, 20 EUR. J. INT’L L. 1147, 1150–51 (2009) (highlighting the ambiguity of the phrase “manifest violation” of the U.N. Charter in the context of the ICC Statute).

188. William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998) (“[B]right-line rules . . . place determinate, readily enforceable limits on public actors.”).

189. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–08 (1958).

Court Justice Douglas called “the beginning of all freedom”<sup>190</sup> and that U.S. Supreme Court Justice Brandeis considered the “right most valued by civilized men.”<sup>191</sup> The intellectual origins of this doctrine are found in the writings of eighteenth century philosopher-lawyers Christian Wolff and Emer de Vattel, who based the prohibition on intervention on the natural liberty and independence of states. They believed that this doctrine entitled states to be free from foreign meddling with their affairs.<sup>192</sup> Building on the initial insights of Wolff and Vattel, nineteenth century statesmen and jurists debated over the content of the putative prohibition on intervention and the breadth of its exceptions. For some writers, the principal purpose of the prohibition on intervention was to protect states against interference with their choice of government.<sup>193</sup> Conversely, some states, especially the conservative monarchies of the Holy Alliance led by Metternich’s Austria and Czar Alexander’s Russia, argued that the emerging prohibition on intervention did not proscribe interference to prevent popular uprisings such as the French Revolution, which toppled the Bourbon Monarchy and undermined stability throughout the continent.<sup>194</sup>

In response to the interventionist posture of the Holy Alliance, and seeking to prevent the extension of the machinations of European politics to the Western Hemisphere, the United States issued the Monroe Doctrine on December 2, 1823. This doctrine stipulated that the independent republics of the Americas shall not be recolonized and shall remain free from European intervention.<sup>195</sup> The Monroe Doctrine’s non-interventionism did not, of course, apply to the U.S. After it consolidated its dominance over North America, the United

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190. Pub. Utils. Comm’n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

191. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

192. ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 5 (1956).

193. E.g., P.H. Winfield, *The History of Intervention in International Law*, 1922 BRIT. Y.B. INT’L L. 130, 137 (“There is a vague, general proposition that a state is entitled to select its own form of government.”).

194. D.L. Hafner, *Castlereagh, the Balance of Power, and ‘Non-Intervention,’* 26 AUSTL. J. POL. & HIST. 71, 77 (1980).

195. Elihu Root, Opening Address, *The Real Monroe Doctrine*, 8 PROC. AM. SOC’Y INT’L L. 6, 6 (1914).

States expanded its sphere of influence southwards and increasingly intervened in Latin America to protect its citizens, corporations, and commercial interests.<sup>196</sup> These practices culminated in the issuance of the Roosevelt Corollary to the Monroe Doctrine, which epitomized President Theodore Roosevelt's "big stick" approach to international politics by granting the United States a right to exercise "international police power" in the Western Hemisphere in response to "[c]hronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society."<sup>197</sup> The result was that "so many Latin American radicals and nationalists historically have looked upon the United States as their natural enemy."<sup>198</sup>

Latin American apprehension towards U.S. interventionism led to the articulation of several legal and policy instruments that constitute the doctrinal origins of the modern prohibition on intervention. Some of these instruments, such as the Calvo and Drago doctrines, prohibited intervention for certain purposes, such as the collection of public debts or the settlement of private financial claims, and proscribed specific means of intervention, especially the use of force.<sup>199</sup> Other instruments, such as the 1826 *Tratado de Unión, Liga y Confederación Perpetua*, the 1848 *Tratado de Confederación*, and the 1856 *Tratado Continental*, stipulated broader prohibitions on intervention. These treaties extended protection to the internal and external affairs of states and prohibited all forms of non-forcible intervention.<sup>200</sup>

Latin American efforts to develop and codify the prohibition on intervention culminated in the conclusion of the 1933 Convention on Rights and Duties of States, Article 8 of which stated: "No state has the right to intervene in the internal or

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196. See JAY SEXTON, *THE MONROE DOCTRINE: EMPIRE AND NATION IN NINETEENTH-CENTURY AMERICA* 199–200 (2011) (highlighting instances of nineteenth century American intervention in Latin America).

197. Serge Ricard, *The Roosevelt Corollary*, 36 *PRESIDENTIAL STUD. Q.* 17, 18 (2006).

198. Mark T. Gilderhus, *The Monroe Doctrine: Meanings and Implications*, 36 *PRESIDENTIAL STUD. Q.* 5, 16 (2006).

199. Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 *AM. J. INT'L L.* 26, 31 (1907).

200. J. Irizarry y Puente, *The Doctrines of Recognition and Intervention in Latin America*, 28 *TUL. L. REV.* 313, 327 (1954).

external affairs of another.”<sup>201</sup> This was followed by the adoption of the Charter of the Organization of American States in 1948, which included the following provisions:

Article 19

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

Article 20

No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.<sup>202</sup>

The tectonic shifts occurring in international law and world politics at the turn of the twentieth century provided a politically permissive environment that enabled the prohibition on intervention to be disseminated from Latin America to the world. Decolonization, a process that began in the Americas and spread to Africa and Asia, upended the traditional tenets of international law. Until the twentieth century, international law was essentially a form of *jus publicum Europaeum*; a corpus of rules that regulated relations between European powers and that justified the expansion of European empires and the subjugation of non-European peoples.<sup>203</sup> As a result, a prohibition on intervention was not conceivable within the repertoire of an international law that was predicated on sovereign *inequality*, and that legitimated the oppression of vast portions of humanity. As the power of European metropolises waned and colonies gained independence through self-determination, the color and composition of the international system changed, which in turn led to a reconfiguration of the

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201. Montevideo Convention on the Rights and Duties of States art. 8, Dec. 26, 1933, 49 Stat. 3097, O.A.S.T.S. No. 37.

202. Charter of the Organization of American States arts. 19–20, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter].

203. See generally ABDULQAWI A. YUSUF, PAN-AFRICANISM AND INTERNATIONAL LAW 53–64 (2014) (outlining the origins and various formulations of *jus publicum Europaeum*).

doctrinal content of international law. Sovereign equality and the right of all states to political independence were deracialized and universalized.<sup>204</sup> The right to self-determination, with its internal and external components, was also recognized.<sup>205</sup> Internal self-determination affirmed the right of states to exercise self-government, while external self-determination confirmed the right of states to freely structure their foreign relations.<sup>206</sup> These foundational principles of international law—sovereign equality, political independence, and self-determination—constitute the doctrinal bases for the prohibition on intervention.

Concurrently, limitations on the liberty of states to use any and all instruments of statecraft began to emerge in international law. Prior to the twentieth century, states were entitled to use whatever tools they chose to pursue their interests, including all forms of coercion.<sup>207</sup> In the aftermath of World War I, however, restrictions on the instruments that states may lawfully employ were gradually instituted. The most consequential of those limitations was the outlawry of war by the 1928 Pact of Paris, before which war was considered a legitimate instrument in the pursuit of national interests.<sup>208</sup> The U.N. Charter further augmented this prohibition on war by proscribing all uses of force by states, which has been interpreted to include the so-called right of self-help<sup>209</sup> and other coercive practices such as reprisals and pacific blockades that

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204. Cf. Winfield, *supra* note 196, at 130–31 (presenting a generalized view of international law, detethered from Europe and Christendom).

205. Notably, only external self-determination was explicitly recognized in U.N. resolutions and agreements; recognition of internal self-determination was implicit as evidenced by state practice. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES* 71, 101 (1995).

206. THOMAS & THOMAS, *supra* note 195, at 68–69 (using the terminology of internal and external independence); *id.* at 101.

207. Hartmut Brosche, *The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations*, 7 CASE W. RES. J. INT'L L. 3, 16 (1974) (“[I]nternational law prior to 1919 did not limit any kind of force, pressure or coercion in inter-state relations.”).

208. OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD*, at xiv (2017).

209. See Clause Krefß, *The International Court of Justice and the ‘Principle of Non-Use of Force,’* in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW*, *supra* note 183, at 561, 573, 601–03 (“There would now seem to be ‘general agreement’ among states not only about the elimination of a

were known as measures short of war.<sup>210</sup> This reflected the ethos of post-World War II international law, the overarching objectives of which were, first, maintaining the peaceful coexistence of states, and second, promoting inter-state cooperation through multilateral institutions.<sup>211</sup> These objectives, which were necessary in a world of nuclear-armed superpowers that were ideological rivals, provided the policy justification for the prohibition on intervention.

## 2. *The Sources, Scope, and Content of the Prohibition on Intervention*

The prohibition on intervention is “part and parcel of customary international law.”<sup>212</sup> It is codified, albeit in slightly varying terms, in the constitutive treaties of regional organizations, including the Organization of American States (OAS), Organisation of African Unity, Organisation of Islamic Cooperation, Association of Southeast Asian Nations, and the African Union.<sup>213</sup> It is echoed in resolutions, declarations, and

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‘sovereign right to go to war’, but also about the prohibition to use force in self-help to secure or enforce legal rights . . .”).

210. See Elihu Lauterpacht, *The Legal Irrelevance of the “State of War,”* 62 PROC. AM. SOC’Y INT’L L. 58, 62 (1968) (explaining that the 1928 Paris Pact did not prohibit measures short of war, but that “Article 2(4) of the [U.N.] Charter [was] intended to fill this gap”).

211. See Quincy Wright, *Subversive Intervention*, 54 AM. J. INT’L L. 521, 526 (1960) (“The only practical way to peace, therefore, seems to be through the peaceful co-existence of sovereign nations, each assured the opportunity to develop its distinctive institutions, ideas, and way of life within a territory secured by international law and politics.”).

212. *Nicaragua Case*, *supra* note 2, ¶ 202.

213. See Charter of the Organisation of Islamic Cooperation art. 2, ¶ 4–5, Mar. 14, 2008, ORG. ISLAMIC COOPERATION, <http://ww1.oic-oci.org/english/charter/OIC%20Charter-new-en.pdf> (requiring that “[a]ll Member States undertake to respect national sovereignty, independence and territorial integrity of other Member States and shall refrain from interfering in the internal affairs of others,” and that “[a]ll Member States undertake to contribute to the maintenance of international peace and security and to refrain from interfering in each other’s internal affairs as enshrined in the present Charter, the Charter of the United Nations, international law and international humanitarian law”); Charter of the Association of Southeast Asian Nations art. 2, ¶¶ 2(e)–2(f), Nov. 20, 2007, 2624 U.N.T.S. 223 (requiring Member States to adhere to the principles of “non-interference in the internal affairs of ASEAN Member States” and “respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion”); Constitutive Act of the African Union art. 4(g), July 11,

policy pronouncements adopted by the United Nations and regional organizations and conferences.<sup>214</sup> Some authorities have even asserted that, based on relevant ICJ decisions, the prohibition on intervention has attained the status of a peremptory rule of international law,<sup>215</sup> a claim that other scholars, this writer included, contest.<sup>216</sup>

While the existence of the prohibition on intervention and its status as a rule of customary international law is uncontroversial, “its exact content is far from obvious.”<sup>217</sup> This is because efforts to demarcate the boundaries of the prohibition on intervention face the familiar challenge of over-inclusivity or under-inclusivity that besets attempts to formulate general rules of law.<sup>218</sup> An excessively narrow definition of intervention risks permitting coercive policies that undermine the political independence of states or impair the right to self-determination, while an unreasonably broad definition could prohibit legitimate forms of pressure that states exercise in the pursuit of their interests. This dilemma persisted throughout intergovernmental attempts to codify or define the prohibition on intervention. The most prominent of these efforts to articulate a rule against intervention were the respective negotiations on three treaties: the 1969 Vienna Convention on the Law of Treaties (VCLT),<sup>219</sup> the 1970 Declaration on Principles

2000, 2158 U.N.T.S. 3 (enshrining the principle of “[n]on-interference by any Member State in the internal affairs of another”); Charter of the Organization of African Unity art. 3, ¶ 2, May 25, 1963, 479 U.N.T.S. 39 (requiring Member States to adhere to the principle of “[n]on-interference in the internal affairs of States”); OAS Charter, *supra* note 202 and accompanying text.

214. Natalino Ronzitti, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW 1, 4–6 (Natalino Ronzitti ed., 2016).

215. *See, e.g.*, Kunig, *supra* note 179 (“The non-intervention principle . . . is part of customary international law and *ius cogens*; affirmed by the ICJ . . .”).

216. *E.g.*, Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT’L L. 345, 358 (2009) (“Non-intervention is not itself a norm of *jus cogens* . . .”).

217. Niki Aloupi, *The Right to Non-Intervention and Non-Interference*, 4 CAMBRIDGE J. INT’L & COMP. L. 566, 570–71 (2015).

218. *See* Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 9 (2007) (“Any rule with a global scope will almost automatically appear as either over-inclusive or under-inclusive . . .”).

219. *See* Stuart S. Malawer, *A New Concept of Consent and World Public Order: “Coerced Treaties” and the Convention on the Law of Treaties*, 4 VAND. INT’L, 1,

of International Law concerning Friendly Relations and Co-operation among States (1970 Friendly Relations Declaration),<sup>220</sup> and the 1996 Draft Code of Crimes against the Peace and Security of Mankind (Draft Code of Crimes against the Peace).<sup>221</sup> The predicament bedeviling these negotiations was whether the prohibition on intervention should be limited to proscribing forcible intervention, or whether it should include non-forcible forms of pressure, such as economic coercion, subversive activities, and hostile propaganda.

On one side, Western powers consistently argued that the prohibition on intervention and the prohibition on the threat or use of force were coterminous. As the U.S. representative noted during deliberations on the 1970 Friendly Relations Declaration, “the basic provision of the [U.N.] Charter concerning the principle of non-intervention was contained in Article 2, paragraph 4. Since Western countries held the term ‘force’ in this provision of the Charter to mean only ‘armed force’, intervention was taken to mean the use or threat of armed force.”<sup>222</sup> This position echoed the predominant view in Western scholarship, which defined intervention as “dictatorial interference” that necessarily involves the use of force.<sup>223</sup> Western states resisted broadening the definition of intervention to retain their freedom to exercise economic pressure through both economic incentives, such as government aid and loan guarantees, and economic disincentives, especially

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16–17 (1970) (outlining the efforts of Arab delegates to incorporate an expansive definition of “threat or use of force” encompassing economic and political pressure).

220. See Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT’L L. 713, 726–29 (1971) (detailing the conflict between Western powers, notably between the United States and Latin American and Eastern European states during negotiations).

221. See generally John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes Against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT’L L. REV. 1 (1995) (providing a historical analysis detailing definitional and political issues inhibiting the Draft Code of Crimes against the Peace).

222. Tomislav Mitrovic, *Non-Intervention in the Internal Affairs of States*, in PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION 219, 226 (Milan Šahović ed., 1972).

223. See *id.* at 224–25 (highlighting contemporary support among numerous English, French and German authors for the “traditional” understanding of intervention).



trade embargoes,<sup>224</sup> which are essential to Western diplomatic practice and are not subject to a general prohibition akin to the prohibition on the use of force. Western states also insisted that any understanding of intervention that extended to non-forcible forms of coercion must include an allowance for the exercise of influence on the policies, preferences, and acts of states in accordance with settled practices of international diplomacy.<sup>225</sup>

On the other hand, having been the “historical victims of ‘settled international practice,’” the newly independent states of the Global South advocated an expanded prohibition on intervention.<sup>226</sup> For those states, the priority was the preservation of their hard-won sovereignty and “the liquidation of imperialism in its widest meaning, with all its political, military, economic and psychological implications.”<sup>227</sup> These states proposed broadening the definition of the word force in instruments such as the VCLT and the 1970 Friendly Relations Declaration to include economic force,<sup>228</sup> a proposal that was previously made and rejected during the drafting of Article 2(4) of the U.N. Charter.<sup>229</sup> These states also sought to include within the definition of intervention activities such as economic and financial sanctions, assistance to opposition parties, aiding or abetting rebel or terrorist groups, interference in civil conflicts, subversive activities or fomenting internal disturbances, boycotts, blockades, and propaganda and any other activities that would qualify as “[i]nterference by authorities of a State in the internal or external affairs of another state.”<sup>230</sup>

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224. See A. Cooper Drury, *Sanctions as Coercive Diplomacy: The U.S. President's Decision to Initiate Economic Sanctions*, 54 POL. RES. Q. 485, 486 (2001) (discussing the increased role of economic sanctions as “the coercive policy tool of choice” and scholarly justifications for their continued use).

225. Mitrovic, *supra* note 225, at 270–71.

226. Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 10 (1989).

227. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196 (2005).

228. Derek W. Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 1 (1972); Malawer, *supra* note 219, at 16–17.

229. Yehuda Z. Blum, *Economic Boycotts in International Law*, 12 TEX. INT'L L.J. 5, 10 (1977) (“[T]he San Francisco Conference in 1945 overwhelmingly rejected a Brazilian amendment to article 2(4) . . . prohibit[ing] not only the threat or use of force but also the threat or use of economic coercion.”).

230. Linarelli, *supra* note 224, at 24, 31, 36.

The outcome of these intergovernmental efforts to formulate a prohibition on intervention is somewhat ambivalent. On one hand, intervention was entirely dropped from the Draft Code of Crimes Against the Peace. This was due to the imprecision of the definition of intervention, which made it unsuitable for inclusion in a criminal code.<sup>231</sup> The VCLT, on the other hand, included Article 52, which stipulates that treaties concluded through the threat or use of force are deemed void. However, numerous states were dissatisfied with this provision, and insisted that treaties concluded through non-forcible coercion should also be void.<sup>232</sup> As a compromise, the Vienna Conference during which the VCTL was concluded adopted the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties. In its sole operative provision, this declaration condemned the “threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent.”<sup>233</sup>

Ultimately, it was the 1970 Friendly Relations Declaration that included the most extensive expression of the prohibition on intervention. The text of the declaration borrowed extensively from the Latin American treaties previously discussed, and additionally echoed earlier declarations on the prohibition on intervention that the General Assembly adopted.<sup>234</sup> The 1970 Friendly Relations Declaration was overall in accord with the views of non-Western states that supported a broad prohibition on intervention. It stated:

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231. See Jamnejad & Wood, *supra* note 219, at 359 (“One reason given was that uncertainties over the scope of the law of intervention made it unsuitable for criminalization . . .”).

232. See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 178 (2d ed. 1984) (discussing the failed “nineteen-power amendment”).

233. U.N. CONFERENCE ON THE LAW OF TREATIES: FIRST AND SECOND SESSIONS, VIENNA, 26 MARCH–24 MAY 1968 AND 9 APRIL–22 MAY 1969: OFFICIAL RECORDS, at 285, U.N. Doc. A/CONF.39/11/Add.2, U.N. Sales No. E.70.V.5 (1971).

234. In particular, the 1970 Friendly Relations Declaration builds on the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. G.A. Res. 2131 (XX), at 2 (Dec. 21, 1965).

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.<sup>235</sup>

Although not binding, the 1970 Friendly Relations Declaration, which was adopted without a vote, is considered an authoritative interpretation of the U.N. Charter and expressive of customary international law.<sup>236</sup> The jurisprudence of the ICJ, including relatively recent decisions, confirms the customary status of the prohibition on intervention and affirms its standing as a distinct principle that is broader than the prohi-

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235. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, at 123 (Oct. 24, 1970).

236. *But see* Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 3 (1994) (presenting common justifications for viewing declarations as authoritative statements of international law, but ultimately cautioning against doing so).

bition on the threat or use of force.<sup>237</sup> Accordingly, the prohibition on intervention is not simply a device of political rhetoric, nor is it “unintelligible” or “functionally useless,” as at least one author has argued.<sup>238</sup> It is an established rule of international law with distinct content and a discernable scope.

The most prominent judicial precedent on the prohibition on intervention, and the most practicable starting point to consider the scope and content of this rule, is the ICJ decision in the *Nicaragua Case*. In that decision, the court explained that the principle of non-intervention:

[F]orbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.<sup>239</sup>

This paragraph provides a basis on which to construct a test to determine when the exercise of pressure by states breaches the prohibition on intervention. Although the court did not frame the concept in these terms, this paragraph identifies the two elements of prohibited intervention. The first is the *object of intervention* (i.e. the matters protected by the prohi-

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237. For instance, in the *Armed Activities in the Congo* case, the ICJ affirmed that the prohibition on intervention exists separately from the prohibition on the use of force, and described the content of the 1970 Friendly Relations Declaration as “declaratory of customary international law.” *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 162 (Dec. 19).

238. Eric S. O'Malley, *Destabilization Policy: Lessons from Reagan on International Law, Revolutions and Dealing with Pariah Nations*, 43 VA. J. INT'L L. 319, 325, 328 (2003).

239. *Nicaragua Case*, *supra* note 2, ¶ 205.

bition on intervention). These are policy areas that fall within the *domaine réservé* of states, which, the court noted, are “matters in which each State is permitted, by the principle of State sovereignty, to decide freely.”<sup>240</sup> The second is the *instrument of intervention*, which, the court stated, are the “methods of coercion.” These two elements must be satisfied for an act to breach the prohibition on intervention. Accordingly, this article defines prohibited intervention as the pursuit of unlawful ends through unlawful means. The ends or purposes of intervention are unlawful if the coercing state impinges on the *domaine réservé* of the coerced state, and the means of intervention are unlawful if a state employs coercive instruments against another state.

This two-pronged understanding of violations of the prohibition on intervention diverges from the views of scholars who have constructed single-pronged tests to determine the legality of intervention. For several scholars, the defining characteristic of unlawful intervention is that the coerced state is forced to give concessions on issues within its *domaine réservé*. For example, commenting on Article 52 of the VCLT, which voids treaties concluded under the threat or use of force, Olivier Corten argues that “any type of pressure hampering the exercise of the sovereign rights of a State is unlawful.”<sup>241</sup> Similarly, writing on the legality of financial sanctions imposed for humanitarian purposes, Evan Criddle describes what he calls the “‘anti-subordination theory’, [which] holds that any measures used to subordinate a state’s sovereign powers to foreign control . . . constitute acts of wrongful ‘intervention’.”<sup>242</sup> Antonios Tzanakopoulos adopts a similar approach, writing that “coercion is effectively tantamount to intervention . . . and is defined by the fact that it is unlawful because it invades a State’s ‘sphere of freedom’. . . . Any invasion into the sphere of freedom constitutes coercion/intervention/coercive interference, namely an unlawful act.”<sup>243</sup> A similar approach focuses,

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240. *Id.*

241. Olivier Corten, *Article 52: Convention of 1969*, in 2 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 1201, 1209 (Olivier Corten & Pierre Klein eds., 2011).

242. Evan J. Criddle, *Humanitarian Financial Intervention*, 24 EUR. J. INT’L L. 583, 591 (2013).

243. Antonios Tzanakopoulos, *The Right to Be Free from Economic Coercion*, 4 CAMBRIDGE J. INT’L & COMP. L. 616, 623 (2015).

not on whether intervention affected the *domaine réservé* of the coerced state, but on whether the actions of the coercing state caused the coerced state to alter its behavior. As Jens David Ohlin explains, the “*sine qua non* of coercion is that the threat compelled the [coerced] State to act in a way that it otherwise would not act.”<sup>244</sup> In short, to these scholars, any infringement on the *domaine réservé* of the coerced state or any alteration of its behavior due to the pressure exercised by the coercing state breaches the prohibition on intervention, regardless of the means of intervention.

This article rejects these single-pronged understandings of unlawful intervention, and proposes a two-pronged test that defines unlawful intervention as the pursuit of unlawful ends through unlawful (i.e. coercive) means for several reasons. First, as discussed below, coercion is a dynamic process in which one or more states engage in pressure and counter-pressure at various levels of intensity using a broad range of instruments over an extended period.<sup>245</sup> It is, therefore, impossible to examine the legality of coercive practices by disaggregating the acts undertaken as part of a coercive strategy and viewing them in isolation. Rather, testing the legality of these acts must be determined through a holistic examination of the relationship between the relevant parties and a systematic tracking of their behavior in light of the objectives of the coercing state and the means it employs to achieve its objectives.

Second, not every interference in the *domaine réservé* of a state breaches the prohibition on intervention. Adopting this two-pronged approach distinguishes between coercive and non-coercive interferences in the *domaine réservé* of states. For instance, did the United States violate the prohibition on intervention when President Trump expressed opposition to the Brexit plan that U.K. Prime Minister Theresa May proposed?<sup>246</sup> Was it unlawful for President Obama to exert pres-

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244. Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579, 1592 (2017).

245. Maria Sperandei, *Bridging Deterrence and Compellence: An Alternative Approach to the Study of Coercive Diplomacy*, 8 INT'L STUD. REV. 253, 278 (2006) (“[C]oercion is a reciprocal, interactive and dynamic process. . . . [C]oercion [is] a continuous process of interaction between the choices of two players . . .”).

246. *Factbox: U.S. President Trump's Views on UK's May, Brexit*, REUTERS, July 13, 2018, <https://www.reuters.com/article/us-usa-trump-britain-sun->

sure on Egyptian President Hosny Mubarak during the popular uprising of 2011 by stating that an “orderly transition must be meaningful, it must be peaceful, and it must begin now”<sup>247</sup> Was it unlawful for U.S. Senator Lindsey Graham to say that “MbS has got to go” following Jamal Khashoggi’s murder?<sup>248</sup> It is certainly within Japan’s *domaine réservé* to honor its citizens who fought in World War II, but is it unlawful for China to protest Japanese commemorations of its fallen soldiers and for South Korea to voice “deep concerns that responsible leaders of Japan’s government and parliament are again paying tribute at the Yasukuni Shrine . . . that glorifies the history of the war of aggression”<sup>249</sup> These are examples of interferences in matters within the *domaine réservé* of states. These acts do not, however, breach the prohibition on intervention because the means employed were not coercive.

Third, this two-pronged approach assumes that the legality of coercive practices depends not only on the nature of those practices, but also on their purposes. This accords with the instruments that codified the prohibition on intervention, such as the OAS Charter and 1970 Friendly Relations Declaration. These instruments prohibit coercion that seeks to achieve specific aims, such as the “subordination of the exercise of [a State’s] sovereign rights and to secure from it advantages of any kind,” depriving “peoples of their national identity,” and causing “the violent overthrow of the regime of another State.”<sup>250</sup> The *Nicaragua Case* and the few other judicial pronouncements of relevance to this question also support the two-pronged approach proposed in this article. For example, in the *Corfu Channel Case*, the ICJ declared that Operation Retail—a minesweeping operation that the United Kingdom executed in Albanian waters on November 13, 1946—violated Al-

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factbox/factbox-u-s-president-trumps-views-on-uks-may-brexidUSKBN1K31J0.

247. Karen DeYoung, *Obama Presses Mubarak to Move ‘Now,’* WASH. POST (Feb. 2, 2011), [https://www.washingtonpost.com/national/obama-presses-for-move-now/2011/02/01/AB3hHbE\\_story.html](https://www.washingtonpost.com/national/obama-presses-for-move-now/2011/02/01/AB3hHbE_story.html).

248. See *supra* note 159 and accompanying text.

249. Chehui Peh & Teppei Kasai, *Asian Neighbors Protest as Japan PM Sends Offering to War Dead Shrine*, REUTERS, Aug. 14, 2017, <https://www.reuters.com/article/us-ww2-anniversary-japan/asian-neighbors-protest-as-japan-pm-sends-offering-to-war-dead-shrine-idUSKCN1AV009>.

250. G.A. Res. 2625 (XXV), *supra* note 238, at 123.

bania's sovereignty.<sup>251</sup> However, in response to Albania's contention that the United Kingdom "made use of an unnecessarily large display of force, out of proportion to the requirements of the [mine] sweep," the court opined that "[i]t does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania."<sup>252</sup> This finding supports the view that merely using an instrument of coercion—in this case, a flotilla of several cruisers and an aircraft carrier—does not by itself give rise to a violation of international law. Rather, it appears that for the ICJ, this instrument of coercion must have been deployed for the purpose of extracting political concessions from Albania to constitute a violation of international law.

Defining unlawful intervention as the pursuit of unlawful ends through unlawful instruments of statecraft means that violations of the prohibition on intervention are composite breaches of international law.<sup>253</sup> The defining characteristic of a composite breach is that it consists of separate acts that are undertaken as part of a single strategy to achieve an unlawful objective. As James Crawford explains, "a composite act is more than a simple series of repeated actions, but, rather, a legal entity the whole of which represents more than the sum of its parts."<sup>254</sup> Because they are elements of a strategy designed to achieve an objective that is impermissible under international law, the "simple series of actions" to which Crawford refers are fused together to create a single internationally wrongful act. The breach of international law is not apparent by examining each of the constituent elements of a composite breach alone. Rather, "[o]nce the acts are considered in their totality, the issue becomes clear."<sup>255</sup> In the context of the prohibition on intervention, those separate acts are, first, a demand directed at a state to make concessions within its *domaine réservé*, and second, the use of unlawful instruments or a com-

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251. Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 35–36 (Apr. 9).

252. *Id.* at 35.

253. See G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, at 4 (Jan. 28, 2002) (defining breaches as consisting of composite act).

254. JAMES CRAWFORD, STATE RESPONSIBILITY 266 (2013).

255. ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY 51 (2017).



combination of lawful and unlawful instruments to coerce the state into making those concessions. The combination of pursuing unlawful ends through unlawful means gives rise to a violation of the prohibition on intervention.

The next two sections elaborate on the content of the two elements of the prohibition on intervention: the unlawful ends and unlawful means of intervention. These sections will also explain how the concept of composite breaches applies to the prohibition on intervention, and further apply these two elements of the prohibition on intervention to the three cases discussed in Part I of this article, which will further illustrate how these elements operate in reality.

### B. *Unlawful Ends: Intervention in the Domaine Réservé of States*

The notion that states are entitled to a *domaine réservé*, within which they are entitled to freedom of action unfettered by international law, is uncontroversial. This freedom, which is protected by the prohibition on intervention, is a corollary of state sovereignty.<sup>256</sup> The scope and content of the *domaine réservé*, however, are uncertain.

To demarcate the scope of the *domaine réservé*, it is useful to distinguish it from the “domestic jurisdiction” of states, which is a related concept often mistakenly used interchangeably with the term *domaine réservé*. “Domestic jurisdiction” is a phrase that made its debut in the lexicon of international law through Article 15 of the Covenant of the League of Nations,<sup>257</sup> and then reappeared, albeit in amended form, in Article 2(7) of the U.N. Charter.<sup>258</sup> The *domaine réservé* is broader than the “domestic jurisdiction” of states. The latter “only refers to the exclusive internal competence of the highest legislative, judicial, and administrative (executive) authorities of the State.”<sup>259</sup> The scope of the *domaine réservé*, on the other hand,

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256. *Nicaragua Case*, *supra* note 2, ¶ 202 (“The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference . . .”).

257. J.L. Brierly, *Matters of Domestic Jurisdiction*, 1925 BRIT. Y.B. INT’L L. 8, 8.

258. U.N. Charter art. 2, ¶ 7.

259. MAREK ST. KOROWICZ, *INTRODUCTION TO INTERNATIONAL LAW: PRESENT CONCEPTIONS OF INTERNATIONAL LAW IN THEORY AND PRACTICE* 157 (1959).

extends beyond the domestic competences of the organs of a state to include its ability to conduct its foreign relations freely. This means that the prohibition on intervention protects not only the domestic affairs of states, but also matters such as “political alliances, diplomatic positions adopted at the international level, and foreign policy in general [which] must be decided on an independent basis without external interference.”<sup>260</sup>

Identifying those specific areas of internal affairs and external relations within the *domaine réservé* is, however, an elusive endeavor. To some scholars, the *domaine réservé* is composed of a set of fundamental rights protected against intervention because they are considered intrinsic characteristics of states, without which statehood would be eviscerated. According to this approach, which resembles natural law jurisprudence, the source of these rights is not international law. Rather, these rights are inherent in statehood and sovereignty.<sup>261</sup> Some of these rights include the freedom to determine the political and economic system of the state, the right to enact a national constitution, the power to exercise jurisdiction throughout the state’s territory, and the regulation of citizenship and nationality.<sup>262</sup>

However, the reality of international law, especially since the twentieth century, is that even these purportedly fundamental rights of states have become the subject of international regulation. This has given rise to an understanding of the *domaine réservé* not as an irreducible sphere of state freedom, but as the residual liberty retained by states in policy areas that are not governed by international law. The *domaine réservé*, therefore, is not static. Its breadth is ever-changing depending on the extent of the international legal obligations of

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260. Marcelo Kohen, *The Principle of Non-Intervention 25 Years After the Nicaragua Judgment*, 25 LEIDEN J. INT’L L. 157, 159 (2012).

261. See Alexander Orakhelashvili, *Sanctions and Fundamental Rights of States: The Case of EU Sanctions Against Iran and Syria*, in ECONOMIC SANCTIONS AND INTERNATIONAL LAW 13, 14–15 (Matthew Happold & Paul Eden eds., 2016) (outlining the history of the fundamental rights doctrine).

262. But see Alfred Verdross, *The Plea of Domestic Jurisdiction Before an International Tribunal and a Political Organ of the United Nations*, 28 HEIDELBERG J. INT’L L. 33, 36 (1968) (outlining these fundamental rights, but ultimately rejecting the doctrine and asserting that the breadth of domestic jurisdiction is dictated according to international law).

a state, the growth of international law, and the intrusiveness of international regulatory and adjudicatory bodies.<sup>263</sup> Therefore, while all states enjoy a *domaine réservé*, the width of that margin of liberty will differ from one state to another because no two states have identical international legal obligations. Accordingly, the protection accorded to each state by virtue of the prohibition on intervention is dependent on the extent of its *domaine réservé*, which is in turn determined by the nature of its international legal obligations.

Applying this prong to the cases in Part I of this article helps to clarify the operation of this first element of the prohibition on intervention, and demonstrates the inherent variability of the concept of the *domaine réservé*. With the exception of obligations enshrined in human rights instruments to which it is party, the United States has no international obligations regarding its domestic governance or its electoral processes. Conducting and administering elections, therefore, is generally within the U.S. *domaine réservé*. Accordingly, Russia's alleged interference in the U.S. presidential election satisfies this first prong of the test. European Union (EU) measures against Hungary and Poland provide a contrasting case of intervention in matters relating to domestic governance. In December 2017, the European Commission took disciplinary action against Poland for adopting legislation that undermined judicial independence.<sup>264</sup> Similarly, on September 12, 2018, the European Parliament voted to take disciplinary action against Hungary in response to domestic policies relating to the freedom of expression, migration, and the rule of law.<sup>265</sup> These measures taken by the EU against two of its member states do not violate the prohibition on intervention. By joining the EU, Poland and Hungary undertook legal obligations that removed these policy areas—to the extent of these obligations—from their *domaine réservé*. This diminished the level of protection afforded to these states against intervention by the EU in these areas of domestic governance.

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263. Katja S. Ziegler, *Domaine Réservé*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398?print=pdf> (last updated Apr. 2013).

264. *Poland Judiciary Reforms: EU Takes Disciplinary Measures*, BBC NEWS (Dec. 20, 2017), <https://www.bbc.com/news/world-europe-42420150>.

265. *EU Parliament Votes to Punish Hungary over 'Breaches' of Core Values*, BBC NEWS (Sept. 12, 2018), <https://www.bbc.com/news/world-europe-45498514>.

Determining the legality of U.S. pressure against North Korea in response to its nuclear program depends on whether Pyongyang retains the freedom to develop nuclear weapons. Under international law, there is no general prohibition on the acquisition of either nuclear weapons or ballistic missiles.<sup>266</sup> Moreover, since its withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons,<sup>267</sup> North Korea is not under a legal obligation to denuclearize. North Korea is, however, under an obligation to denuclearize under the Security Council resolutions that have instructed it to dismantle its nuclear program.<sup>268</sup> As a U.N. member state, North Korea is bound by Article 25 of the Charter to carry out Security Council resolutions. This means that the right to maintain a nuclear weapons program is not within North Korea's *domaine réservé*, and therefore, not protected against foreign intervention. Accordingly, demanding that North Korea denuclearize does not infringe on its *domaine réservé* and, as such, does not violate the prohibition on intervention.

The murder of Jamal Khashoggi is a more complex case. The stated objective of Turkey's expertly executed campaign of press leaks was to ensure a comprehensive investigation of the case, and to hold those responsible for Khashoggi's murder accountable. These objectives do not impinge on Saudi Arabia's *domaine réservé*, since it is unquestionable that Saudi Arabia is not free to murder its citizens in its consulates in foreign states. These were not, however, Turkey's only motives. Ankara adroitly exploited the fallout from Khashoggi's murder to achieve other unstated objectives, including weakening the Saudi Crown Prince and possibly derailing his ascent to the throne, and pressuring the United States to realign its Middle East policies to be in line with Turkish interests. These objectives potentially impinge on the *domaine réservé* of the United

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266. Gro Nystuen & Kjølvi Egeland, *A 'Legal Gap'? Nuclear Weapons Under International Law*, ARMS CONTROL ASS'N (March 2018), [https://www.armscontrol.org/ACT/2016\\_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law](https://www.armscontrol.org/ACT/2016_03/Features/A-Legal-Gap-Nuclear-Weapons-Under-International-Law).

267. Assia Dosseva, *Recent Developments: North Korea and the Non-Proliferation Treaty*, 31 YALE J. INT'L L. 265, 266 (2006).

268. See *UN Security Council Resolutions on North Korea*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheets/UN-Security-Council-Resolutions-on-North-Korea> (last updated Apr. 2018) (providing outlines of the nine Security Council resolutions on North Korea adopted since 2006).

States and Saudi Arabia. This is because the United States, like all states, enjoys the liberty to freely articulate its foreign policy and align itself with countries of its choice. Similarly, Saudi Arabia's choice of political leadership is a matter that falls within its *domaine réservé*. Ultimately, however, Turkey's behavior throughout the Khashoggi affair did not violate the prohibition on intervention because, while its ulterior motives might be unlawful, the instruments it employed—press leaks, official statements, and intelligence sharing—do not constitute unlawful coercion.

C. *Unlawful Means: Coercion as the Instrument of Intervention*

This section examines the second element of the prohibition on intervention. As noted above, not every intrusion into the *domaine réservé* of a state amounts to a breach of the prohibition on intervention. Only when an infringement on the *domaine réservé* is combined with the use of coercive means will a breach of the prohibition on intervention occur.<sup>269</sup> This is implicit in the *Nicaragua Case*, where the ICJ explained that “[i]ntervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion . . . defines, and indeed forms the very essence of, prohibited intervention . . . .”<sup>270</sup> Nowhere, however, does the court define the “element of coercion,” nor does it articulate a doctrine that distinguishes between unlawful intervention through coercive means and intervention through the exercise of pressure that is not wrongful. This section addresses this gap in the legal understanding of coercion.

This section discusses the purposes and processes of coercion in international relations, and then engages with the question of how to distinguish between lawful pressure and unlawful forms of pressure that constitute coercion. Before proceeding, however, it should be noted that this article does not purport to propose a general theory of coercion that applies to all law, both domestic and international, across time and space. Indeed, it is doubtful that it is possible to formulate such a universal concept of coercion. Rather, the objective is to develop an understanding of coercion within international

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269. See *supra* pp. 32, 41.

270. *Nicaragua Case*, *supra* note 2, ¶ 205.

law, and specifically as an element of the prohibition on intervention.

### 1. *The Concept of Coercion*

Coercion is a process in which a state exercises power to alter the behavior of an adversary. Power, therefore, is an instrument, while coercion is a strategy in which power is used to achieve preferred policy outcomes.<sup>271</sup> The ultimate and most extreme form of coercion is the use of force to destroy the capabilities of an adversary and compel its capitulation. However, naked aggression, in which a state wages war to subvert the will and liberty of another state, remains an exceptional form of coercion. In most cases, coercion is employed as a bargaining strategy.<sup>272</sup> Non-forceful coercion is a strategy that alters the behavior of an adversary, not by destroying its capabilities, but by weakening its resolve.<sup>273</sup> As Thomas Schelling explained, this form of coercion seeks to “structure someone’s motives, while brute force tries to overcome his strength.”<sup>274</sup> In other words, unless it decides to wage war, the coercing state shapes the behavior of the coerced state by exploiting its vulnerabilities and manipulating its fears, thereby limiting its will to resist the demands of the coercing state.<sup>275</sup>

When employed as a bargaining strategy, coercion is, in effect, a form of communication. The coercing state communicates specific demands to the coerced state and backs those demands with pressure to induce compliance. Like any communicative strategy, states exercising coercion send both verbal and non-verbal signals through an admixture of instru-

271. See JOSEPH S. NYE, JR., *THE FUTURE OF POWER* 13 (2011) (providing an example that illustrates the dynamic in which power is used as an instrument to shape others’ preferences or strategies).

272. See Todd S. Sechser, *A Bargaining Theory of Coercion*, in *COERCION: THE POWER TO HURT IN INTERNATIONAL POLITICS* 55, 56 (Kelly M. Greenhill & Peter Krause eds., 2018) (“[C]oercion is fundamentally about *bargaining*.”).

273. See FRANCIS GRIMAL, *THREATS OF FORCE: INTERNATIONAL LAW AND STRATEGY* 103 (2012) (citing Paul Gordon Lauren, *Ultimata and Coercive Diplomacy*, 16 INT’L STUD. Q. 131 (1972)) (“[C]oercive diplomacy focuses upon affecting an opponent’s will rather than upon his military capabilities.”).

274. THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 3 (1966).

275. Cf. ALEXANDER L. GEORGE, *FORCEFUL PERSUASION: COERCIVE DIPLOMACY AS AN ALTERNATIVE TO WAR* 11 (1991) (“[T]he central task of a coercive strategy [is] to create in the opponent the expectation of costs of sufficient magnitude to erode his motivation to continue what he is doing.”).

ments,<sup>276</sup> including diplomatic, military, economic, and political tools, to generate pressure on the coerced state. These instruments signal the resolve of the coercing state and underline its determination to force the coerced state to concede. The coerced state also employs instruments of statecraft to signal its steadfastness and ability to withstand pressure. Both the coercing and coerced states many also use these tools to signal their openness to compromise and their preparedness to accommodate the demands of their adversaries.

Coercion is rarely a one-way or one-off affair. Rather, it is a dynamic and iterative process in which adversaries employ various instruments of power at differing levels of intensity in a continuous process of pressure and counter-pressure.<sup>277</sup> Furthermore, while coercion is usually depicted as a bilateral process—coercing state vs. coerced state—the reality is that coercion is often a multilateral matter. Turkey exploited the murder of Jamal Khashoggi both to weaken the Saudi Crown Prince and to alter U.S. policies in the region. Japan, South Korea, and the United States are all targets of North Korean coercion, while China was subjected to pressure from the United States to influence North Korea. Regardless of the number of parties involved and whatever the instruments used, the objective is always to diminish the ability of an adversary to oppose the coercing state. That is also the purpose of interventions in domestic political processes. Russia's alleged interference in the 2016 U.S. presidential election, for instance, was intended to weaken U.S. resolve to oppose Russian policies by assisting a candidate that was perceived as less hostile to Moscow, as well as to aggravate societal tension, sow popular discord, and undermine faith in the democratic process.

The source of stigma surrounding coercion is that it undermines the freedom and liberty of states.<sup>278</sup> When successful, coercion constrains the autonomy of the coerced state and impinges on its political independence. It is a calculated exer-

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276. Cf. KENNETH A. SCHULTZ, *DEMOCRACY AND COERCIVE DIPLOMACY* 57–58 (2001) (describing threats, displays of force, and diplomacy as the “external communication” of states).

277. Myres S. McDougal & Florentino P. Feliciano, *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 AM. J. INT'L L. 241, 248–49 (1958).

278. Cf. Westen, *supra* note 182, at 558–59 (using “freedom” as a core concept for understanding coercion).

cise of intimidation to compel a state to behave according to foreign diktat. It leads states to adopt policies and make concessions out of fear and a desire to limit or avoid threatened harm. This violates a core presumption underlying international law that states are at liberty, within the bounds of international law, to adopt and implement policies of their choice, which is a corollary of the sovereignty of states.<sup>279</sup>

In order to fully comprehend the nature and operation of coercion, it is necessary to distinguish it from other strategies that states employ to alter the behavior of other states. The antithesis of coercion is persuasion.<sup>280</sup> Like coercion, persuasion shapes state policy. However, unlike coercion, which exploits the vulnerabilities of a state to weaken its resolve to resist an adversary, persuasion seeks to alter a state's conceptualization of its self-interest. It rearranges the values of a state, reconfigures its preferences and policy priorities, and proposes alternative policy mechanisms to achieve those preferences and priorities.<sup>281</sup> Persuasion appeals to reason and invokes the "logic of appropriateness," which shapes behavior, not by threatening punishment, but by presenting certain policies and outcomes as "true, reasonable, natural, right, and good."<sup>282</sup>

Like coercion, persuasion intrudes on the *domaine réservé* of states. For instance, while the ICJ affirmed that "[e]very State possesses a fundamental right to choose and implement its own political, economic, and social systems,"<sup>283</sup> the reality is that states often have narrow margins of appreciation regarding these choices. As argued elsewhere, throughout history, certain hegemonic ideas about the proper methods of political

279. Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?* 29 MICH. J. INT'L L. 71, 75-77 (2007).

280. Cf. John W. Chapman, *Coercion in Politics and Strategy*, in COERCION 289, 289 (J. Roland Pennock & John W. Chapman eds., 1972) ("[P]olitics may be predominantly either persuasive or coercive.").

281. See GLENN HERALD SNYDER & PAUL DIESING, CONFLICT AMONG NATIONS: BARGAINING, DECISION MAKING, AND SYSTEM STRUCTURE IN INTERNATIONAL CRISES 198 (1977) ("Persuasion helps [the adversary] make these choices to one's own advantage, by changing his valuation of the outcomes and his estimate of one's own valuations . . .").

282. James G. March & Johan P. Olsen, *The Logic of Appropriateness*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 478, 479 (Robert E. Goodin ed., 2011).

283. *Nicaragua Case*, *supra* note 2, ¶ 258.



governance and economic management have set the parameters of acceptable behavior for actors within the international system.<sup>284</sup> In the post-Cold War era, for instance, those hegemonic ideas were based on liberal peace theory, which prescribes liberal democracy and neoliberal economics as the path towards domestic good governance and international peace and security.<sup>285</sup> Therefore, to many writers, persuasion is no less prejudicial to autonomy than coercion. One scholar even suggested that “[i]t is, perhaps, legitimate to consider persuasion, as a rule, to be merely a form of violence, ‘violence committed against the soul.’”<sup>286</sup>

While this writer recognizes the potency of persuasive processes that structure the preferences, priorities, and perhaps even the identities of actors in the international system, the reality is that coercion and persuasion are far from identical. Where coercion assaults free will, persuasion determines what a free will desires. Persuasion, therefore, is a subtle, indirect, and diffuse exercise of power. While coercion requires the deployment of “relational power,” which interdicts and redirects the decision-making process of the target state, persuasion is an exercise of “meta-power” that shapes the normative environment within which decisions are made.<sup>287</sup>

Differentiating between coercive and persuasive intrusions into the *domaine réservé* of states requires a contextual evaluation of the interactions and relationships between the relevant parties. First, states exercise coercion in the context of adversarial relationships or rivalries.<sup>288</sup> Second, coercion involves articulating a specific demand that the coercing state communicates to the coerced state. Third, the coercing state develops and implements a coordinated strategy of pressuring the coerced state to comply with its demand. Fourth, in addi-

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284. Mohamed S. Helal, *Anarchy, Ordering Principles and the Constitutive Regime of the International System*, 8 GLOBAL CONSTITUTIONALISM 470, 486 (2019).

285. Mohamed S. Helal, *The Crisis of World Order and the Constitutive Regime of the International System*, 46 FLA. ST. U. L. REV. 569, 580–81 (2019).

286. Franz L. Neumann, *Approaches to the Study of Political Power*, 65 POL. SCI. Q. 161, 168 (1950).

287. Stephen D. Krasner, *Transforming International Regimes: What the Third World Wants and Why*, 25 INT’L STUD. Q. 119, 122 (1981).

288. For a definition of adversarial relationships, specifically “enduring rivalries,” see ZEEV MAOZ & BEN D. MOR, *BOUND BY STRUGGLE: THE STRATEGIC EVOLUTION OF ENDURING INTERNATIONAL RIVALRIES* 5 (2002).

tion to communicating resolve, the pressure that the coercing state generates also signals the urgency of its demand and intimates the possibility of escalation if the coerced state resists the demands of the coercing state.<sup>289</sup> Finally, to constitute coercion, the coercing state must use unlawful instruments to compel the coerced state to comply with its demands. Coercion, therefore, is the communication of specific demands falling within the *domaine réservé* of a state backed by pressure generated by unlawful instruments. Further, coercion is exercised in a calculated and coordinated manner, which creates a sense of urgency within the overall context of an adversarial relationship. Strategies that shape or alter the behavior of states or actors within the international system that do not exhibit these features constitute a form of persuasion, not an exercise of coercion.

## 2. *Defining Unlawful Coercion*

Distinguishing between the lawful exercise of pressure, which is unavoidable in interstate relations, and the exercise of coercion requires considering three questions. The first investigates the nature of coercion by asking whether it should be defined as threatening or inflicting physical harm, or whether it should be understood more broadly to include non-forceful pressure. The second question is about the method of measuring coercion. Specifically, should determining whether a certain exercise of pressure amounts to coercion depend on the impact or consequences of that pressure on the coerced state or, instead, on the legality of the behavior of the coercing state regardless of its impact? Third, and finally, can the use of *lawful* instruments of statecraft ever violate the prohibition on intervention?

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289. For a discussion of how this relationship fits into the coercive diplomacy framework, see NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 57–58 (2007).

a. The Nature of Coercion: Occurrent Coercion and Dispositional Coercion

For some, coercion is synonymous with violence. Only physical compulsion, often called “occurrent coercion,”<sup>290</sup> ought to be legally proscribed and socially ostracized. In domestic society, the paradigmatic example of occurrent coercion is when a robber holds someone at gunpoint and says: “Your money or your life.”<sup>291</sup> In international affairs, the archetypical form of occurrent coercion is the blatant ultimatum in which a state threatens to wage war unless its demands are met. Conversely, other writers have suggested that any process that induces persons to alter their behavior is coercive. This understanding, labelled “dispositional coercion,”<sup>292</sup> imagines coercion as an inescapable facet of human life. Every human interaction and every human institution, including family and friendship, society and public opinion, the state, the law, and the economy, are considered coercive.<sup>293</sup>

Occurrent coercion is unduly narrow. First, there is no conceptual reason or logical justification for excluding practices such as economic sanctions or cyber-interference from the understanding of coercion in international law. That would ignore the destructive potential and intrusive capabilities of these non-forceful instruments.<sup>294</sup> Second, as the literature on coercive diplomacy demonstrates, the reality is that the practice of coercion is not limited to the use of force. States apply pressure against their adversaries through a range of instruments that are often employed in tandem. In the North Korean nuclear crisis, for example, fiery rhetoric was combined with demonstrations of force, unilateral and multilateral sanctions, cyber operations, and diplomatic pressure in inter-

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290. See Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 50–51 (2002) (expressing skepticism towards the value of “occurrent coercion” as a concept).

291. Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621, 1639 (2006).

292. Berman, *supra* note 294, at 51.

293. Cf. W. Michael Reisman, Editorial Comment, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT’L L. 642, 645 (1984) (“[C]oercion is a ubiquitous feature of all social life . . .”).

294. See H. J. McCloskey, *Coercion: Its Nature and Significance*, 18 S. J. PHIL. 335, 341 (1980) (“[T]hreats not based on the use of force may involve reference to as serious evils . . . as may those based on threats to use force . . .”).

national organizations. Similarly, Russia's intervention in the U.S. presidential election included covert operations that disseminated misinformation against Secretary Clinton and overt messaging from outlets such as Russia Today that promoted far-right policies and social positions. Indeed, coercive diplomacy is an attractive strategy precisely because it provides a policy tool that is politically and financially cost-effective when compared to the use of force.<sup>295</sup> Thus, from a policy perspective, limiting the definition of coercion to the threat or use of force constructs a false distinction that is unreflective of the realities of the practice of coercive diplomacy.

Third, both international and domestic law have adopted understandings of unlawful coercion that go beyond physical compulsion. Internationally, the 1970 Friendly Relations Declaration, the *Nicaragua Case*, and the International Law Commission (ILC) recognized that coercion is not limited to the use of force.<sup>296</sup> Domestically, fields including constitutional, criminal, and contract law have categorized various forms of non-forceful behavior as unlawfully coercive.<sup>297</sup> Moreover, because breaches of the prohibition on intervention are composite acts,<sup>298</sup> it is necessary to include in any legal evaluation of state behavior the full range of actions undertaken by the relevant parties—including forceful or non-forceful instruments—as part of a coercive strategy. This article argues, therefore, that excluding dispositional/non-forceful coercion and restricting the definition to occurrent/forceful coercion would be unrealistic and out of step with established legal standards.

b. Measuring Coercion: The Impact of Coercion vs. The Legality of Coercion

To some scholars of both law and philosophy, coercion ought to be judged on the bases of its impact on the coerced party. Writing from a philosophical perspective, Virginia Held

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295. GEORGE, *supra* note 279, at 6.

296. For instance, the ILC stated that “coercion could possibly take other forms, e.g. serious economic pressure.” Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc A/56/10, at 70 (2001) [hereinafter Draft Articles on State Responsibility].

297. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1443–44 (1989) (discussing coercion in the context of contract and labor law).

298. See *supra* note 256 and accompanying text.

argued that “[c]oercion is the activity of causing someone to do something against his will, or of bringing about his doing what he does against his will.”<sup>299</sup> Similarly, in a seminal study on threats of force in international law, Romana Sadurska posited that “[o]nly communications that arouse the anticipation of severe deprivation or destruction of values in the target audience and, hence, trigger a reaction of stress that leads to accommodating or adaptive behavior as the only reasonable alternative can be regarded as a threat.”<sup>300</sup> Whether an act is coercive, in other words, depends, not on the characteristics of the act, but on its impact on the coerced party. If the latter acts not out of its own volition, but out of a desire to avoid the imposed or threatened harm, then its acts are unfree, and therefore, coerced.

The ILC Articles on Responsibility of States of Internationally Wrongful Acts (Articles on State Responsibility) adopt a similar understanding of coercion. Article 18 discusses the assigning of international responsibility in situations wherein a state is coerced by another state to commit an internationally wrongful act. The impact of coercion in these situations is that responsibility for the wrongful conduct is transferred from the coerced state, which committed the internationally wrongful act, to the coercing state. The rationale underlying this rule is that “the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.”<sup>301</sup> To allow for this reassigning of responsibility from the coerced state to the coercing state, the coercion must be of such gravity that it “forces the will of the coerced state . . . giving it no effective choice but to comply with the wishes of the coercing state.”<sup>302</sup> This, the ILC noted, means that coercion “has the same essential character as *force majeure*,” which is “irresistible force” that “makes it materially impossible” for the coerced state to resist the coercing state.<sup>303</sup>

These approaches are inadequate for several reasons.

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299. Virginia Held, *Coercion and Coercive Offers*, in COERCION, *supra* note 283, at 49, 50–51.

300. Romana Sadurska, *Threats of Force*, 82 AM. J. INT’L L. 238, 244 (1988).

301. Draft Articles on State Responsibility, *supra* note 300, at 65.

302. *Id.* at 69.

303. *Id.* at 69, 76.

First, constructing a clear chain of causation—“the process of connecting an act (or omission) with an outcome as cause and effect”<sup>304</sup>—is exceedingly difficult.<sup>305</sup> Divining the exact motivations of states and identifying the exact causal factors driving state behavior is often as challenging as deciphering the edicts of the Delphic oracle. It requires identifying some baseline or default position from which the coerced state deviated under the pressure of coercion, which may never be known with certainty. For instance, did North Korea agree to “complete denuclearization” at a 2018 summit between Kim Jong-un and President Trump because it buckled under the weight of U.S. and international pressure?<sup>306</sup> Or was North Korea following a predetermined strategy? Is it plausible that, having developed ballistic missiles capable of reaching the United States, North Korea deescalated to exploit President Trump’s cavalier approach to diplomacy in order to secure an agreement that alleviates international pressure without making significant substantive concessions, and that brings it closer to its longtime objective of recognition of its status as a nuclear weapons state?<sup>307</sup> We may never know.

Second, states are complex creatures with multiple motivations driving behavior. Even in situations of extreme coercion, state behavior is determined by various factors. Policy outcomes may reflect a combination of both coercion and consensual, cooperative behavior. As Jack Goldsmith and Eric Posner argue, even the Treaty of Versailles, an agreement concluded in the aftermath of a devastating defeat and the complete capitulation of Germany, contained elements of coopera-

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304. Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26 EUR. J. INT’L L. 471, 472 (2015).

305. See, e.g., GRAHAM ALLISON, *DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES’S TRAP?* xiv (2017) (“The complexity of causation in human affairs has vexed philosophers, jurists, and social scientists.”).

306. See Chung-in Moon, *A Real Path to Peace on the Korean Peninsula*, FOREIGN AFF. (Apr. 30, 2018), <https://www.foreignaffairs.com/articles/north-korea/2018-04-30/real-path-peace-korean-peninsula> (summarizing the achievements of the Panmunjom summit between Moon and Kim).

307. Cf. Michael Green, *Deciphering Kim Jong Un’s Motives*, FOREIGN AFF. (May 16, 2018), <https://www.foreignaffairs.com/articles/north-korea/2018-05-16/deciphering-kim-jong-uns-motives> (“Kim will probably be counting on Trump to settle for a political agreement that is big on historical aspirations and short on verification and timetables”).

tive behavior that accorded with and secured some German interests.<sup>308</sup> Approaches that define unlawful coercion as acts that cause a state to act against its will tell us nothing about the degree to which coercion must determine the behavior of the coerced state to be unlawful, nor do these approaches provide a method with which to distinguish between the consensual and coerced components of state behavior.

Third, applying an approach that focuses on the impact of coercion would mean that intense and clearly unlawful pressure that fails to alter the behavior of the coerced state could be considered non-coercive and thus lawful, while minimal pressure that causes a state to alter its behavior would be unlawful. Hence, the U.S. ultimatum of March 17, 2003 that threatened Saddam Hussein with an invasion unless he and his family left Iraq<sup>309</sup> would be lawful because it failed to alter the behavior of the Iraqi President and his government. On the other hand, Turkey's damaging leaks and press releases that generated global outcry over the murder of Jamal Khashoggi, and that seemingly caused Saudi Arabia to admit that its agents were responsible for this crime, would be unlawful. That would be a patently absurd result.

Fourth, such an approach would also mean that the exact same behavior could be coercive and unlawful if it causes the coerced state to alter its behavior, and non-coercive and lawful if it fails to have the desired effect. Assuming that the alleged Russian interference in the 2016 U.S. presidential election did indeed contribute to elevating Donald Trump to the White House, the interference would then be classified as an unlawful intervention. On the other hand, the reported Russian interference in the 2017 French presidential election that failed to hand the *Élysée* to right-wing candidate Marine Le Pen<sup>310</sup>

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308. Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 121 (2003).

309. *Bush Ultimatum to Iraq*, CNN (Mar. 17, 2003), <http://www.cnn.com/2003/WORLD/meast/03/17/sprj.irq.int.main>.

310. See Andy Greenberg, *The NSA Confirms It: Russia Hacked French Election Infrastructure*, WIRED (May 9, 2017), <https://www.wired.com/2017/05/nsa-director-confirms-russia-hacked-french-election-infrastructure> (“[W]hile public evidence can’t definitively prove Russia’s involvement, NSA director Michael Rogers suggested to Congress today that America’s most powerful cybersecurity agency has pinned at least some electoral interference on Moscow.”).

would not be unlawful because it failed to affect the outcome of the election. That would also be patently absurd.

Fifth, and finally on this point, the understanding of coercion that the ILC adopted in the Articles on State Responsibility is inapposite to this discussion of the legality of coercion. These articles neither consider nor address the question of the legality of coercion. Rather, they determine the impact of coercion on the responsibility of states and identify situations in which the coercing state should be responsible for wrongful conduct committed by the coerced state.<sup>311</sup> That is why the ILC requires that the pressure exercised by the coercing state amount to “irresistible force” that puts the coerced state in a position of having “no effective choice” but to comply with the demands of the coercing state. The legality of the behavior of the coercing state, however, is an entirely different matter.<sup>312</sup> Indeed, for the purposes of Article 18 of the Articles on State Responsibility, “it is irrelevant if the coercion is lawful or unlawful.”<sup>313</sup>

Accordingly, determining the legality of the pressure tactics that states employ should focus on the behavior of the coercing state regardless of its impact on the coerced state. The test should consider whether the instruments employed by the coercing state are permissible. If these instruments are impermissible, the behavior of the coercing state would be coercive, and thus unlawful. This approach would provide a single objective legal standard that is applicable to all states, regardless

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311. This is the logic underlying the articles on state responsibility, which distinguish between primary and secondary obligations. The former are substantive prescriptions or proscriptions that regulate the behavior of states, while the latter are the rules that are employed to determine whether the substantive primary rules have been breached and the consequences of any such breach. Draft Articles on State Responsibility, *supra* note 300, at 31.

312. As the philosophical and legal literature on coercion has noted, the concept of coercion performs two separate functions. First, it identifies situations where behavior is coercive, and therefore condemnable both legally and morally, and second, it explains the impact of coercion on responsibility and blameworthiness. See Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA PHIL. (Oct. 27, 2011), <https://plato.stanford.edu/entries/coercion> (distinguishing between “responsibility under coercion” and the “wrongfulness of coercion”).

313. Christian Dominicé, *Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 281, 288 (James Crawford et al. eds., 2010).



of their strength or wealth, and that would protect all states, whether powerful or weak, against the unlawful instruments of statecraft.

c. Lawful Acts as Coercive Instruments of Statecraft

The third and most difficult question is whether the use of *lawful* instruments of statecraft as part of coercive strategies could constitute a breach of the prohibition on intervention. As stated above, this article defines unlawful intervention as the pursuit of unlawful ends—compelling a state to make concessions within its *domaine réservé*—through unlawful (i.e. coercive) means. Therefore, as a general matter, intruding into the *domaine réservé* of a state is unlawful only when undertaken through coercive means.

The reality of coercion, however, is that states employ various instruments to alter the behavior of their adversaries. While some of these instruments are unlawful, many are lawful. As discussed below in Part III, lawful instruments of statecraft include increasing defense spending; developing defensive or offensive weapons systems (and signaling possession of these systems); ceasing military, economic, or financial aid; suspending trade relations; and expressing political condemnation. The question is whether there are situations in which the use of lawful measures—which, generally, do not constitute coercion—could breach the prohibition on intervention. This section examines this question as it relates to two forms of lawful measures. The first are negative measures that threaten or cause harm to the coerced state, such as economic sanctions. The second are positive measures, such as offers of benefits or inducements that a coercing state presents to a coerced state to encourage it to comply with its demands.

Beginning with negative or harmful measures, this section contends that the use of these lawful instruments to intervene in the *domaine réservé* of a state violates the prohibition on intervention only when combined with unlawful instruments. In other words, influencing a state's policy on matters within its *domaine réservé* exclusively through lawful means would be a form of persuasion that does not breach the prohibition on intervention. If, however, the coercing state employs a mixture of lawful and unlawful means to intervene in the *domaine réservé* of the coerced state, the behavior of the coercing state

would, *in toto*, amount to a breach of the prohibition on intervention. In terms of the state responsibility of the coercing state, in these cases, the use of the unlawful measures—such as imposing a trade embargo in violation of a free trade treaty—would breach two bodies of law. It would, first, violate the relevant *lex specialis* (i.e. the rule that prohibits that specific measure), and second, the *lex generalis* prohibition on intervention.

This approach diverges from the method that the ICJ applied in the *Nicaragua Case*. In the early and mid-1980s, the United States initiated a “concerted and multifaceted campaign to overthrow the government of Nicaragua.”<sup>314</sup> As part of this campaign, the United States implemented a comprehensive strategy of coercion that included a wide range of measures. The United States mined Nicaraguan ports, executed high altitude reconnaissance flights, conducted military maneuvers with the Honduran military, trained, armed, and provided financial and logistical support to the *Contras*, ceased economic aid, reduced U.S. imports of Nicaraguan sugar, and imposed a trade embargo.<sup>315</sup>

The concern here is not with the legality *vel non* of each U.S. measure taken against Nicaragua.<sup>316</sup> Rather, the methodology that the ICJ applied to determine whether these actions violated the prohibition on intervention is unsatisfying. The court examined each U.S. action separately and tested its legality against the relevant rules of international law. Thus, for instance, the court found that the U.S.-Honduran maneuvers conducted close to the Nicaraguan border did not violate the prohibition on threats of force, but still concluded that “the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua.”<sup>317</sup> Similarly, the court adjudged that “the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-in-

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314. William M. Leogrande, *Making the Economy Scream: US Economic Sanctions Against Sandinista Nicaragua*, 17 *THIRD WORLD Q.* 329, 329 (1996).

315. *Nicaragua Case*, *supra* note 2, ¶¶ 78, 87, 92, 106, 123–25.

316. For a more general discussion of the legality of these U.S. actions, see generally J. Curtis Henderson, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 *WASH. & LEE L. REV.* 167 (1986).

317. *Nicaragua Case*, *supra* note 2, ¶ 228.

tervention.”<sup>318</sup> Regarding the U.S. economic sanctions, however, the court declared that “it is unable to regard such action on the economic plane as is here complained of [by Nicaragua] as a breach of the customary-law principle of non-intervention.”<sup>319</sup>

This approach, which disaggregated the U.S. campaign of pressure against Nicaragua and examined the legality of each U.S. measure undertaken as part of this campaign separately is, in this author’s view, inappropriate to determine whether these measures breached the prohibition on intervention. Rather, the court should have recognized the composite nature of breaches of the prohibition on intervention. Composite breaches, as discussed above,<sup>320</sup> consist of separate acts that are part of a common objective or a unified strategy that is, in its totality, unlawful. That overall strategy may consist of separate lawful acts, separate unlawful acts, or a combination thereof. Moreover, those separate acts, which may or may not be individually unlawful, could be either identical or different in character.<sup>321</sup> Hence, a determination of whether a state has breached the prohibition on intervention should proceed in the following manner. First, the legality of the various measures or “separate acts” undertaken as part of a coercive strategy should be evaluated separately. This would establish whether those “separate acts” violate any relevant *lex specialis* that is applicable between the coerced and coercing states. Second, those “separate acts” should be examined as elements of a broader whole and evaluated in combination to determine whether the overall policy of the coercing state constitutes a composite breach of the prohibition on intervention. If this analysis reveals that the coercing state combined lawful and unlawful measures to intervene within the *domaine réservé* of the coerced state, then it would have breached the prohibition on intervention.

The second form of lawful instruments used in coercive strategies are offers of benefits or inducements. Some scholars

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318. *Id.* ¶ 242.

319. *Id.* ¶ 245.

320. See *supra* notes 257–58, 302 and accompanying text.

321. See Jean Salmon, *Duration of the Breach*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY*, *supra* note 317, at 384, 391–92 (discussing three different alternatives of global breaches).

reject the proposition that inducements or offers can be coercive. According to this view, fear is the hallmark of coercion. An act is coercive when it causes an actor to behave out of the desire to avoid, reduce, or remove harm. Thus, some scholars argue that offers and inducements are inherently non-coercive because they involve promising or giving benefits as opposed to threatening harm or generating fear.<sup>322</sup>

On the other hand, other scholars understand coercion as any pressure that restricts the freedom of the target of coercion, whether by threatening or imposing harm or by withholding benefits. According to this view, there is therefore no reason to assume that offers and inducements are, *ab initio*, non-coercive. “Rewards, bribes, inducements may be . . . near-irresistible such that the person induced to act in a certain way may be unfree, or may properly be excused for yielding to the inducement.”<sup>323</sup> Scholars argue that a party’s freedom in this situation is restricted because it is presented with “a Godfather offer”<sup>324</sup>—an offer it cannot refuse.

Considering this matter for the purposes of developing an understanding of coercion as part of the prohibition on intervention requires understanding the reality of the practice of coercion in international affairs. Like any bargaining process, coercion often involves a combination of carrots and sticks.<sup>325</sup> In addition to generating pressure through deprivation and harm by using instruments such as military threats, economic sanctions, or political humiliation, a coercing state often provides inducements and assurances to the coerced state. For instance, while President Trump was threatening North Korea with “fire and fury,” his Secretaries of State and Defense were assuring Pyongyang that Washington’s objective was denuclearization through diplomatic means, not regime change.<sup>326</sup> Similarly, Turkey’s President Erdogan carefully calibrated his criticism of Saudi Arabia after the murder of Jamal

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322. See Bernard Gert, *Coercion and Freedom*, in COERCION, *supra* note 283, at 30, 34 (“[C]onsequences which only involve the gaining of a good cannot be unreasonable incentives.”).

323. McCloskey, *supra* note 298, at 339.

324. This author credits colleague Peter Shane with introducing him to this term.

325. ALLISON CARNEGIE, *POWER PLAYS: HOW INTERNATIONAL INSTITUTIONS RESHAPE COERCIVE DIPLOMACY* 21 (2015).

326. See *supra* notes 104–11 and accompanying text.

Khashoggi to undermine the Crown Prince without rupturing relations with King Salman. The objective of combining pressure with inducements and assurances is two-fold. First, the coercing state incentivizes the coerced state to make concessions by demonstrating that cooperation will pay off. Second, the coercing state assures the coerced state that if it cooperates, it will grant the coerced state a reprieve from the pressure exerted upon it.<sup>327</sup>

This section argues that offers or inducements alone do not amount to unlawful coercion. Offers are the bread and butter of interstate politics. Military assistance, economic aid, financial support, and political backing are incentives used to shape state policies.<sup>328</sup> At times, offers are part of single trade-offs. For instance, developing countries elected to the two-year nonpermanent membership of the U.N. Security Council often receive aid from wealthy permanent members in return for votes on Security Council resolutions.<sup>329</sup> Occasionally, states make trade-offs with non-state actors, such as when the United States released five members of the Taliban from Guantanamo Bay in return for the release of Sergeant Bowe Bergdahl, the only U.S. serviceman held by the Taliban.<sup>330</sup> In addition to using offers as part of a quid pro quo, states also use them as instruments of long-term strategies. For example, during the Cold War, China and the Soviet Union competed for influence within the communist bloc by offering generous aid packages to leftist African governments.<sup>331</sup> The United States, on the other hand, launched the Marshall Plan and

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327. Robert J. Art & Kelly M. Greenhill, *Coercion: An Analytical Overview*, in *COERCION: THE POWER TO HURT IN INTERNATIONAL POLITICS*, *supra* note 276, at 3, 23.

328. See Hans Morgenthau, *A Political Theory of Foreign Aid*, 56 AM. POL. SCI. REV. 301, 301 (1962) (identifying six types of foreign aid).

329. Axel Dreher et al., *Global Horse Trading: IMF Loans for Votes in the United Nations Security Council*, 53 EUR. ECON. REV. 742, 743 (2009) (“[A]verage US foreign aid increases by 54 percent and average UN development aid by 7 percent when a country is elected to the Security Council.”).

330. Eric Schmitt & Charlie Savage, *Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade*, N.Y. TIMES (May 31, 2014), <https://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html>.

331. See generally Robert A. Scalapino, *Sino-Soviet Competition in Africa*, 42 FOREIGN AFF. 640 (1964) (discussing the use of foreign aid by China and Russia in their competition for African influence).

adopted the Truman Doctrine to contain communism in Europe.<sup>332</sup>

Notwithstanding their form, inducements and offers exploit the weaknesses and needs of the recipient state to induce it to alter its behavior.<sup>333</sup> In an unequal world, however, nothing in international law prevents powerful states from leveraging the needs of weaker states to incentivize them to cooperate in the furtherance of their interests. Moreover, nothing in international law entitles weak states to assistance from their powerful partners. Therefore, on their own, inducements such as official government aid and political support are not coercive.<sup>334</sup>

This article contends, however, that inducements are coercive, and thus unlawful, in two situations. The first is if a state is under a legal obligation to provide benefits to another state, but then either withholds those benefits or makes the provision of those benefits conditional on the recipient state making concessions within its *domaine réservé*.<sup>335</sup> In such a situa-

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332. See generally Dennis Merrill, *The Truman Doctrine: Containing Communism and Modernity*, 36 PRESIDENTIAL STUD. Q. 27 (2006).

333. Cf. Bruno Bueno de Mesquita & Alastair Smith, *Foreign Aid and Policy Concessions*, 51 J. CONFLICT RESOL. 251, 254 (2007) (“[A]id giving and getting is a strategic process in which donors purchase policy support from recipients who use at least some of the assistance to ensure that they are securely ensconced in power.”).

334. The situations discussed here relate to the legality of official state-to-state aid. This discussion does not address the legality of aid to political actors *within* a state, such as opposition political leaders, political parties, or rebel groups. Foreign aid or support directed at non-state or non-governmental actors is a complex matter that is briefly addressed below. See *infra* pp. 64, 81. However, suffice it to say at this point that the general definition of unlawful intervention articulated in this article (the pursuit of unlawful means through unlawful ends) applies to aid or support to non-state actors. If, for instance, a state actively assists non-state actors committed to the violent overthrow of a government, that would violate the prohibition on non-intervention and, potentially, the prohibition on the use of force. If, however, a state provides aid to non-state actors for lawful purposes, such as humanitarian aid, that would not violate the prohibition on intervention. Similarly, if a state provides general political support to non-state actors through expressions of sympathy and solidarity, that would not breach the prohibition on intervention on its own, since the instrument used (expressions of political support) are not necessarily coercive.

335. Cf. Michael Bothe, *Compatibility and Legitimacy of Sanctions Regimes*, in COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW, *supra* note 217, at 33, 34 (“If the sanctionee is legally entitled to the advantage withdrawn or

tion, the coercing state would have committed two internationally wrongful acts: First, it would breach the *lex specialis* obligating it to provide the benefit that it withheld or threatened to withhold, and second, it would breach the *lex generalis* prohibition on intervention. A hypothetical scenario of this situation would be if the United States, which is legally bound to defend South Korea and Japan,<sup>336</sup> were to make its commitment to defend those states conditional on, for example, an increase of the defense budgets of those states,<sup>337</sup> which is a matter within their *domaine réservé*. In this hypothetical case, the United States would violate its treaty-based obligations towards its allies by withholding or threatening to withhold the benefit of collective defense. It would also breach the *lex generalis* prohibition on intervention by withholding or threatening to withhold a benefit that those states are legally entitled to receive in order to induce those states to make concessions within their *domaine réservé*.

The second situation in which offers or inducements potentially violate the prohibition on intervention is if the coercing state uses unlawful instruments, such as impermissible economic sanctions,<sup>338</sup> to cause harm or deprivation to the coerced state, which the coercing state then offers to alleviate

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withheld, the ensuing question is whether there is any rule allowing for exceptions to such entitlement.”).

336. Mutual Defense Treaty Between the United States and the Republic of Korea, S. Kor.-U.S., Oct. 1, 1953, 5 U.S.T. 2368; Security Treaty Between the United States and Japan, Japan-U.S., Sept. 8, 1951, 3 U.S.T. 3329.

337. This hypothetical is not beyond the realm possibility in the Trump era. See, e.g., Julie Hirschfeld Davis, *Trump Warns NATO Allies to Spend More on Defense, or Else*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/world/europe/trump-nato.html> (reporting that President Trump has warned NATO allies that their lack of spending on domestic military fails to meet their security obligations); Kevin Knodell, *Don't Let the U.S.-Japanese Alliance Get Out of Shape*, FOREIGN POL'Y (Sept. 17, 2018), <https://foreignpolicy.com/2018/09/17/u-s-japan-military-exercise-rising-thunder> (recounting an instance in which President Trump suggested withdrawing from Japan “unless Tokyo agreed to pay vast sums of money”).

338. Economic sanctions are impermissible if they are imposed in violation of an established rule relating to economic interactions, such as WTO law or a bilateral investment treaty, or in breach of a general rule of international law, such as state immunity, immunity *ratione personae*, or human rights law. The below section on economic coercion discusses this at length.

through inducements.<sup>339</sup> A hypothetical example of this second situation is if North Korea *had not* been under an obligation to denuclearize pursuant to Security Council resolutions. In that situation, an offer by a state, such as the United States, to lift or alleviate impermissible sanctions imposed to pressure North Korea to denuclearize would constitute unlawful coercion. To clarify, the mere lifting or offer of lifting sanctions is not, *eo ipso*, unlawful coercion. Rather, the illegality stems from the overall impact of combining impermissible sanctions with an offer to lift these sanctions in return for concessions on a matter within the *domaine réservé* of the state.<sup>340</sup>

This approach to evaluating the legality of offers and inducements is appropriate in light of the composite nature of breaches of the prohibition on intervention. The legality of offers and inducements must be determined through a holistic examination of the legal relationships and political interactions between the relevant parties. If offers and inducements are employed as part of a strategy that involves the use of unlawful tools, such as withholding or threatening to withhold benefits that the coercing state is legally required to provide, then offers and inducements should be viewed as an element of a composite policy of coercion that violates the prohibition on intervention.

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To conclude, it is useful to recap the main claims made in this part. The prohibition on intervention is composed of two elements. First, to constitute intervention, the coercing state must impinge on the coerced state's *domaine réservé*, which are policy areas in which the coerced state has not undertaken international legal obligations. Second, the coercing state must employ unlawful instruments against the coerced state. This eschews consideration of the gravity of coercion or its impact on the coerced state. Also, coercion is not limited to physical

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339. Cf. Michael Gorr, *Toward a Theory of Coercion*, 16 CAN. J. PHIL. 383, 399 (1986) (distinguishing between exploitation and coercion based on whether the offeror has caused the harm proposed to be lifted).

340. Cf. Oscar Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostages Crisis*, 37 J. INT'L AFF. 231, 234 (1984) ("To make [the ouster of existing government] a condition of removing the economic embargo would be an illicit coercive act.").



compulsion; it may be exercised through any policy tool, including military, economic, cyber, or political instruments. Furthermore, the use of lawful inducements and offers of benefits may amount to coercion if the coercing state uses these lawful measures in combination with unlawful measures.

This two-pronged test is appropriate given the composite nature of breaches of the prohibition on intervention. As the cases discussed in Part I show, coercion often involves multiple instruments. States pressure their adversaries and intervene in their affairs through a variety of tools. Therefore, a single violation of the prohibition on intervention is, in most cases, composed of separate acts that, together, constitute a single strategy or policy of intervention. Part III of this article discusses different forms of coercion, and identifies the unlawful instruments of statecraft that are employed in coercive strategies.

#### IV. THE COERCION CONTINUUM

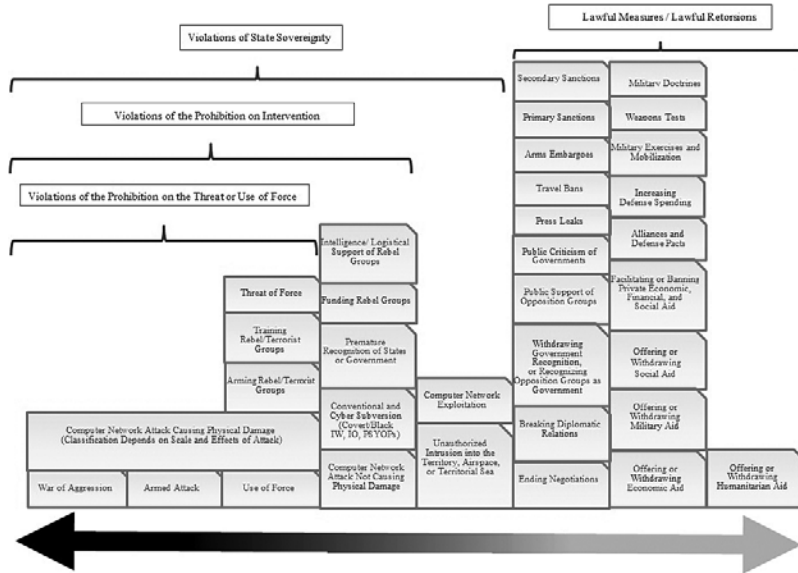
Coercion is the continuation of politics by multiple means.<sup>341</sup> States employ an array of instruments to pursue and protect their interests, to shape and influence the policies of other states, and to exercise pressure against their adversaries. This part categorizes the instruments of statecraft under four categories—military coercion, economic coercion, cyber coercion, and political coercion—and discusses the legality of the most prominent policy instruments that fall within each of these categories, and then identifies which of these instruments are *eo ipso* unlawfully coercive.

These categories and the coercive practices discussed therein do not exhaust all the instruments of statecraft. Constructing a comprehensive catalogue of every tool that states employ is probably impossible. Moreover, these four forms of coercion are not discrete, disconnected categories. The reality of coercion is that states use a combination of these instruments in confrontations with their adversaries. Therefore, the forms of coercion discussed here should not be viewed as mutually exclusive options on a policy menu. Rather, they are ele-

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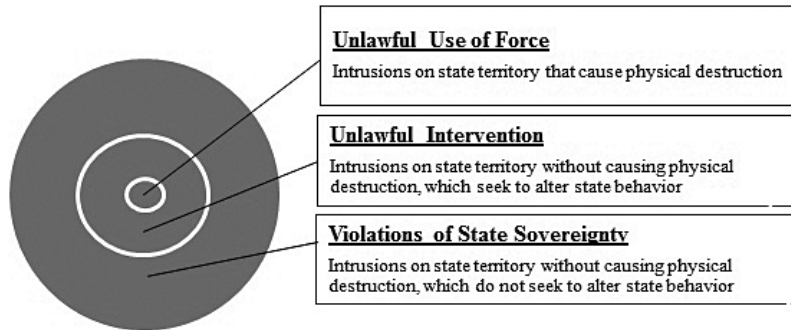
341. This is an obvious play on Clausewitz's adage that "[w]ar is a mere continuation of policy by other means." CARL VON CLAUSEWITZ, ON WAR 35 (J.J. Graham trans., Dorset Press 1991) (1832).

ments on a continuum—a coercion continuum, as shown in Figure 1.



In addition to reflecting the realities of the practice of coercion, imagining these policy instruments as a continuum accords with the legal nature of the prohibition on intervention and the structure of the legal regulation of coercive practices. Coercion is governed by multiple, often overlapping, rules and regimes of international law. Viewing the instruments of coercion as a continuum helps reveal the connections and overlaps between the prohibition on intervention and other applicable rules of international law.

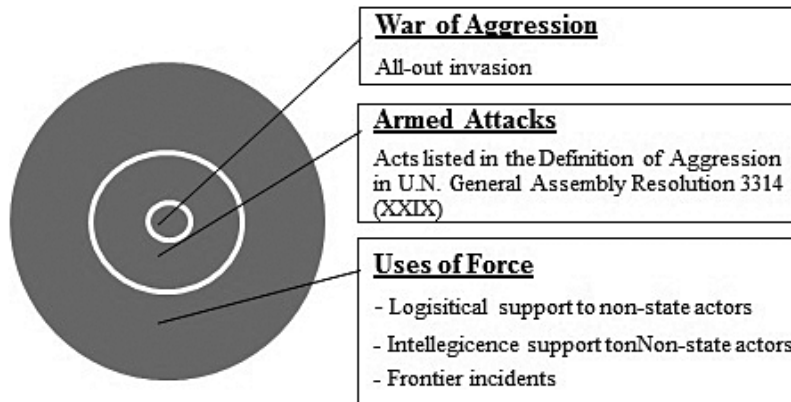
The relationship between acts on the unlawful side of the coercion continuum (i.e. unlawful uses of force, unlawful interventions, and violations of state sovereignty) can be represented as concentric circles of illegality as shown on Figure 2. All unlawful uses of force violate the *lex specialis* of the prohibition on the use of force, in addition to breaching both the prohibition on intervention and state sovereignty. Similarly, any unlawful intervention violates the prohibition on intervention and the principle of state sovereignty, while acts that unlawfully intrude on state territory without seeking to alter state behavior only violate the principle of state sovereignty.



### A. Military Coercion

War is the ultimate form of coercion. War, however, is a multifaceted phenomenon. International law recognizes three principal forms of unlawful force: the use of force, armed attacks, and wars of aggression, in ascending order of coerciveness. These forms of military coercion are, *eo ipso*, unlawful. The difference between these forms of military coercion is gravity. As the ICJ noted in several judgments, some uses of force amount—by virtue of their gravity, scale, and effects—to armed attacks, while “other less grave forms” of armed activity constitute uses of force.<sup>342</sup> The relationship between these forms of forceful coercion can be represented as concentric circles, as shown in Figure 3. Wars of aggression are the gravest form of armed attacks; armed attacks are the gravest forms of the use of force; and uses of force are the least grave forms of forceful coercion. These acts are unlawful whatever the means or weapons deployed, whether conventional, nonconventional, or cyber weapons.

<sup>342</sup> Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 51 (Nov. 6) (quoting *Nicaragua Case*, *supra* note 2, ¶ 191).



Wars of aggression are all-out invasions, such as Iraq's 1990 invasion of Kuwait or the U.S. 2003 invasion of Iraq. The Rome Statute of the International Criminal Court (ICC) is the basis for identifying wars of aggression as the most extreme form of coercion. Paragraph (1) of Article 8 *bis* defined the "crime of aggression" as "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."<sup>343</sup> Accordingly, for the purposes of the ICC Statute, it appears that not all *acts* of aggression constitute *crimes* of aggression. Only those acts of aggression that, due to their gravity, amount to a manifest violation of the U.N. Charter constitute crimes of aggression. Those acts are typically all-out invasions (i.e. wars of aggression) by one state against another.<sup>344</sup>

Following wars of aggression on the sliding scale of military coercion are armed attacks. The definition of the phrase "armed attacks," which appears in Article 51 of the U.N. Charter,<sup>345</sup> is perhaps one of the most debated issues in international law.<sup>346</sup> The significance of this term is that states are

343. Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 3.

344. See Dapo Akande & Antonios Tzanakopoulos, *The International Court of Justice and the Concept of Aggression*, in *THE CRIME OF AGGRESSION* 214, 217–18 (Claus Kreß & Stefan Barriga eds., 2016) (indicating that aggression constitutes an international crime when it "reaches the (gravity) threshold of a 'war of aggression'").

345. U.N. Charter art. 51.

346. See generally Albrecht Randelzhofer, *Article 2(4)*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 200 (Bruno Simma ed., 3d ed. 2012).

entitled to use force in self-defense in response to armed attacks. No comprehensive list of acts that constitute armed attacks has ever been proposed, nor, probably, can such an exhaustive catalogue ever be constructed. Moreover, this is not the place to engage in a detailed discussion of the concept of “armed attack” and the scope of the right to self-defense. Nonetheless, the acts listed in Articles 1–3 of the Definition of Aggression, annexed to U.N. General Assembly Resolution 3314 (XXIX), arguably constitute the core content of the concept of armed attacks.<sup>347</sup> Armed attacks may be committed directly or indirectly.<sup>348</sup> The former are attacks by the armed forces of a state. Indirect attacks, on the other hand, are committed by non-state actors that are sent by or on behalf of a state to commit acts amounting to an armed attack against another state.<sup>349</sup>

Uses of force are the least grave form of forceful coercion, insofar as uses of force do not necessarily amount to the graver armed attacks.<sup>350</sup> The ICJ has recognized that there are certain “measures which do not constitute an armed attack but may nevertheless involve a use of force.”<sup>351</sup> Examples of uses of force that do not amount to armed attacks include “frontier incidents,” which are situations wherein the gravity, scale, and effects of force exercised do not cross the requisite threshold necessary for an act to constitute an armed attack.<sup>352</sup> Providing arms to irregular armed forces that are not acting under the direction of the state—such as rebel groups, opposition or separatist movements, and terrorist organizations—also constitutes a use of force not amounting to an armed attack. Simi-

347. Cf. TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 139 (2010) (noting that Articles 1–3 of the Declaration of Aggression list impermissible acts, but arguing that this list should not be considered exhaustive).

348. See, e.g., Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1625 (1984) (“[A]rticle 2(4) remains the most explicit Charter rule against intervention through armed force, indirect and direct . . .”).

349. *Nicaragua Case*, *supra* note 2, ¶ 195.

350. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 205–08 (6th ed. 2017) (noting that uses of force may not meet the standard for an armed attack if not of sufficient gravity).

351. *Nicaragua Case*, *supra* note 2, ¶ 210.

352. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 153–54 (4th ed. 2018).

larly, training members of irregular groups that engage in forceful activities on the territory of another state constitutes an unlawful use of force. The *Nicaragua Case*—in which the ICJ opined that it “does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support”—affirms this.<sup>353</sup>

In addition to outlawing the use of force, international law also prohibits *threats of force*. Although the same body of international law governs the use of force and threats of force, these forms of coercion are, in reality, employed in different ways and pursue different policy objectives. The use of force achieves its objectives through physical destruction. Concessions are extracted from an adversary by attacking and degrading its capabilities. Threats of force, on the other hand, are a bargaining tool that extracts concessions by intimidating an adversary and playing on its fears without inflicting physical damage.<sup>354</sup> The challenge when considering the legality of threats of force as coercive instruments lies in the difficulty in distinguishing between unlawful threats and a state’s lawful use of its military capabilities to influence the policies of other states. Indeed, defining unlawful threats might be a Sisyphean task because of both the paucity of judicial opinion and scholarly writing on this issue,<sup>355</sup> and the ubiquity of threatening practices in international relations. As Kenneth Waltz reminds us: “The state among states, it is often said, conducts its affairs in the brooding shadow of violence.”<sup>356</sup>

As shown on the coercion continuum, states employ a variety of military instruments to influence the policies of allies and adversaries alike. These include relatively benign measures, such as offering or withdrawing military aid and offering

353. *Nicaragua Case*, *supra* note 2, ¶ 195.

354. BARRY M. BLECHMAN & STEPHEN S. KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* 12 (1978) (defining the “political use of the armed forces” as physical actions taken by the “uniformed military services as part of a deliberate attempt by the national authorities to influence, or to be prepared to influence, specific behavior of individuals in another nation *without engaging in a continuing contest of violence*”).

355. See STÜRCHLER, *supra* note 293, at 38 (noting the lack of attention paid to the “threat” component of “threats of force”).

356. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 102 (1979).

or suspending arms sales. Other more threatening activities include creating alliances and defense pacts, increasing defense spending, developing and testing new weapons, conducting military parades, military exercises, maneuvers, mobilizations, and troop movements, dispatching warships on port visits or “freedom of navigation operations,”<sup>357</sup> the articulation and publication of defense doctrines, like the National Security Strategy or the Nuclear Posture Review, and issuing bellicose statements from civilian officials or military commanders.<sup>358</sup>

Politically, many of these acts or policies will be perceived as threatening or even hostile. Indeed, that is precisely why states engage in these activities.<sup>359</sup> None of these acts, however, are, *eo ipso*, unlawful. Absent an obligation arising from a specific treaty, nothing in international law prevents a state from acquiring new weapons, testing new weapons, conducting military exercises, and so on.<sup>360</sup> Indeed, in response to a U.S. claim in the *Nicaragua Case* that the militarization of Nicaragua was “excessive” and indicated “its aggressive intent,” the ICJ noted that “in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited.”<sup>361</sup> Only in a specific set of narrow circumstances could these generally lawful activities constitute a violation of the prohibition on the threat of force. Specifically, this section proposes dividing military instruments of policy that do not involve the use of force into two categories: threats of force, which are unlawful, and demonstrations of force, which are lawful.

This section defines threats of force as statements or demonstrations of force by a state that communicates, with a sense of urgency, a specific demand to another state, and which promises the use of force in the case of noncompliance. Thus,

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357. Ankit Panda, *US Navy Conducts First Freedom of Navigation Operation of 2019 in South China Sea*, DIPLOMAT (Jan. 8, 2019), <https://thediplomat.com/2019/01/us-navy-conducts-first-freedom-of-navigation-operation-of-2019-in-south-china-sea>.

358. SNYDER & DIESING, *supra* note 284, at 220.

359. BLECHMAN & KAPLAN, *supra* note 359, at 5–8.

360. *Cf.* STÜRCHLER, *supra* note 293, at 84–86 (discussing the ICJ’s decision declining to find that nuclear deterrence amounts to an unlawful threat of force).

361. *Nicaragua Case*, *supra* note 2, ¶ 269.

threats of force are similar to ultimatums.<sup>362</sup> Threats may be verbal or written, as with the infamous 1938 Godesberg Memorandum that contained Hitler's ultimatum to Czechoslovakia.<sup>363</sup> In many cases, however, ultimatums are communicated through a combination of verbal and non-verbal/physical actions.<sup>364</sup>

The legality of threats of force hinges on whether the execution of the threatened force would be unlawful.<sup>365</sup> Accordingly, since the only exceptions to the prohibition on the use of force are self-defense and enforcement measures authorized by the Security Council, threats of force are only lawful if they threaten the use of force in self-defense or to enforce a Security Council resolution explicitly authorizing the use of force.<sup>366</sup>

Threats, whether written, verbal, or physical, communicate urgency and signal a clear preparedness to use force, which indicates an unambiguous commitment to execute the

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362. GRIMAL, *supra* note 277, at 103 (quoting Paul Gordon Lauren, *Ultimata and Coercive Diplomacy*, 16 INT'L STUD. Q. 131, 137 (1972)) (listing the defining characteristics of an ultimatum as "(1) specific demands, (2) a time limit for compliance, and (3) a threat of punishment or reprisals for failure to comply").

363. Quincy Wright, *The Munich Settlement and International Law*, 33 AM. J. INT'L L. 12, 12 (1939).

364. For example, Robert Kennedy's 1962 ultimatum to Soviet Ambassador Anatoly Dobrynin at the height of the Cuban Missile Crisis. The demand for the withdrawal of Soviet missiles from Cuba was accompanied by a promise to withdraw U.S. *Jupiter* missiles from Turkey in combination with the naval blockade of Cuba, extensive anti-submarine operations against Soviet vessels in the Caribbean, and the declaration of DefCon 2. For an overview of the Cuban Missile Crisis, see Alexander L. George, *The Cuban Missile Crisis: Peaceful Resolution Through Coercive Diplomacy*, in *THE LIMITS OF COERCIVE DIPLOMACY* 111 (Alexander L. George & William E. Simons eds., 2d ed. 1994).

365. As the ICJ explained, "[i]f the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 47 (July 8).

366. See Anne Lagerwall & François Dubuisson, *The Threat of the Use of Force and Ultimata*, in *OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW*, *supra* note 183, at 910, 915 ("The threat of force is contrary to the Charter when the use of force cannot be justified, either because no authorization has been granted by the Security Council or the conditions required by the Charter's Article 51 with regard to self-defence are not met.").



threat if the demand is not met.<sup>367</sup> This distinguishes threats of force from demonstrations of force, which some scholars call “implicit” threats.<sup>368</sup> When engaging in demonstrations of force, states use military assets to intimidate an adversary, weaken its resolve, and alter its behavior. However, unlike threats of force, demonstrations of force send ambiguous messages. The commitment or readiness to use force if the coerced states fails to comply with the demands of the coercing state remains uncertain and equivocal.<sup>369</sup> Demonstrations of force, in other words, are muscle flexing. They are actions and/or statements—such as military exercises, weapons tests, troop movements, mobilizations, port visits, and naval maneuvers—intended to highlight military capabilities and signal resolve. However, in these situations, the possibility that the coercing state will actually resort to force to bring about the desired alteration in behavior of the coerced state remains relatively remote. A threat of force, on the other hand, is characterized by the near-certainty of the outbreak of war if the coerced state fails to comply. Even though the coercing state is demonstrating its military capabilities to influence the decision-making process of its adversary, demonstrations of force do not violate the prohibition on threats of force because they do not signal a clear commitment to use force to enforce a specific demand.<sup>370</sup>

Demonstrations of force, while generally lawful, may, if employed as part of an overall policy of intervention, constitute a violation of international law. As argued in Part II,<sup>371</sup> a breach of the prohibition on intervention is a composite act. It is a single breach of international law that consists of several acts that separately may or may not be unlawful. Accordingly,

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367. Cf. Dino Kritsiotis, *Close Encounters of a Sovereign Kind*, 20 EUR. J. INT’L L. 299, 306 (2009) (“[W]e do gain a sense from [the ICJ] advisory opinion] of how explicit a threat of force needs to be in order to be counted as such, and the Court follows this up with its references to the ‘stated’ and the ‘declared’ readiness of a state to use force.”)

368. E.g., James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 VAND. J. TRANSNAT’L L. 285, 296–97 (2011) (referring to “positive actions” that are “intended or perceived as a threat of force” as implicit).

369. For a discussion of ambiguous threats generally, see SNYDER & DIESING, *supra* note 284, at 216.

370. Green & Grimal, *supra* note 373, at 296.

371. See *supra* notes 257–58 and accompanying text.

demonstrations of force undertaken in combination with unlawful instruments as part of an overall strategy to extract concessions from a state within its *domaine réservé* may violate the prohibition on intervention.

This differs from the approach of the ICJ in the *Nicaragua Case*. One of the claims that Nicaragua advanced was that the United States violated the prohibition on the threat of force by conducting joint military exercises with Honduras that “formed part of a general and sustained policy of force” against Nicaragua.<sup>372</sup> The court rejected Nicaragua’s claim. It judged that it was “not satisfied that the maneuvers complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.”<sup>373</sup> The court was correct to find that these maneuvers did not violate the prohibition on the use of force. The United States did not issue an ultimatum that it threatened to enforce through armed action. These maneuvers did not communicate clear U.S. preparedness to use armed force against Nicaragua if it failed to comply with a specific demand. These maneuvers were, however, part of a systematic U.S. strategy to compel Nicaragua to alter its political orientation—a matter within Nicaragua’s *domaine réservé*. This strategy included acts of unlawful force, unlawful intervention, and unlawful breaches of Nicaraguan sovereignty. These maneuvers were an integral element of this strategy, and should have been found unlawful as a component of a composite breach of the prohibition on intervention.

### B. *Economic Coercion*

Since time immemorial, money has been an indispensable instrument of foreign policy.<sup>374</sup> One of the most potent tools of statecraft is the ability to influence the fortunes and wealth of nations. A preliminary challenge in examining economic coercion is the definitional confusion surrounding activities commonly understood as belonging to this category of state-

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372. *Nicaragua Case*, *supra* note 2, ¶ 92.

373. *Id.* ¶ 227.

374. Indeed, Thucydides reported that the belligerents in the Peloponnesian Wars used economic sanctions. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 9–10 (3d ed. 2007).

craft. Terms such as “economic statecraft,” “economic warfare,” and “geoeconomics” are used interchangeably to refer to the pursuit of national interests through economic means.<sup>375</sup> For the purposes of this article, it is unnecessary to distinguish between these concepts. Because the coercion continuum is intended to encompass a wide range of instruments of statecraft, this article adopts a broad understanding of economic coercion that includes both positive measures, such as economic and financial aid, and negative measures, such as asset freezes and trade boycotts.<sup>376</sup> This coheres with the concept of coercion described above in Part II, which rejects the view that inducements and offers of benefits are non-coercive and that only harmful acts should be understood as coercive.

While many states have exercised economic coercion in one form or another, and although some non-Western powers, especially China, are flexing their economic muscle with greater assertiveness, the United States has made economic coercion an almost permanent fixture in its foreign policy.<sup>377</sup> Like the various forms of military coercion, the instruments of economic coercion can be viewed as a spectrum of severity.<sup>378</sup> Since the outlawry of pacific blockades as an instrument of coercion,<sup>379</sup> total embargos have become the severest form of ec-

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375. For a general overview providing the definitions of these terms, see DAVID A. BALDWIN, *ECONOMIC STATECRAFT* 29–40 (1985).

376. The understanding of economic coercion reflected in this article is close to the definition of economic statecraft, which is “the use of economic tools and relationships to achieve foreign policy objectives. Economic statecraft may be negative, involving the threat or use of sanctions or other forms of economic coercion or punishment, or it may be positive, involving the use of economic relationships as incentives or rewards.” Michael Mastanduno, *Economic Statecraft*, in *FOREIGN POLICY: THEORIES, ACTORS, CASES* 171, 172 (Steve Smith et al. eds., 2008).

377. Edward Fishman, *Even Smarter Sanctions: How to Fight in the Era of Economic Warfare*, *FOREIGN AFF.* (Dec. 2017), <https://www.foreignaffairs.com/articles/2017-10-16/even-smarter-sanctions>.

378. See Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983, 988 (1974) (highlighting several kinds of coercion, including economic and military, and noting that each kind “may be implemented on an extremely broad spectrum of intensity”).

379. A pacific blockade is the imposition in time of peace of a naval blockade that interdicts all maritime transport with the coerced state. Pacific blockades are considered acts of aggression that are unlawful under Article 2(4) of the U.N. Charter. See Quincy Wright, *The Cuban Quarantine*, 57 AM. J.

onomic coercion. It entails the complete severance of trade relations, financial transactions, and travel between the coercing and coerced states. The U.S. restrictions imposed on China between the establishment of the People's Republic of China and the Nixon Administration's "opening" of China are an example of a total embargo.<sup>380</sup> States have also imposed partial embargoes. During the Cold War, the United States and its NATO allies applied a partial embargo against the Soviet Union and its allies in Eastern Europe. This embargo, which was administered by a body called the Coordinating Committee for Multilateral Export Controls, restricted Soviet access to sensitive western technology and prevented the export of certain categories of industrial materiel.<sup>381</sup> Embargoes could also target a single sector or a specific strategic commodity that is critical to the coerced state. Examples include the U.S. oil embargo imposed on Japan to compel Tokyo to revise its policy of aggression in China and South East Asia prior to U.S. entry into World War II,<sup>382</sup> and the Arab oil embargo against Western states that supported Israel during the 1973 October/Yom Kippur War.<sup>383</sup>

Embargoes—whether total, partial, or targeted at a specific sector or commodity—are principally implemented through export and import controls. Export controls are domestic legislation that either prevent or restrict the export of certain goods from the coercing state to the coerced state. Especially in the United States, but also in other industrialized

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INT'L L. 546, 554–55 (1963) ("Such procedures are not 'peaceful means' but 'threats or uses of force' . . .").

380. For a contemporary discussion of the embargo, see generally Luke T. Lee & John B. McCobb, Jr., *United States Trade Embargo on China, 1949-1970: Legal Status and Future Prospects*, 4 N.Y.U. J. INT'L L. & POL. 1 (1971).

381. For a historical comparison of the Chinese and Soviet embargoes, see Jeffrey A. Engel, *Of Fat and Thin Communists: Diplomacy and Philosophy in Western Economic Warfare Strategies Toward China (and Tyrants, Broadly)*, 29 DIPLOMATIC HIST. 445, 449–50 (2005).

382. See Scott D. Sagan, *From Deterrence to Coercion to War: The Road to Pearl Harbor*, in THE LIMITS OF COERCIVE DIPLOMACY, *supra* note 369, at 57, 84 (discussing the oil embargo of 1941).

383. J. Dapray Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187, 187 (1974).

states,<sup>384</sup> export controls have both targeted specific hostile states and restricted the export of specific types of sensitive goods.<sup>385</sup> Import controls, on the other hand, restrict the entry of certain products from the coerced state into the coercing state. They are used in situations wherein the coerced state is dependent on the sale of certain products in the markets of the coercing state. A recent example was China's imposition of import restrictions on Filipino bananas during the Scarborough Shoal incident, a maritime dispute in the South China Sea, which inflicted significant losses on the Philippines.<sup>386</sup>

Asset freezes and financial sanctions are also frequently used as instruments of economic coercion. An asset freeze prevents the coerced state from accessing assets that it owns, but that are located in the jurisdiction of the coercing state, such as financial holdings, banks, and other institutions. Asset freezes may be aimed at official government entities, such as when the United States blocked dollar-denominated accounts owned by the Iranian Central Bank during the Tehran hostage crisis,<sup>387</sup> or at individuals, such as asset freezes that the United States and European states have imposed on individuals suspected of terrorist activities.<sup>388</sup> Financial sanctions serve multiple purposes that often overlap with the purposes of asset freezes. They limit the access of the coerced state to financial markets, undermine its ability to acquire financial credit and loan guarantees, and restrict its access to financial services from institutions under the jurisdiction of the coercing

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384. See e.g., Mitsuo Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INT'L L.J. 103, 103 (1979) (describing Japan's system of export controls).

385. ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 895, 897 (2d ed. 2008).

386. See Madhu Sudan Ravindran, *China's Potential for Economic Coercion in the South China Sea Disputes: A Comparative Study of the Philippines and Vietnam*, 3 J. CURRENT SOUTHEAST ASIAN AFF. 105, 117 (2012) ("The Scarborough Shoal incident showed how vulnerable the Philippines was to Chinese restrictions on banana imports.").

387. Robert Carswell, *Economic Sanctions and the Iran Experience*, 60 FOREIGN AFF. 247, 247 (1981).

388. Elizabeth F. Defeis, *Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community*, 30 FORDHAM INT'L L.J. 1449, 1449 (2007).

state.<sup>389</sup> Financial sanctions, which are primarily imposed by the United States and European states, generate pressure on the coerced state by exploiting the size and dominance of the financial sector of the coercing state and the dependence of the coerced state on that market.<sup>390</sup>

Another instrument of economic coercion is to denial of access to economic assistance from international financial institutions. Western states, especially the United States, have used their voting power and political influence in institutions such as the International Monetary Fund (IMF) and the World Bank to deny their adversaries access to funds and support from these institutions. For instance, following the conclusion of an arms deal between Egypt and the Eastern Bloc in 1955 and the failure of attempts to convince Cairo to adopt a pro-Western foreign policy, the Eisenhower Administration denied Egypt funding from the World Bank to build the Aswan High Dam, thereby forcing Egypt to seek assistance from the Soviet Union.<sup>391</sup> Similarly, after the election of Salvador Allende to the presidency of Chile, the United States launched an “invisible blockade,” the purpose of which was to “make the economy scream.”<sup>392</sup> This included opposing Chilean requests for assistance from financial institutions and development agencies and preventing the implementation of projects and loans that had previously been pending.<sup>393</sup>

The least coercive form of economic statecraft is the offering of economic or financial aid and then threatening to withdraw such aid and assistance. States use offers of aid and threats of withholding assistance to shape the policies of allies and adversaries alike. For example, President Obama offered Israel three billion dollars in aid in return for a sixty-day freeze

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389. See David Cortright et al., *Targeted Financial Sanctions: Smart Sanctions That Do Work*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 23, 23 (David Cortright & George A. Lopez eds., 2002) (distinguishing asset freezes from “broader [financial] measures”).

390. Cf. KERN ALEXANDER, ECONOMIC SANCTIONS 40–41 (2009) (discussing the economic influence of major Western economies).

391. For an account of the Aswan Dam funding, see Amy L. S. Staples, *Seeing Diplomacy Through Bankers’ Eyes: The World Bank, the Anglo-Iranian Crisis, and the Aswan High Dam*, 26 DIPLOMATIC HIST. 397, 412–17 (2002).

392. PETER KORNBLUH, THE PINOCHET FILE 83 (2013).

393. *Id.* at 84–85.

on the construction of settlements in the West Bank,<sup>394</sup> while President George H.W. Bush threatened to suspend U.S. aid to Israel to prod Prime Minister Yitzhak Shamir to attend the 1991 Madrid Peace Conference.<sup>395</sup>

These instruments of economic coercion may be employed either as primary or secondary sanctions. The former are situations in which the coercing state implements measures directly against the coerced state. Secondary sanctions, on the other hand, are “techniques by which *A* attempts to hurt *C* by announcing that it will deal with *B* only if *B* does not deal with *C*.”<sup>396</sup> The rationale underlying secondary sanctions is that, on their own, primary sanctions may be ineffective. Unless a large number of states with significant economic prowess and considerable influence in international financial markets implement primary sanctions in concert, the coerced state could circumvent the measures imposed by reorienting its economic dealings toward non-sanctioning states. To close this loophole, states, especially the United States, adopt legislation that essentially presents foreign states, their nationals, and their corporations with a stark choice: either trade with the coerced state and risk trade relations with the sanctioning state, or terminate trade with the coerced state and maintain trade relations with the sanctioning state.<sup>397</sup> An example of secondary sanctions is the Arab boycott of Israel. Not only did the Arab League impose an embargo on trade, transactions, and communications with Israel, but it also instituted a “black-list” of “third parties, i.e., non-Israeli nationals or companies, which . . . significantly contribute to Israel’s economic and military strength” that were also boycotted.<sup>398</sup>

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394. Asaf Siniver, *Change Nobody Believes In: Obama and the Israeli-Palestinian Conflict*, 22 DIPL. & STATECRAFT 678, 686 (2011).

395. Khaled Elgindy, *Obama’s Record of Israeli-Palestinian Peace*, FOREIGN AFF. (OCT. 5, 2016), <https://www.foreignaffairs.com/articles/israel/2016-10-05/obamas-record-israeli-palestinian-peace>.

396. Andreas F. Lowenfeld, “. . . Sauce for the Gander”: *The Arab Boycott and the United States Political Trade Controls*, 12 TEX. INT’L L.J. 25, 25 (1977).

397. For examples of U.S. legislation that imposes secondary sanctions and how foreign companies need to react, see Gary Clyde Hufbauer & Barbara Oegg, *Economic Sanctions: Public Goals and Private Compensation*, 4 CHI. J. INT’L L. 305, 316–17 (2003).

398. Nancy Turck, *The Arab Boycott of Israel*, 55 FOREIGN AFF. 472, 474–75 (1977).

Do these instruments and methods of economic statecraft violate the prohibition on intervention? As argued throughout this article, unlawful intervention is the use of unlawful means to pursue unlawful ends. Many of the ends or policy objectives pursued by states that have exercised these economic instruments impinge on the *domaine réservé* of states. Pressuring the Philippines to make concessions in a maritime dispute, forcing Israel to participate in a peace conference, punishing Egypt for purchasing Soviet arms, and penalizing Chile for electing a leftist president are all unlawful ends. To amount to unlawful intervention, however, the instruments used to pursue these policies must also be unlawful.

This section first considers the legality of primary sanctions. Unlike the general prohibition on the threat or use of force, there is no general conventional or customary prohibition on the use of any of the aforementioned economic instruments of statecraft when exercised as primary sanctions.<sup>399</sup> This does not mean, however, that states are legally unconstrained when it comes to economic coercion. A variety of rules and regimes, including multilateral (both universal and regional) and bilateral instruments, govern these areas of economic policy. The legality of the use of economic instruments, such those discussed in this section, should be determined on a case-by-case basis in light of the rules—i.e. the *lex specialis*—applicable to those instruments.

The most important of those rules and regimes that govern the use of economic instruments of statecraft are the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). As Andreas Lowenfeld noted, economic sanctions, such as total and partial embargos or export and import controls, are generally inconsistent with the overall objective of the GATT, which facilitates trade on a non-discriminatory basis.<sup>400</sup> However, GATT Article XXI—the security exception provision—permits a state to take “any action which it considers necessary for the protection of its essential

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399. See Michael P. Malloy, *Où Est Votre Chapeau? Economic Sanctions and Trade Regulation*, 4 CHI. J. INT'L L. 371, 374 (2003) (“[I]t is not evident what customary principle of public international law requires a countermeasure justification when a state decides to interdict commercial or financial intercourse with another state.”).

400. LOWENFELD, *supra* note 390, at 915.



security interests.”<sup>401</sup> This provision is entirely self-judging. States are free to define their “essential security interests” and to determine which measures are necessary to protect those interests.<sup>402</sup> The only restraint on the freedom to invoke this provision is the potential political backlash from trading partners in response to unreasonable uses of this exception. Moreover, the WTO dispute settlement system has not, as of this writing,<sup>403</sup> provided comprehensive guidance on the scope and content of this exception, nor has it definitively found any violation of this exception.<sup>404</sup> Similar self-judging exceptions are also increasingly incorporated into international investment agreements.<sup>405</sup> Accordingly, measures such as economic sanctions taken pursuant to self-judging security exception provisions in treaties that are applicable between the coercing and coerced states are generally lawful. By joining the WTO or concluding an investment agreement that includes a self-judging security exception provision, states consent to the possibility that their trading partners may invoke these clauses to impose economic sanctions for security reasons that they alone determine.

Unlike measures targeting trade relations, asset freezes and financial sanctions are not the subject of a single legal regime and are not governed by a single international organization.<sup>406</sup> However, several areas of international law are rele-

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401. General Agreement on Tariffs and Trade art. 21, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

402. See Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 698 (2011) (explaining that the self-judging characteristic of the security exception under WTO gives its Member States considerable latitude in invoking the exception).

403. Recent cases brought before the WTO dispute settlement body have examined the legality of invoking the national security exception. Tania Voon, *The Security Exception in WTO Law: Entering a New Era*, 113 AJIL UNBOUND 45, 46 (2019).

404. R.V. Anuradha, *Petrificus Totalus: The Spell of National Security!*, 13 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 311, 315 (2018).

405. See William J. Moon, *Essential Security Interests in International Investment Agreements*, 15 J. INT’L ECON. L. 481, 482–83 (2012) (noting the popularity of the security exception provisions).

406. Restrictions on money transfers may fall under the jurisdiction of the IMF pursuant to Article VIII of the Articles of Agreement of the IMF. However, as Michael Bothe notes, the IMF has not objected to any restrictive measures imposed by states on monetary transfers with other states. Bothe, *supra* note 339, at 37.

vant as *lex generalis* to the imposition of these measures. These areas include various forms of immunity, such as state immunity, diplomatic immunity, and Head of State immunity, which may limit the liberty of a state to impose financial sanctions or asset freezes. Several scholars have argued that asset freezes that target government assets and states institutions, such as central banks, violate state immunity.<sup>407</sup> Sanctioning and subjecting individuals—such as Heads of State, Heads of Government, Foreign Ministers, and state representatives on official missions—to asset freezes on their private property may violate the principles of immunity *ratione personae*.<sup>408</sup>

Echoing the general rule that “the right of belligerents to adopt means of injuring the enemy is not unlimited,”<sup>409</sup> it is also argued that humanitarian and human rights law limit the right of states to deploy the instruments of economic statecraft against their adversaries. It is contended that principles of necessity and proportionality should be used to evaluate the legality of economic measures, and that states are under an obligation to limit the detrimental effects of economic sanctions on individual human rights.<sup>410</sup> Though it cited neither humanitarian nor human rights law, the Order of the ICJ on the Request for Provisional Measures in the case that Iran filed against the United States for imposing sanctions following its withdrawal from the Joint Comprehensive Plan of Action (known as the Iran nuclear deal) appears to support these claims. The ICJ ordered the United States to lift measures that prevented “the free exportation to the territory of Iran of

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407. See, e.g., Jean-Marc Thouvenien, *Gel des Fonds des Banques Centrales et Immunité d'Exécution*, in IMMUNITIES IN AN AGE OF GLOBAL CONSTITUTIONALISM 209, 219 (Anne Peters et al. eds., 2015).

408. Contra Tom Ruys, *Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 670, 698–99 (Tom Ruys & Nicolas Angelet eds., 2019) (noting “absence of clear guidance” in the law on this question, though ultimately criticizing the argument that sanctions can violate immunity).

409. Convention (IV) Respecting the Laws and Customs of War on Land, annex, art. 22, Oct. 18, 1907, 36 Stat. 2277.

410. Daniel H. Joyner, *International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions*, in COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW, *supra* note 217, at 190, 195–96.

goods required for humanitarian needs,”<sup>411</sup> including medical provisions, foodstuffs, and equipment needed for ensuring aviation safety.

Generally, states are at liberty to either offer or withdraw economic and other forms of aid. In the *Nicaragua Case*, as part of a discussion on whether the termination of U.S. aid to Nicaragua violated the 1956 U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation, the ICJ noted that “[t]he cessation of economic aid, the giving of which is more of a unilateral and voluntary nature, could be regarded as such a violation only in exceptional circumstances.”<sup>412</sup> Nowhere, however, did the court identify those exceptional circumstances. Part II above identifies the instances in which inducements, offers, or benefits could constitute coercion in violation of the prohibition on intervention.<sup>413</sup> The first instance is where a state is under a legal obligation to provide aid, but then withholds it or makes its provision conditional on the recipient state making concessions on an issue within its *domaine réservé*. Second, an offer or inducement would be unlawful if the coercing state unlawfully inflicted harm on the coerced state that it then offers to alleviate in return for concessions within the *domaine réservé*. These two scenarios are the “exceptional circumstances” in which the withdrawal of aid would constitute unlawful coercion.

The question of the legality of secondary sanctions is more complicated. Writing in 1976, Henry Steiner called this issue a “cloudy subject,”<sup>414</sup> and scholarship since then has not entirely dispelled the clouds of uncertainty over the legality of this practice. It is impossible in this article to engage comprehensively with this subject. Suffice it to say, however, that according to some states and scholars, the imposition of secondary sanctions is, ipso facto, unlawful. Scholars argue that these measures are unlawful exercises of extraterritorial juris-

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411. Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Provisional Measure Order, ¶ 98 (Oct. 3, 2018). <https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf>.

412. *Nicaragua Case*, *supra* note 2, ¶ 276.

413. *See supra* pp. 56–59.

414. Henry J. Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1356 (1976).

diction by the coercing state.<sup>415</sup> Other more nuanced views, to which this author is sympathetic, argue that secondary sanctions are not unlawful as long as they apply to the assets or activities of real or legal persons within the territory or under the jurisdiction of the sanctioning state.<sup>416</sup> Hence, sanctions designed to apply to activities that have no jurisdictional nexus with the sanctioning state should be unlawful.<sup>417</sup>

In short, primary sanctions are generally lawful, unless prohibited pursuant to a governing *lex specialis* or limited under an applicable *lex generalis*, such as human rights or humanitarian law. Secondary sanctions, on the other hand, are lawful as long as they regulate activities of actors with a jurisdictional connection to the sanctioning state. As argued above,<sup>418</sup> however, breaches of the prohibition on intervention are composite acts. Accordingly, a strategy of coercion and its components should not be disaggregated and evaluated separately in isolation of the broader pattern of relations between the coercing and coerced state. Deploying instruments of economic coercion that are generally lawful in combination with unlawful instruments of statecraft to intrude on a state's *domaine réservé* would, *in toto*, amount to a violation of the prohibition on intervention.

### C. Cyber Coercion

Cyber is all the rage. International law, international relations, and many other academic and policy-oriented disciplines are examining the opportunities, challenges, and vulnerabilities generated by the rise of the Internet, the emergence of the information society, and the digitalization of the economy. This article is not, of course, the place to comprehensively engage with the growing multidisciplinary literature

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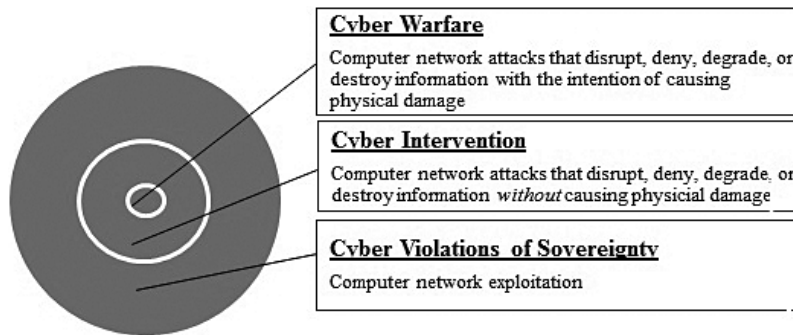
415. See, e.g., Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7 CHINESE J. INT'L L. 625, 655 (2008) ("In view of foreign nations' repeated and unisonous rejections of extraterritorial jurisdiction . . . it might be argued that secondary boycotts are illegal under international law.").

416. Sean D. Murphy, *International Law, the United States, and the Non-Military 'War' Against Terrorism*, 14 EUR. J. INT'L L. 347, 349 (2003).

417. See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 430 (1996) (arguing that secondary boycotts contravene international law when they "coerce conduct that takes place wholly outside of the state['s] . . . jurisdiction").

418. See *supra* notes 20–21 and accompanying text.

on cyber-issues, nor can this article identify and evaluate the legality of every cyber operation that may be directed against states or individuals.<sup>419</sup> Rather, the purpose of this section is to identify the main categories of cyber coercion and to discuss the contours of the legal regimes governing these forms of coercion. Building on the trichotomy of unlawful acts identified on the coercion continuum (uses of force, intervention, and violations of state sovereignty), this section distinguishes between three types of “cyber operations”:<sup>420</sup> cyber warfare, cyber intervention, and cyber violations of sovereignty. Cyber warfare and cyber intervention are undertaken through computer network attacks (CNAs), while cyber violations of sovereignty are committed through computer network exploitation (CNEs). Like the instruments of military coercion, these forms of cyber coercion can be viewed as concentric circles that reflect the descending level of severity and intrusiveness.



As noted above, the hallmark of the use of force as a form of coercion is that it inflicts physical damage on the coerced state.<sup>421</sup> That physical damage can be caused through conventional, nonconventional, or cyber weapons. The distinguishing feature of cyber weapons is that they target “software control-

419. For a description of the different forms and categories of cyber-attacks, see generally Simon Hansman & Ray Hunt, *A Taxonomy of Network and Computer Attacks*, 24 *COMPUTERS & SECURITY* 31 (2005).

420. Cyber operations refers to “the employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace.” TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 15 (Michael N. Schmitt ed., 2013).

421. See *supra* notes 294–95 and accompanying text.

ling processes” within the coerced state.<sup>422</sup> The coercing state uses data streams in “cyberspace”<sup>423</sup> to access and control the computer systems of the coercing state. As indicated on the coercion continuum, these are CNAs, which are operations that “disrupt, deny, degrade, or destroy information.”<sup>424</sup> These attacks occur through numerous mechanisms, such as:

[T]ransmitting viruses to destroy or alter data, using logic bombs that sit idle in a system until triggered on the occasion of a particular occurrence or at a set time, inserting worms that reproduce themselves upon entry into a system and thereby overloading the network, and employing sniffers to monitor and/or seize data.<sup>425</sup>

A CNA does not directly cause physical damage or destruction like a bomb or a bullet. Rather, the physical destruction is the after-effect that results from the damage that the

422. Lionel D. Alford, Jr., *Cyber Warfare: A New Doctrine and Taxonomy*, CROSS TALK, Apr. 2001, at 27, 28 (defining cyber warfare as “any act intended to compel an opponent to fulfill our national will, executed against the software controlling processes within an opponent’s system”).

423. For definitions of cyberspace, see Michael Robinson et al., *Cyber Warfare: Issues and Challenges*, 49 COMPUTERS & SECURITY 70, 71–72 (2015).

424. Titiriga Remus, *Cyber-Attacks and International Law of Armed Conflicts; a “Jus ad Bellum” Perspective*, 8 J. INT’L COM. L. & TECH. 179, 179 (2013). Scholars and experts have constructed various taxonomies of CNAs. For example, Adam Liff identifies three categories of CNAs: (1) “Botnets/Distributed Denial-of-Service attacks,” which constitute a “flood of traffic from a large number of systems . . . designed to crash or disrupt network access”; (2) “Basic malware,” which is a “computer program the employs numerous surreptitious means . . . to open up an access point, transmit data, and/or disrupt the way that target systems behave”; and (3) “Advanced malware,” which operates in the same manner as basic malware, but has the ability to “disrupt heavily defended systems.” Adam P. Liff, *Cyberwar: A New ‘Absolute Weapon’? The Proliferation of Cyberwarfare Capabilities and Interstate War*, 35 J. STRATEGIC STUD. 401, 406 (2012). Another taxonomy distinguishes between three categories of cyber-attacks. Tier 1 Attacks “require no special network or computer access privileges in order to launch” and include denial-of-service attacks, distributed denial-of-service attacks, and phishing; Tier 2 Attacks, in which “an attacker has access to a computer, but with limited privileges,” include password hacking, “sniffing,” and nuisance attacks; and Tier 3 Attacks, in which an attacker acquires “administrative privileges to a computer or network,” include backdoors, rootkits, spyware, keyloggers, and adware. Ian M. Chapman et al., *Taxonomy of Cyber Attacks and Simulation of Their Effects*, PROC. MIL. MODELING & SIMULATION SYMP. 73, 74–77 (2011).

425. Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 84 INT’L REV. RED CROSS 365, 367 (2002).

cyber-attack caused to the computer systems. Hence, a cyber-attack causes physical destruction to military assets or critical infrastructure by damaging the computer networks or the data supporting and operating these physical entities.<sup>426</sup>

Not all CNAs are unlawful uses of force. Whether an attack constitutes a use of force and whether it amounts to an armed attack that entitles the coerced state to use force in self-defense are questions governed by the applicable *lex specialis*—namely, *jus ad bellum*.<sup>427</sup> As discussed in the section on military coercion, the legal characterization of an attack, whether conventional, nonconventional, or cyber, is determined on a case-by-case basis depending on its scale and effects.<sup>428</sup> A CNA, therefore, is an unlawful use of force if it is the “functional equivalent of a clash of arms between States.”<sup>429</sup> The most prominent example of a CNA that was considered a use of force—and perhaps even an armed attack—is the 2009–10 Stuxnet attack against Iran.<sup>430</sup> This attack, which was reportedly attributed to the United States and Israel, destroyed ten percent of the nuclear enrichment centrifuges at the Iranian Natanz nuclear facility.<sup>431</sup>

CNAs can also be launched as a form of intervention. Unlike cyber warfare, which is the subject of extensive debate,

426. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 912 (1999) (considering the ability of CNAs to burst oil pipelines or shut off the power to hospitals).

427. MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 20 (2014).

428. See Horace B. Robertson, Jr., *Self-Defense Against Computer Network Attack Under International Law*, 76 INT'L L. STUD. 121, 134–38 (2002) (discussing the “instrumentalities” and “consequences” approaches to evaluating whether a computer network attack rises to the level of an “armed attack”).

429. Michael N. Schmitt, *Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defense, and Armed Conflicts*, in PROCEEDINGS OF A WORKSHOP ON DETERRING CYBER-ATTACKS 151, 174 (2010).

430. See John Richardson, *Stuxnet as Cyberwarfare: Applying the Law of War to the Virtual Battlefield*, 29 J. MARSHALL J. COMPUTER & INFO. L. 1, 11 (2011) (“With respect to the events at the Natanz nuclear facility, analyzing the Stuxnet event from either an *effects based approach* or *strict liability approach* would suggest that an armed attack did in fact occur.”).

431. Despite several officials indicating involvement of the United States and Israel, no country had taken responsibility for the attack as of 2015. Andrew Moore, *Stuxnet and Article 2(4)'s Prohibition Against the Use of Force: Customary Law and Potential Models*, 64 NAVAL L. REV. 1, 2 & n.6 (2015).

cyber intervention has attracted less scholarly attention.<sup>432</sup> This section defines cyber intervention as any CNA that is intended to disrupt, deny, degrade, or destroy information without causing physical destruction. An example of this is the widely discussed cyber-attack against Estonia in April and May 2007. In response to its decision to relocate a Soviet war memorial, Estonia was subjected to a denial-of-service attack that disrupted governmental and commercial Internet services. Because this attack did not cause physical damage and was limited to disrupting Internet services, it was not categorized as a use of force.<sup>433</sup> Assuming that it can be attributed to the Russian government, which has not been proved with certainty,<sup>434</sup> this CNA would amount to a violation of the prohibition on intervention because it was launched in relation to a matter that is undoubtedly within the *domaine réservé* of Estonia.

The understanding of unlawful cyber intervention proposed here considers any CNA that is intended to disrupt, deny, degrade, or destroy information *eo ipso* unlawful, regardless of the outcome and effects on the coerced state. This diverges from the view of scholars that a cyber-operation would constitute unlawful coercion only if it causes the coerced state to alter its behavior within its *domaine réservé*.<sup>435</sup> As discussed above, this author is skeptical of approaches that identify coercive practices and evaluate their legality based on their effects and impact upon the coerced state.<sup>436</sup> Even if it were possible to show that the coercing state caused the coerced state to al-

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432. For a notable exception, see generally TALLINN MANUAL 2.0, *supra* note 14, at 312–27.

433. See Arie J. Schaap, *Cyber Warfare Operations: Development and Use Under International Law*, 64 A.F. L. REV. 121, 144–46 (2009) (“[T]he international community appears to have concluded that unattributable DoS attacks will not automatically qualify as violating this prohibition [on the use of force].”). A denial-of-service attack is “implemented by either forcing the victim computer to reset, or consuming its resources, e.g. CPU cycles, memory or network bandwidth. As a result, the targeted computer can no longer provide its intended services to its legitimate users.” SHUI YU, DISTRIBUTED DENIAL OF SERVICE ATTACK AND DEFENSE 1 (2014).

434. Michael N. Schmitt, *Cyber Operations and the Jus ad Bellum Revisited*, 56 VILL. L. REV. 569, 570 (2011).

435. TALLINN MANUAL 2.0, *supra* note 14, at 320 (arguing that “an act is coercive so long as there is a causal nexus to an infringement on the internal or external affairs of the target State (the effect); such causation of the requisite effect may be direct or indirect in nature”).

436. See *supra* pp. 51–54.



ter its behavior, adopting such a rule would lead to unreasonable results. An act that successfully coerces a state into making concessions or that disrupts Internet services in the target state would be unlawful, while an identical act that fails because the target state implemented effective computer network defense would be lawful.

To further clarify and demarcate the extent to which cyber operations are unlawful under the prohibition on intervention, it is useful to consider CNE, which are “[e]nabling operations and intelligence collection capabilities conducted through the use of computer networks to gather data from target or adversary automated information systems or networks.”<sup>437</sup> CNE, therefore, are not intended to either inflict physical damage or affect, alter, or damage information stored on or channeled through an adversary’s networks. Rather, the objective is to gain access to information to reveal an adversary’s plans, capabilities, and decision-making processes. CNE, therefore, are a form of espionage. While it is beyond the ambit of this article to explore the controversial question of the legality of peacetime espionage,<sup>438</sup> this section argues that peacetime CNE violates sovereignty if undertaken to acquire unauthorized access to a state’s computer networks. Penetrative cyber operations that gain unauthorized access to computer networks are the functional equivalent of unauthorized flights over a state’s territory conducted for intelligence gathering, which violate sovereignty.<sup>439</sup> Further, naval incursions, including both surface vessels and submarines, into a state’s territorial sea for intelligence gathering purposes breaches the principle of innocent passage.<sup>440</sup> Both of these types of operations violate a state’s sovereignty.

Accordingly, the alleged Russian intrusions into the DNC servers in mid-April 2016, as described in Part I of this article,

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437. Steven R. Chabinsky, *Cybersecurity Strategy: A Primer for Policy Makers and Those on the Front Line*, 4 J. NAT’L SECURITY L. & POL’Y 27, 30 n.11 (2010).

438. For a discussion of the topic, see generally A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT’L L. 595 (2007).

439. Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT’L L. 836, 845 (1960).

440. See generally F. David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625 (1984) (discussing the problem of characterizing innocent passage).

were an unlawful CNE operation that violated U.S. sovereignty. The subsequent exfiltration and dumping of these e-mails via DCleaks and WikiLeaks amounted to a CNA that violated the prohibition on intervention, which some writers refer to as “doxfare.”<sup>441</sup> In other words, this operation, which began as a CNE, evolved into a CNA that disrupted and degraded information on computer networks for the purposes of intervening in an election campaign, which, if attributable to Russia, violated the prohibition on intervention.

The rise of social media and increased connectivity have made cyber operations an effective instrument of information operations (IO), information warfare (IW) and psychological operations (PSYOPs).<sup>442</sup> Although there are important differences between IO, IW, and PSYOPs, these terms are used interchangeably to generally refer to activities that “influence the perceptions, attitudes and behavior of selected individuals or groups with the goal of achieving political or military objectives.”<sup>443</sup> There is no general prohibition in international law on these activities, and the little literature that has considered this question has focused on whether they can be categorized as unlawful uses of force.<sup>444</sup> These activities, however, are better examined through the prism of the prohibition on intervention, because their principal purpose is not to cause physical destruction, but to weaken resolve and undermine confidence by manipulating information and perceptions. Ultimately, these activities amount to subversion, which is recognized as a form of prohibited intervention in relevant documents, such as the 1970 Friendly Relations Declaration.

While some scholars have suggested that the prohibition on intervention does not proscribe IO, IW, or PSYOPs,<sup>445</sup> this

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441. E.g., Ido Kilovaty, *Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT'L SECURITY J. 146, 152 (2018).

442. See generally NJ Shallcross, *Social Media and Information Operations in the 21st Century*, 16 J. INFO. WARFARE, no. 1, 2017, at 1.

443. Steven Collins, *NATO and Strategic PSYOPs: Policy Pariah or Growth Industry?*, 1 J. INFO. WARFARE, no. 3, 2002, at 72, 73.

444. See, e.g., Jason Barkham, *Information Warfare and International Law on the Use of Force*, 34 N.Y.U. J. INT'L L. & POL. 57, 57 (2001) (examining informational warfare under Article 2(4) of the UN Charter).

445. Notably, the latest comment on this issue, written in 2000, clearly suggested that future developments in the law could change the status of IW relating to intervention. Emily Haslam, *Information Warfare: Technological*

section proposes that the prohibition on intervention outlaws certain activities that belong to this category of instruments of statecraft. Specifically, in times of peace, *covert* or *black* IO, IW, or PSYOPs, are unlawful under the prohibition on intervention if these activities are undertaken to interfere with the *domaine réservé* of a state. The principal challenge in considering whether IO, IW, or PSYOPs are unlawful in peacetime is that these instruments are often employed in activities that are persuasive, not coercive. As discussed above, persuasion alters an actor's perception of its own interests and values; it affects behavior by realigning and reconfiguring an actor's desires.<sup>446</sup> These objectives are often pursued through IO, IW, or PSYOPs. Therefore, the standard that this section proposes to distinguish between persuasive and coercive IO, IW, or PSYOPs operations is whether these operations are conducted covertly. Here, covert operations are defined in the same terms as so-called "black" PSYOPs, which are operations in which the identity of the actor communicating the information is purposively misrepresented.<sup>447</sup>

Accordingly, the use of, for example, Russia Today by Russia, Radio Free Europe by the United States, or Al Jazeera by Qatar, as instruments of IO, IW, or PSYOPs is not unlawful. These are cases of so-called "white PSYOPs," through which an actor participates in an international marketplace of ideas and pursues policies of persuasion, even if by propagating misinformation, engaging in deception, or spreading propaganda. When using a medium that does not conceal or misrepresent the identity or allegiance of the communicator, the target state and audience are afforded an opportunity to question the genuineness of the disseminated information. Black PSYOPs, on the other hand, are perfidious. By misrepresenting or concealing its identity, the communicator engages in subversion that undermines and sabotages the political process, an act that should be proscribed by the prohibition on intervention.

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*Changes and International Law*, 5 J. CONFLICT & SECURITY L. 157, 163–64 (2000).

446. See *supra* notes 283–85 and accompanying text.

447. THOMAS ELKJER NISSEN, ROYAL DANISH DEF. COLL., BLACK AND WHITE AND 256 SHADES OF GREY IN BETWEEN 4, 8 (2012).

#### D. *Political Coercion*

The literature on intervention has traditionally focused on the legality of military and economic tools of statecraft. In recent years, cyber operations have also attracted attention as a novel policy instrument in international relations.<sup>448</sup> Political coercion, on the other hand, has received little systematic consideration as a distinct instrument of statecraft. This is perhaps understandable in light of the fact that most instruments of political coercion are lawful mechanisms of exercising pressure in international relations.

States exercise an infinite variety of forms of political pressure. These include criticizing a government or expressing support of an opposition party or movement, offering or withdrawing various forms of aid, breaking or threatening to break ongoing negotiations, breaking or threatening to break diplomatic relations, declaring diplomats *persona non grata*, terminating treaties, suspending air travel, granting asylum to political dissidents, promoting or preventing immigration, and imposing travel bans or visa restrictions. Political pressure can be exercised bilaterally or multilaterally, and through regional or universal organizations. Moreover, political pressure can be aimed at the state generally, or it can target specific individuals, such as senior government officials and Heads of State, as well as their families, political allies, and business associates. These are only illustrative examples of political pressure. Indeed, it is unlikely that an exhaustive list of all forms of political pressure can be constructed.

This section focuses on two forms of political pressure. The first is public criticism of the domestic or external policies of a state and/or public support of opposition parties or rebel movements. The language of the 1970 Friendly Relations Declaration and some of the regional treaties that codify and enshrine the prohibition on intervention, such as the OAS Charter, might suggest that criticism of government policies or political support of opposition groups might be unlawful. Moreover, states routinely reject and condemn such forms of political pressure. For instance, Nigeria condemned U.S. and

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448. Increasingly, scholars have focused on the interaction between cyber and international law and politics. For an example, see generally RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE (Nicholas Tsagourias & Russell Buchan eds., 2015).

European expressions of concern regarding the suspension of the Nigerian Chief Justice in the run-up to the 2019 presidential election as unacceptable “meddling” in its internal affairs.<sup>449</sup> Similarly, Saudi Arabia declared that it “will not accept interference in its internal affairs or imposed diktats from any country,” and expelled the Canadian Ambassador after Canada urged Riyadh to release women’s rights activists that it had detained.<sup>450</sup> This method of exercising political pressure is neither insignificant nor ineffective. States, like all political actors, have an interest in maintaining positive reputations.<sup>451</sup> Even states subjected to international opprobrium, such as North Korea, need to retain positive relations with the few allies they have in the international system. State leaders and individuals engaged in international politics also seek to cultivate positive perceptions of themselves. The case of Jamal Khashoggi’s murder discussed in Part I demonstrates how reputational costs, generated primarily by press leaks and public criticism, severely harmed the standing of the Saudi Crown Prince and had a significant impact on Riyadh’s foreign and domestic policy.

This sort of public criticism of the domestic or external policies of states is not, on its own, unlawful. These activities are ubiquitous in international relations. States from every region and governments of every political and economic orientation publicly criticize their friends and foes. This practice is hardly the exclusive purview of great powers. Indeed, “[f]or reasons of geography, history or national security, small and medium-sized countries often maintain an intense interest in other states’ domestic politics.”<sup>452</sup> These activities are, essentially, forms of persuasion. Criticism of domestic politics, expressions of concern regarding human rights violations, disap-

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449. Mojeed Alabi, *2019 Elections: Nigeria Warns U.S., U.K. Against Meddling in Country’s Internal Affairs*, PREMIUM TIMES (Jan. 27, 2019), <https://www.premiumtimesng.com/news/headlines/308195-2019-elections-nigeria-warns-u-s-u-k-against-meddling-in-countrys-internal-affairs.html>.

450. Ashifa Kassam, *Saudi Arabia Expels Canadian Envoy for Urging Activists’ Release*, GUARDIAN (Aug. 6, 2018), <https://www.theguardian.com/world/2018/aug/06/saudi-arabia-expels-canadian-ambassador-for-urging-release-of-activists>.

451. For discussion of state reputations and their importance to international law, see generally Rachel Brewster, *Unpacking the State’s Reputation*, 50 HARV. INT’L L.J. 231 (2009).

452. Damrosch, *supra* note 229, at 2.

proval of environmental policies, questioning economic practices, or recommending political or economic reforms are forms of persuasion that states regularly exercise.

Similarly, expressions of political support of domestic opposition are generally not unlawful. Although the ICJ did not address this point directly, parts of the discussion in the *Nicaragua Case* lend support to this claim. Nicaragua made no secret of what the court called its expressions of “solidarity and sympathy with the opposition in various States, especially in El Salvador.”<sup>453</sup> The Reagan Administration also engaged in “expressing solidarity and support for the *contras*, described on occasion as ‘freedom fighters’, and indicating that support for the *contras* would continue until the Nicaraguan Government took certain action, desired by the United States Government.”<sup>454</sup> These activities were undoubtedly intended to influence state policies within the *domaine réservé*. However, nowhere in the judgment does the ICJ consider these activities to constitute coercion, nor did the United States or Nicaragua submit that these acts were unlawful. Rather, it appears that the ICJ viewed these pronouncements as revelatory of the policy purposes and broader intent of the litigants. In other words, while expressions of support for domestic opposition are generally not unlawful, they may, when viewed in combination with other acts, reveal and confirm the existence of a systematic policy of unlawful intervention.

However, as discussed in the section on military coercion, supporting domestic opposition by other means beyond mere expressions of “solidarity and sympathy,” such as by providing arms, would violate the prohibitions on the use of force and on intervention. Meanwhile, supporting domestic opposition through financial or logistical assistance would amount to unlawful intervention. Similarly, engaging in black PSYOPs that interfere in domestic politics and support a particular political party or opposition movement would also breach the prohibition on intervention.

Recognition of states and/or governments is another form of political pressure. The recognition of states is the process through which a state expresses its view on whether an entity has satisfied the prerequisites of attaining statehood.

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453. *Nicaragua Case*, *supra* note 2, ¶ 208.

454. *Id.* ¶ 240.

The recognition of governments, on the other hand, is the process by which a state expresses its view on whether certain persons or authorities are entitled to represent and act on the foreign state's behalf on the international plane.<sup>455</sup> Generally, states retain discretion regarding recognition or non-recognition of states and governments. As the Badinter Commission noted, recognition is a “discretionary act that other States may perform when they choose and in a manner of their own choosing.”<sup>456</sup>

Nonetheless, *premature recognition* of states and/or governments may amount to unlawful intervention.<sup>457</sup> Premature recognition of states occurs when a state extends recognition to an entity that does not in fact exhibit the elements or characteristics of statehood. For instance, it would be an act of unlawful intervention to recognize as a sovereign state a breakaway province or seceding territory while the parent state is seeking to resist an ongoing secession, reassert its control, and protect its territorial integrity.<sup>458</sup> Premature recognition of governments, on the other hand, is when a state recognizes a person, group of persons, organization as the government of another state, despite the fact that those individuals or organizations do not exercise effective control<sup>459</sup> over the territory of that state. Such an act could constitute unlawful intervention in the internal affairs of a state, or unlawful interference in civil strife.<sup>460</sup>

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455. See Jochen A. Frowein, *Recognition*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1086?print=pdf> (last updated Dec. 2010).

456. Opinion No. 10, 92 I.L.R. 206, 208 (Arb. Comm'n Conf. Yugoslavia 1992).

457. HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 9 (1947).

458. See JOHN DUGARD, *THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO* 23–24 (2013) (noting the historical view that it was an “international wrong to recognize such [seceding] territories”).

459. Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Government*, 48 INT'L & COMP. L.Q. 545, 566 (describing the “effective control” test as the “central (and often determinative) issue” on recognition).

460. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 1985 BRIT. Y.B. INT'L L. 189.

## V. CONCLUSION

The prohibition on intervention is an elementary rule of international law. It is, as the ICJ noted, a corollary of sovereignty that states routinely invoke. While coercive diplomacy and interventionist policies have been principally exercised by powerful states against weaker adversaries, the reality is that even the great powers, such as the United States, China, and Russia, have protested policies of other states by referencing the prohibition on intervention. Moreover, rapidly evolving technologies, especially in cyberspace, will provide opportunities for all states to coerce other states, while at the same time exposing vulnerabilities from which no state, whether a superpower or a marginal player, can perfectly secure itself. Moreover, in a “post-American world”<sup>461</sup> in which the United States and its NATO allies will no longer monopolize the power to intervene and exercise coercive policies, several great powers and many “pivotal states”<sup>462</sup> will compete for global influence.

These policy realities highlight the importance of the prohibition on intervention as a doctrinal instrument to evaluate the legality of state conduct. Unfortunately, however, this rule has not received sufficient scholarly attention, and has not been the subject of extensive judicial consideration. Moreover, nowhere in international law scholarship or judicial precedent has coercion, which is “the very essence of prohibited intervention,” been defined. This article addressed these lacunae. It outlined the origins, scope, content, and legal nature of the prohibition on intervention. It defined unlawful intervention as the pursuit of unlawful ends through unlawful means. The former—the unlawful ends—is any infringement on the *domaine réservé* of a state, while the latter—the unlawful means—is the use of coercive instruments to achieve the unlawful ends. This novel conceptualization of the prohibition on intervention reflects the composite nature of breaches of this rule. Unlawful intervention is executed through separate acts that, together, constitute a single strategy that amounts to a composite breach of the prohibition on intervention. This

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461. The term is borrowed from FAREED ZAKARIA, *THE POST-AMERICAN WORLD* 5 (2008).

462. The term is borrowed from *THE PIVOTAL STATES: A NEW FRAMEWORK FOR U.S. POLICY IN THE DEVELOPING WORLD* 4 (Robert S. Chase et al. eds., 1999).



approach to understanding and applying the prohibition on intervention diverges from the methodology of the ICJ in the *Nicaragua Case*.

This article also constructed the coercion continuum to provide a catalogue of the forms of coercion that states employ, and to reveal the interconnections and interchangeability of the instruments of coercion. It highlights the reality that coercive strategies often involve a combination of instruments that include the simultaneous infliction of harm and the offering of inducements. The coercion continuum also reveals the legal overlaps in the regulation of coercion. It shows how a single coercive strategy could be governed by multiple legal regimes, including *jus ad bellum*, WTO law, investment protections, human rights, and the overarching principle of state sovereignty. This reaffirms the appropriateness of conceiving unlawful interventions as composite breaches of international law, and challenges methodologies that evaluate the legality of interventionist policies by disaggregating a strategy of coercion into its constituent elements and judging the legality of these elements separately.

Hence, the disinformation aired on Russia Today during the 2016 U.S. presidential election would, if viewed separately, constitute a lawful form of white PSYOPs, while the dissemination of disinformation through anonymous and fake social media accounts would constitute unlawful black PSYOPs. That, however, would be constructing an artificial distinction between two elements of a single strategy of interfering in an election campaign. Russia's interference in the U.S. election should be viewed comprehensively. All the instruments employed—including black and white PSYOPs, computer exploitation attacks that planted bugs in the DNC servers, CNAs that damaged the DNC servers, and the exfiltration and dumping of e-mails at critical junctures of the campaign—are elements of a composite breach that includes both lawful and unlawful acts that impinged on the US *domaine réservé*. As discussed, this breach violates the prohibition on intervention.

The point of departure in evaluating the legality of the dramatic events of the 2017 North Korean nuclear crisis is determining whether North Korea's acquisition and maintenance of a nuclear weapons program is a matter within its *domaine réservé*. As discussed above, while general international law does not prohibit the development and possession of nu-

clear weapons, North Korea is under an obligation to denuclearize pursuant to U.N. Security Council resolutions. Accordingly, pressuring North Korea to denuclearize does not violate the prohibition on intervention. Military exercises, such as the U.S.-South Korea Foal Eagle maneuvers, demonstrations of force, and belligerent statements (and tweets) that show U.S. resolve to defend itself and its allies, and which are intended to intimidate North Korea and signal a rejection of Pyongyang's attempts to establish itself as a de facto nuclear power, are not part of a strategy that violates the prohibition on intervention. This is because the first prong of the test—interference within the *domaine réservé* of the coerced state—is not met.

Finally, the tragic murder of Jamal Khashoggi is a case wherein instruments of statecraft—press leaks, official statements, and government criticism—that Turkey employed to generate pressure on Saudi Arabia had significant political ramifications both within Saudi Arabia and throughout the Middle East. Nothing in Turkey's behavior, however, violated the prohibition on intervention. The murder of its citizens and attempting to cover up the crime is undoubtedly not within Saudi Arabia's *domaine réservé*. However, the tools that Turkey used were, as shown on the coercion continuum, lawful instruments of statecraft.