

ARTICLE

Gray Zone Tactics and the Principle of Non-Intervention: Can “One of the Vaguest Branches of International Law” Solve the Gray Zone Problem?

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Abstract

States have increasingly turned to “gray zone tactics,” or actions that exceed accepted peacetime competition but do not rise to a level likely to trigger a military response, in recent years in order to pursue strategic objectives. Such tactics are often difficult to conclusively orient on the use of force spectrum, which makes determining legally available response options similarly difficult.

Because a use of force framework may not always satisfactorily encompass gray zone tactics, another approach appears necessary. This Article explores the feasibility of analyzing gray zone tactics under an unlawful intervention framework. Though the principle of non-intervention has the potential to more adequately encompass such tactics and expand victim state response options, successful application is likely to meet with several hurdles, illustrating the frustrating nature of gray zone tactics.

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I. Introduction

States increasingly use their military forces to execute “gray zone tactics” in pursuit of strategic objectives.¹ These tactics exceed the limits of accepted peacetime competition between states but avoid rising to a level that would warrant a conventional military response.² Whether by design, necessity, or chance, these tactics fall *somewhere* between war and peace on the use-of-force spectrum, though exactly *where* they fall is difficult to say with any certainty. Do military-on-military gray zone tactics violate the prohibition on the threat of or use of force? Are gray zone tactics armed attacks? Something else entirely? The fact that gray zone tactics elude familiar categories of military action makes understanding potential responses difficult, as the range of permissible responses depends in part on how international law categorizes the initial act.

Where gray zone tactics involve one state using its military forces against another state, a use-of-force analysis is an appropriate starting point in evaluating these tactics and determining lawful response options. Yet, as this Article explains, many victim states may find the use-of-force framework unsatisfying. An alternative—and novel—approach is to evaluate whether such tactics violate the principle of non-intervention, which prohibits coercive actions intended to cause a victim state to do or refrain from doing something falling solely within the victim state’s domestic affairs.³

Certain gray zone tactics clearly violate the principle of non-intervention. However, fitting *military-on-military* gray zone tactics into an unlawful intervention framework is likely to prove a difficult task in many instances, because these tactics often implicate international, as opposed to solely domestic, affairs. Given this reality and the frustrations that accompany a use-of-force analysis,

¹ While this Article focuses on actions taken by one State’s military against another State’s military, the use of gray zone tactics is not limited to military actions alone, nor are such tactics exclusive to State actors. For example, gray zone tactics could include economic or cyber actions by one State in an effort to influence foreign policy in another State; non-State armed groups and private corporations could also employ gray zone tactics. However, such tactics fall outside the scope of this Article.

² See MICHAEL J. MAZARR, *MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA OF CONFLICT* 1 (2015); LYLE J. MORRIS, MICHAEL J. MAZARR, JEFFREY W. HORNUNG, STEPHANIE PEZARD, ANIKA BINNENDIJK & MARTA KEPE, *GAINING COMPETITIVE ADVANTAGE IN THE GRAY ZONE: RESPONSE OPTIONS FOR COERCIVE AGGRESSION BELOW THE THRESHOLD OF MAJOR WAR* 8 (2019); Sugio Takahashi, *Development of Gray-zone Deterrence: Concept Building and Lessons From Japan’s Experience*, 31 PAC. R. 787, 787–88 (2018); see generally James J. Wirtz, *Life in the “Gray Zone:” observations for contemporary strategists*, 33 DEF. & SEC. ANALYSIS 107 (2017); Aurel Sari, *Legal Resilience in an Era of Grey Zone Conflicts and Hybrid Threats*, 1–29 (ECIL Working Paper 2019/1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315682 [<https://perma.cc/Q2EE-8GVD>].

³ For one authoritative explanation of the non-intervention principle, see generally Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT’L L. 345 (2009).

victim states will likely continue to find current understandings of gray zone tactics and response options unsatisfying.

This Article explores the application and value of analyzing gray zone tactics through a non-intervention framework. Section I undertakes a deeper examination of the problem, including questions on the definition of, motivation behind, and effects of these tactics. Section II introduces three examples of military-on-military gray zone tactics: Russia's use of military aircraft to fly close to U.S. warships; China's seizure of a U.S. unmanned underwater vehicle; and Iran's use of armed small boats to harass U.K. and U.S. warships. Section III briefly analyzes these examples under a use-of-force framework, illustrating the potential difficulties that may arise when approaching gray zone tactics from that paradigm. Sections IV and V then analyze these examples under the principle of non-intervention, which has been described as "one of the vaguest branches of international law."⁴

Considering levels of diplomatic and military tension among the major actors in current gray zone campaigns, how states understand and respond to gray zone tactics carries important consequences. If victim states are consistently unable to respond effectively, similar gray zone tactics may become normalized, thus permitting this type of state-to-state interaction. On the other hand, a mischaracterization of or hasty response to such tactics could result in the serious and rapid escalation of military engagements. Further, some states could conclude that current legal frameworks do not allow for effective responses to gray zone tactics. Those states may stretch their use-of-force determinations to encompass these tactics in order to expand response options—including those involving uses of force in self-defense—and such expanded responses could become the norm. Given these potential impacts on international norms, the legal challenges surrounding gray zone tactics must be clarified.

II. Defining Gray Zone Tactics

A. Terminology

At least some of the uncertainty surrounding gray zone tactics likely stems from the lack of a universal definition of the term under international law.⁵ The concept apparently originated in relation to policy and military discourse rather than

⁴ P.H. Winfield, *The History of Intervention in International Law*, 1922 BRIT. Y.B. INT'L L. 130, 130.

⁵ See BELINDA BRAGG, NSI, GRAY ZONE CONFLICTS, CHALLENGES, AND OPPORTUNITIES: INTEGRATION REPORT 3 (2017), <http://nsiteam.com/social/wp-content/uploads/2017/07/Integration-Report-Final-07-13-2017-R.pdf> [<https://perma.cc/32L9-5J9C>] ("It's not surprising that the boundaries of such a complex and amorphous concept as the [gray zone] remain contested, but it is a problem. We cannot advance our understanding of gray zone challenges . . . [until] we have a carefully crafted and generally accepted definition of what is in, and what is out, of the gray zone.").

legal doctrine.⁶ A reader that consults five different sources concerning the topic is likely to find five slightly different definitions.⁷ For example, one frequently cited paper describes gray zone tactics as “efforts [that] remain below the thresholds that would generate a powerful . . . response, but nonetheless are forceful and deliberate, calculated to gain measurable traction over time”⁸ while another influential source describes them as tactics “too small to provoke a reaction . . . or invoke the committed response.”⁹ Other sources offer slightly different definitions, including: acts that “challenge the status quo without resorting to war;”¹⁰ acts that “exceed the threshold of ordinary competition, yet fall below the level of large-scale direct military conflict;”¹¹ and acts that “lie[] somewhere between ordinary diplomacy and all-out war.”¹²

Adding to the confusion is the fact that these tactics are referred to by many terms, including “gray zone tactics,”¹³ “hybrid warfare,”¹⁴ “measures short of armed conflict,”¹⁵ and “measures short of war.”¹⁶ Further, “gray zone tactics” has been used to describe a variety of state actions, including military, cyber, economic, diplomatic, and other activities.¹⁷ Some argue that the use of the term “gray zone” is problematic because it creates a misconception that there is a “twilight zone” on the use-of-force spectrum between peace and war.¹⁸ Others have voiced concern

⁶ See Sari, *supra* note 2, at 15 (“The legal community is thus confronted with a situation where policy and strategic discourse has adopted a language that does not translate well into legal doctrine and vice versa.”).

⁷ Such variations in description are abundant, even within a single State. For example, the United States’ 2017 National Security Strategy refers to tactics falling “below the threshold of military conflict;” the United States’ 2018 National Defense Strategy refers to “efforts short of armed conflict;” and a U.S. Special Operations Command public white paper refers to “interactions . . . that fall between the traditional war and peace duality.” Compare WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (2017) [hereinafter 2017 NSS] with DEP’T OF DEF., SUMMARY OF NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, U.S. 2 (2018) [hereinafter 2018 NDS] and Philip Kapusta, *White Paper: The Gray Zone*, SPECIAL WARFARE, Oct.–Dec. 2015, at 20, 20.

⁸ MAZARR, *supra* note 2, at 1–2.

⁹ THOMAS SCHELLING, *ARMS AND INFLUENCE* 68 (1967).

¹⁰ Van Jackson, *Tactics of Strategic Competition: Gray Zones, Redlines, and Conflicts Before War*, 70 NAVAL WAR COLL. REV. 39, 39 (2017).

¹¹ MORRIS, ET AL., *supra* note 2, at 8.

¹² Sari, *supra* note 2, at 14.

¹³ MAZARR, *supra* note 2, at 3.

¹⁴ See *id.* at 45. This article does not address hybrid warfare, which refers to “combinations of conventional and unconventional means” and, while it may include gray zone tactics, encompasses something more comprehensive. See *id.*; FRANK HOFFMAN, POTOMAC INST. FOR POL’Y STUD., *CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARS* 14 (2007) (defining hybrid warfare as warfare that “incorporate[s] a range of different modes of warfare, including conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder.”).

¹⁵ Frank Hoffman, *Examining Complex Forms of Conflict: Gray Zone and Hybrid Challenges*, PRISM, Nov. 2018, at 30, 32.

¹⁶ ANTULIO J. ECHEVARRIA, STRATEGIC STUD. INST., *OPERATING IN THE GRAY ZONE*, vii (2016).

¹⁷ See MAZARR, *supra* note 2, at 1–5; MORRIS, ET AL., *supra* note 2, at 7–12.

¹⁸ Sari, *supra* note 2, at 14 (“Despite protests that the notion is not meant to replace the duality between war and peace with a tripartite model that distinguishes between war, the grey zone and

that the term “does not translate well into legal doctrine and vice versa,” and that therefore the term “may prove to be of limited benefit for legal analysis.”¹⁹ These variations in definition, terminology, and content make it difficult to confirm whether states have the same basic understanding of the issue. While there is currently no universal definition of nor any agreement as to precisely what constitutes gray zone tactics, a majority of scholars and practitioners seem to agree that gray zone tactics share a unifying characteristic: states use gray zone tactics to gain a strategic advantage while remaining below the level that would trigger a military response.²⁰ While recognizing the lack of consensus on the exact meaning of “gray zone tactic,” for simplicity’s sake, this Article will use that term to describe acts that exceed the threshold of accepted peacetime competition but do not rise to a level likely to trigger a conventional military response.²¹ This Article will specifically focus on gray zone tactics used by one state’s military forces against another state’s military forces.

B. Motivation

Gray zone tactics fall below the level likely to trigger a military response, but it is unclear whether that is by design, necessity, or chance.²² One possibility is that states purposefully design these campaigns to avoid triggering the use of force in self-defense or potentially even sparking a full-scale conventional military conflict.²³ Another possibility is that states use such tactics because they must—

peace. . . in the eyes of most commentators, it seems to do exactly that.”). *See also* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 18 (5th ed. 2011) (While not commenting on gray zone tactics in particular, noting that “[l]egally speaking, there are only two states of affairs in international relations—war and peace—with no undistributed middle ground.”); Interview with James Kraska, Charles H. Stockton Professor of International Maritime Law, U.S. Naval War College (Feb. 2020).

¹⁹ Sari, *supra* note 2, at 15 (emphasis omitted).

²⁰ *See* MAZARR, *supra* note 2, at 1; MORRIS, ET AL., *supra* note 2, at 8; Wirtz, *supra* note 2, at 107; Sari, *supra* note 2, at 14; Takahashi, *supra* note 2.

²¹ The lack of a universal understanding of exactly what gray zone tactics encompass is an issue that spans legal and non-legal scholarship focused on this subject. Selecting a single term to describe the tactics within this Article was problematic, as every term or definition seems to suggest pre-determined answers to the very questions surrounding these tactics. For example, the term “gray zone” suggests recognition of an area that falls outside of a traditional war/peace binary; the phrase “unlikely to trigger a military response” seems to conclude that an armed attack *did not* or *could not* occur; the term “tactic” seems to assume an individual act is part of a larger strategy. While recognizing that these issues need attention, this Article does not attempt to settle any of the above debates, and uses the term “gray zone tactic” and the definition provided above without prejudging answers to any of these questions. Instead, this Article focuses on exploring gray zone tactics in relation to various international legal frameworks in an attempt to shed light on the potential inadequacies and varying interpretations of these frameworks as they relate to a particular type of gray zone tactic.

²² *See* MAZARR, *supra* note 2, at 1; MORRIS, ET AL., *supra* note 2, at 8; Wirtz, *supra* note 2, at 107;; Takahashi, *supra* note 2.

²³ *See* MAZARR, *supra* note 2, at 34 (“One leading purpose of such approaches can be to avoid the sort of fundamental clash that characterizes conclusive strategies.”). While serving as Commander of U.S. Special Operations Command, Gen. Joseph Votel suggested that States specifically design gray zone tactics to “attempt to maximize their coercive influence while limiting their risk of serious retribution. They are. . . adept at avoiding crossing thresholds that would clearly justify the use of

their limited military capabilities do not allow them to mount effective conventional military campaigns. For these states, gray zone tactics “speak to a fundamental inability to do anything more.”²⁴ A final possibility is that some states employ gray zone tactics without a great deal of forethought. By luck, they happen to land in the area between accepted peacetime competition and armed attack. Each of these explanations may hold true in particular situations, depending on the states involved and their specific motivations and resources.

C. *Effects and Challenges*

Whatever the motivations driving the use of gray zone tactics, such tactics can be challenging for victim states for several reasons. Because the specific goals behind these tactics are often unclear or even expressly denied, attribution becomes difficult under international law.²⁵ Of additional concern is the likelihood that, given the high cost of conventional warfare and the ease of mounting gray zone campaigns, such tactics will only increase in coming years.²⁶

Most importantly, because gray zone tactics “defy straightforward legal categorization,” they create uncertainty for victim states as to what response options are both appropriate under the circumstances and permissible under international law.²⁷ If unanswered, gray zone tactics can weaken victim state credibility; if imprudently answered, they create a situation ripe for escalation.²⁸ As a single gray

conventional military force.” *Special Operations Forces in an Uncertain Threat Environment: A Review of the Fiscal Year 2016 Budget Request for U.S. Special Operations Command Before the H. Subcomm. on Emerging Threats of the H. Comm. on Armed Servs.*, 114th Cong. 7 (2015) (statement of Gen. Joseph L. Votel, Commander, U.S. Special Operations Command).

²⁴ MAZARR, *supra* note 2, at 25 (“[M]any states can also be attracted to gray zone techniques because of their relative weakness. Russian and Chinese gray zone tactics lately have been interpreted as indications of cunning and influence, when, in fact, they may speak to a fundamental inability to do anything more.”).

²⁵ See 2017 NSS, *supra* note 11, at 3 (“In addition, many actors have become skilled at operating below the threshold of military conflict—challenging the United States, our allies, and our partners with hostile actions cloaked in deniability.”).

²⁶ See Wirtz, *supra* note 2, at 110 (noting that “the cost of major aggression has become so severe, and economic and social interdependence so powerful, that states with some degree of aggressive intent arguably will be in the market for alternative ways to achieve their goals. These realities increase the incentive to use gray zone approaches.”).

²⁷ As is common in much of international law, one may expect some degree of vagueness. See Ariel Sari, *Legal Aspects of Hybrid Warfare*, LAWFARE (Oct. 2, 2015), <https://www.lawfareblog.com/legal-aspects-hybrid-warfare> [https://perma.cc/FML6-ULQM] (“Those thresholds and lines exist not because they are the result of legislative oversight or incompetence, but because they reflect underlying political choices and stalemates. There are gray areas in the law because States do not want, or could not agree, that all of it is black and white.”). However, at some point vagueness can become more of a hindrance than a help. See Rosa Brooks, *Rule of Law in the Gray Zone*, MODERN WAR INST. (July 2, 2018), <https://mwi.usma.edu/rule-law-gray-zone/> [https://perma.cc/STA3-VRZ5] (“Beyond a certain point, however, vagueness and ambiguity are crippling. When key international law concepts and categories lose all fixed meaning, consensus breaks down about how to evaluate state behavior; and although legal rules may continue to exist on paper, they no longer do much to ensure that states will behave in a predictable, nonarbitrary fashion.”).

²⁸ See MAZARR, *supra* note 2, at 115; Wirtz, *supra* note 2, at 108.

zone action is often objectively quite minor by itself, victim states may be reluctant to respond at all. The danger here is that a continued failure to respond can result in the gradual erosion of the status quo, including regarding what types of interactions are acceptable between states. Victim states may find themselves struggling with limited response options that do not adequately address the original act. Additionally, states that do not recognize a gap between unlawful uses of force and armed attacks may wrestle with whether or not to respond with force in self-defense.²⁹ For all of these reasons, gray zone tactics are uniquely challenging and deserving of continued discussion within both military and international legal communities.

III. Case Studies: Russian, Chinese, and Iranian Gray Zone Tactics

Given the lack of a universal definition explaining what constitutes gray zone tactics, examining actual examples is the most effective way to illustrate and analyze the concept. Russia, China, and Iran each employ gray zone tactics as defined by this Article: acts that exceed the threshold of accepted peacetime competition but do not rise to the level likely to trigger a military response.³⁰ This Article focuses on three specific examples of such tactics, each involving one state using its military against another state, but none of which occurred in relation to an armed conflict: Russia's use of military aircraft to buzz warships, China's seizure of an unmanned underwater vehicle, and Iran's use of armed small boats to harass warships.³¹

A. *Russian Military Aircraft U.S. and U.K. Buzz Warships*

²⁹ In contrast to a majority of the international community, the United States has asserted the view that there is no gap between an unlawful use of force under art. 2(4) of the U.N. Charter and an armed attack as contemplated by art. 51 of the Charter. This position allows the United States to claim the right to respond with force in self-defense to potentially any unlawful use of force. See William H. Taft, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 300 (2004) (“[T]he United Nations Charter specifically recognizes a right to defend against an ‘armed attack,’ and it contains no suggestion that only certain armed attacks qualify.”). While recognizing this important difference of views, this Article does not take a position on the matter, other than to note that response options to gray zone tactics may be more expansive—to include a use of force in purported self-defense—for States which adhere to this “no gap” theory.

³⁰ Though this Article focuses on Russian, Chinese, and Iranian gray zone tactics, this does not imply that these States monopolize such tactics. For example, China has indicated that it views U.S. freedom of navigation operations in the South China Sea as gray zone tactics. See Liu Zhen, ‘*Grey Zone’ Tactics Are Raising Risk of Military Conflict in South China Sea*, *Observers Say*, S. CHINA MORNING POST (Oct. 20, 2019), <https://www.scmp.com/news/china/military/article/3033672/grey-zone-tactics-are-raising-risk-military-conflict-south> [<https://perma.cc/X2WA-P9PU>]. Some have argued that, at least historically, the United States frequently employed gray zone tactics to achieve its strategic goals. See NATHAN FREIER, STRATEGIC STUD. INST., OUTPLAYED: REGAINING STRATEGIC INITIATIVE IN THE GRAY ZONE 64–70 (2016).

³¹ Though English-language sources are certainly not the only sources that are relevant to a study of these particular gray zone tactics, this Article utilizes only English-language sources because English is the author's dominant language.

Russia has repeatedly used gray zone tactics in recent years,³² including “buzzing” foreign warships with Russian military aircraft.³³ Buzzing tactics involve purposefully flying an aircraft close to a ship—often within mere feet—a dangerous maneuver that has the potential to result in collision and fatalities.³⁴ The United States has regularly been on the receiving end of this tactic.³⁵ For example, on April 11 and 12, 2016, the U.S. naval destroyer *USS Donald Cook* was operating in the Baltic Sea.³⁶ According to the United States, Russian aircraft performed “multiple, aggressive flight maneuvers . . . within close proximity of the ship.”³⁷

A U.S. European Command statement noted concerns with the “unsafe and unprofessional” Russian flight maneuvers, explaining that “[t]hese actions have the potential to unnecessarily escalate tensions between countries, and could result in a miscalculation or accident that could cause serious injury or death.”³⁸ Senior U.S. officials uniformly condemned Russia’s tactics, observing the United States’s right to operate freely in international waters under existing law. Deputy Secretary of Defense Bob Work said that the area where the incident occurred “is in international

³² See LINDA ROBINSON, TODD C. HELMUS, RAPHAEL S. COHEN, ALIREZA NADER, ANDREW RADIN, MADELINE MAGNUSON & KATYA MIGACHEVA, *MODERN POLITICAL WARFARE: CURRENT PRACTICES AND POSSIBLE RESPONSES*, RAND CORP. 41–104 (2018); BEN CONNABLE, JASON H. CAMPBELL & DAN MADDEN, RAND CORP., *STRETCHING AND EXPLOITING THRESHOLDS FOR HIGH-ORDER WAR: HOW RUSSIA, CHINA, AND IRAN ARE ERODING AMERICAN INFLUENCE USING TIME-TESTED MEASURES SHORT OF WAR 17–20* (2016); Brooks, *supra* note 27; see generally Ines Gillich, *Illegally Evading Attribution? Russia’s Use of Unmarked Troops in Crimea and International Humanitarian Law*, 48 VAND. J. TRANSNAT’L L. 1191 (2015).

³³ Russia has also directed its buzzing tactics against military aircraft. Two recent examples occurred on April 15 and 19, 2020. On April 15, 2020, a Russian military aircraft performed “a high-speed, inverted maneuver, 25 ft. directly in front of a U.S. military aircraft.” See Press Release, U.S. Sixth Fleet, *Unsafe Russian Intercept over Mediterranean Sea*, (Apr. 15, 2020), <https://www.c6f.navy.mil/Press-Room/News/Article/2150387/unsafe-russian-intercept-over-mediterranean-sea/> [<https://perma.cc/MUC4-VAB9>]. The Sixth Fleet called the first incident “unsafe” and “irresponsible.” *Id.* On April 19, 2020, a Russian military aircraft “conduct[ed] [a] high-speed, high-powered maneuver that decreased aircraft separation to within 25 feet, directly in front of the P-8A, exposing the U.S. aircraft to wake turbulence and jet exhaust.” See Press Release, U.S. Sixth Fleet, *Second Unsafe Intercept by Russia in U.S. Sixth Fleet*, (Apr. 20, 2020), <https://www.c6f.navy.mil/Press-Room/News/Article/2155654/second-unsafe-russian-intercept-over-mediterranean-sea/> [<https://perma.cc/8UBF-QDDK>]. The Sixth Fleet called the second incident “unsafe and unprofessional.” *Id.*

³⁴ For examples of “buzzing,” see Ivan Watson & Sebastian Shukla, *Russian Fighter Jets ‘Buzz’ U.S. Warship in Black Sea, Photos Show*, CNN (Feb. 16, 2017), <https://www.cnn.com/2017/02/16/us/russia-us-ship-fly-by/index.html> [<https://perma.cc/ZJ93-5XAA>]; Julian Borger, *Russian Attack Jets Buzz US Warship in Riskiest Encounter For Years*, GUARDIAN (Apr. 13, 2016), <https://www.theguardian.com/us-news/2016/apr/13/russian-attack-planes-buzz-uss-donald-cook-baltic-sea> [<https://perma.cc/YSW7-RHNY>].

³⁵ See Sean Fahey, *Will Russia Dial Back the Incidents at Sea?*, LAWFARE (June 30, 2017), <https://www.lawfareblog.com/will-russia-dial-back-incidents-sea> [<https://perma.cc/PMN2-4N2Z>].

³⁶ Press Release, U.S. European Command, *US Navy Ship Encounters Aggressive Russian Aircraft in Baltic Sea*, (Apr. 13, 2016), <https://www.defense.gov/Explore/News/Article/Article/720536/navy-ship-encounters-aggressive-russian-aircraft-in-baltic-sea/> [<https://perma.cc/SK44-L36X>] [hereinafter U.S. European Command Press Release]

³⁷ *Id.*

³⁸ *Id.*

waters and the U.S. will continue to fly, sail and operate anywhere international law allows.”³⁹ White House Press Secretary Josh Earnest described Russia’s actions as “entirely inconsistent with the professional norms of militaries operating in proximity to each other in international waters and international airspace.”⁴⁰ Secretary of State John Kerry warned that Russia should “understand that this is serious business and the United States is not going to be intimidated in high seas.”⁴¹

Though President Vladimir Putin expressed reservations about the incident,⁴² other Russian officials defended and downplayed the tactics. A Russian Defense Ministry spokesperson reportedly commented that:

[F]rankly speaking, [Russia] does not understand the reason for such a painful reaction of our American colleagues. . . The principle of freedom of navigation for the US destroyer, which is staying in close proximity to a Russian naval base in the Baltic Sea, does not at all cancel the principle of freedom of flight for Russian aircraft.⁴³

Russia has also used buzzing tactics against other states. In May 2018, the British warship *HMS Duncan* was swarmed by seventeen Russian military aircraft while the ship operated approximately thirty miles from Crimea.⁴⁴ According to U.K. news sources, “the warplanes hurtled just a few hundred feet away from the . . . destroyer, while brazenly ignoring repeated warnings from the ship,”⁴⁵ and as the aircraft departed, a Russian pilot allegedly sent the warship a message: “Good luck,

³⁹ News Release, Lisa Ferdinando, U.S. Dept. of Def., ‘Extremely Aggressive’ Russia Endangers Lives, Work Says, (May 16, 2016), <https://www.defense.gov/Explore/News/Article/Article/760367/extremely-aggressive-russia-endangers-lives-work-says> [<https://perma.cc/5C5Y-HAJX>].

⁴⁰ Press Briefing, Josh Earnest, The White House, (Apr. 13, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/13/press-briefing-press-secretary-josh-earnest-4132016> [<https://perma.cc/B3C5-9YJ4>].

⁴¹ Faith Karimi & Don Melvin, *Kerry: Navy Destroyer Could Have ‘Shot Down’ Russian Fighter Jets*, CNN (Apr. 15, 2016), <https://www.cnn.com/2016/04/14/europe/russia-defends-donald-cook-overflight/index.html> [<https://perma.cc/PQ4S-3AUD>].

⁴² *Putin Condemns Russian Planes Buzzing U.S. Ships*, MOSCOW TIMES (Oct. 27, 2016), <https://www.themoscowtimes.com/2016/10/27/putin-condemns-russian-planes-buzzing-us-ships-a55905> [<https://perma.cc/XTS8-8764>] (describing Russian President Vladimir Putin’s alleged reaction to the Russian tactics: “Putin called the incident of a Russian military plane flying close to a U.S. Navy ship in the Black Sea ‘high risk.’ During his address, some participants reportedly said the Americans ‘deserved it,’ to which Putin replied, ‘What are you, crazy?’”).

⁴³ *USS Donald Cook Was About 70km from Russian Navy Base when Warplanes Passed It*, TASS (Apr. 14, 2016), <https://tass.com/defense/869555> [<https://perma.cc/S3K9-7SV7>] [hereinafter TASS Article].

⁴⁴ Christopher Woody, *17 Russian Jets Buzzed a British Destroyer in an ‘Unprecedented’ Show of Force*, TASK & PURPOSE (Nov. 27, 2018), <https://taskandpurpose.com/news/17-russian-jets-buzz-british-destroyer> [<https://perma.cc/AC94-V5ND>].

⁴⁵ *HMS Duncan: Royal Navy Warship Swarmed by ‘Unprecedented’ Force of Russian Jet in Black Sea Raid*, NEWS PORTSMOUTH (Nov. 16, 2018), <https://www.portsmouth.co.uk/news/hms-duncan-royal-navy-warshipa-swarmed-unprecedented-force-russian-jets-black-sea-raid-177819> [<https://perma.cc/NG7T-WRAR>].

guys.”⁴⁶ Russian media defended the act, describing the ship’s earlier transit of the Bosphorus Strait as “a clear provocation.”⁴⁷

B. *China: Seizure of Unmanned Underwater Vehicle*

China has deployed extensive and diverse gray zone tactics in the South China Sea over the last several years, including use of both military and civilian assets.⁴⁸ A notable example occurred on December 15, 2016, when the Chinese navy seized a U.S. unmanned underwater vehicle (UUV) that was operating approximately fifty nautical miles northwest of Subic Bay.⁴⁹ The UUV was an unclassified system used to gather “military oceanographic data such as salinity, water temperature, and sound speed.”⁵⁰ China returned the UUV to the United States four days later, after negotiations.⁵¹

Unsurprisingly, American and Chinese accounts of the facts differ. According to the United States, the U.S. naval survey ship *USNS Bowditch* was conducting an operation to retrieve the UUV when the Chinese navy seized the vehicle.⁵² When the *Bowditch* crew radioed the Chinese ship and requested the UUV’s return, the Chinese reportedly acknowledged the request but failed to return the UUV.⁵³ According to a Chinese Defense Ministry spokesperson:

[A] Chinese naval lifeboat located an unidentified device in relevant waters of the South China Sea. In order to prevent the device from causing harm to the safety of navigation and personnel of passing

⁴⁶ Woody, *supra* note 44.

⁴⁷ George Allison, *Royal Navy Destroyer Swarmed by 17 Russian Jets in Black Sea*, U.K. DEF. J. (Nov. 26, 2018), <https://ukdefencejournal.org.uk/royal-navy-destroyer-swarmed-by-17-russian-jets-in-black-sea/> [https://perma.cc/44S4-LLEX].

⁴⁸ A recent example involves a Chinese naval destroyer using a laser on a U.S. Navy aircraft. The Pentagon called the Chinese actions “unsafe and unprofessional.” See Press Release, Dep’t of Def., Statement on People’s Liberation Army Navy Lasing of U.S. Navy P-8A in Unsafe, Unprofessional Manner (Mar. 6, 2020),

<https://www.defense.gov/Newsroom/Releases/Release/Article/2104791/department-of-defense-statement-on-peoples-liberation-army-navy-lasing-of-us-na/> [https://perma.cc/T3WL-G5AA]. For other examples of China’s gray zone tactics, see Michael O’Hanlon, *China, the Gray Zone, and Contingency Planning at the Department of Defense & Beyond*, BROOKINGS INST. 2–3 (2019), https://www.brookings.edu/wp-content/uploads/2019/09/FP_20190930_china_gray_zone_ohanlon.pdf; MAZARR, *supra* note 2 at 81–89.

⁴⁹ See Press Release, Dep’t of Def., Statement by Pentagon Press Secretary Peter Cook on Incident in South China Sea (Dec. 16, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/1032611/statement-by-pentagon-press-secretary-peter-cook-on-incident-in-south-china-sea/> [https://perma.cc/MAE2-F6E7].

⁵⁰ *Id.*

⁵¹ See Press Release, Dep’t of Def., Statement by Pentagon Press Secretary Peter Cook on Return of U.S. Navy Unmanned Underwater Vehicle, (Dec. 19, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/1034224/statement-by-pentagon-press-secretary-peter-cook-on-return-of-us-navy-uuv/> [https://perma.cc/3CYV-WZTH].

⁵² See *id.*

⁵³ See *id.*

vessels, the Chinese naval lifeboat identified and examined the device in a professional and responsible manner.⁵⁴

The spokesperson indicated that China handled the incident professionally, stating that “[d]uring the process, the Chinese side maintained communication with the US side, and the UUV has been handed over to the US side . . . [T]he matter was not that complicated.”⁵⁵ China allegedly criticized the U.S. response to the incident, stating that “the U.S. side’s unilateral and open hyping up is inappropriate, and is not beneficial to the smooth resolution of this issue. We express regret at this.”⁵⁶

Both China and the U.S. claimed that the other had violated international law. The United States asserted that the UUV was a “clearly marked”⁵⁷ sovereign-immune vessel “conducting routine operations in the international waters of the South China Sea in full compliance with international law”⁵⁸ and that the “incident was inconsistent with both international law and standards of professionalism for conduct between navies at sea.”⁵⁹ In addition to downplaying the incident, China also defended its actions: American press reported on China’s disapproval of the United States’ “close-in reconnaissance and military surveys” in China’s claimed territorial waters.⁶⁰ The Chinese Defense Ministry stated that “China firmly opposes [this practice] and urges the U.S. side to stop such operations.”⁶¹ Chinese newspapers echoed the legality of China’s actions, noting that “[r]eports stated that China found the device in its territorial waters in the South China Sea, thus earning the responsibility and right to identify the device in order to avoid potential hazard to passing ships,”⁶² and that China’s actions were legal because rules governing

⁵⁴ Press Conference Transcript, China Defense Ministry’s Regular Press Conference on Dec. 29 (Dec. 30, 2016), http://eng.mod.gov.cn/Press/2016-12/30/content_4768598.htm [<https://perma.cc/UJ9J-22CK>].

⁵⁵ *Id.*

⁵⁶ Ben Blanchard & Steve Holland, *China to Return Seized U.S. Drone, Says Washington ‘Hyping Up’ Incident*, REUTERS (Dec. 16, 2016), <https://www.reuters.com/article/us-usa-china-drone-idUSKBN14526J> [<https://perma.cc/VLZ7-YPH6>]; see also Jane Perlez & Matthew Rosenberg, *China Agrees to Return Seized Drone, Ending Standoff, Pentagon Says*, N.Y. TIMES (Dec. 17, 2016), <https://www.nytimes.com/2016/12/17/world/asia/china-us-drone.html> [<https://perma.cc/7BXJ-FUUB>].

⁵⁷ Terry Moon Cronk, *Chinese Seize U.S. Navy Underwater Drone in South China Sea*, U.S. DEP’T OF DEF. NEWS (Dec. 16, 2016), <https://www.defense.gov/Explore/News/Article/Article/1032823/chinese-seize-us-navy-underwater-drone-in-south-china-sea/> [<https://perma.cc/UX7R-CL3V>].

⁵⁸ Press Release, *supra* note 50 (“The U.S. remains committed to upholding the accepted principles and norms of international law and freedom of navigation and overflight and will continue to fly, sail, and operate in the South China Sea wherever international law allows, in the same way that we operate everywhere else around the world.”).

⁵⁹ *Id.*

⁶⁰ Perlez & Rosenberg, *supra* note 55.

⁶¹ *Id.*

⁶² Hua Yiwen, *Underwater Drone Just a Sample of US Military Action Against China*, PEOPLE’S DAILY ONLINE (Dec. 19, 2016), <http://en.people.cn/n3/2016/1219/c98649-9156644.html> [<https://perma.cc/X5GF-5VGA>].

drones were unclear.⁶³ As one Chinese commentator argued, “This is the gray area. . . [i]f the U.S. military can send the drone, surely China can seize it.”⁶⁴

C. Iran: Using Armed Small Boats to Harass Warships

Iran has become known for employing “unconventional warfare elements and asymmetric capabilities.”⁶⁵ One of Iran’s current favored gray zone tactics is the utilization of armed small boats to harass ships operating in the Strait of Hormuz and the Arabian Gulf.⁶⁶ For example, between July and September 2019, Iran’s Islamic Revolutionary Guard Corps (IRGC) used armed small boats to approach the U.K. warship *HMS Montrose* approximately 115 times, coming close enough on several occasions to prompt warning flares from the warship.⁶⁷ *HMS Montrose* Commanding Officer Will King noted at the time that Iran has demonstrated a “continuous intent to disrupt or interfere with UK interests in the area,”⁶⁸ and the senior Royal Navy officer in the Middle East called on Iran to “stick[] to international law and stop[] it[s] aggressive action.”⁶⁹ Iranian Foreign Minister Javad Zarif tweeted that Iran’s actions were meant to “uphold int[ernationa]l maritime rules” and that the United Kingdom should “cease being an accessory to #EconomicTerrorism of the US.”⁷⁰

Similarly, Iran has used armed small boats to harass U.S. warships in the region, including passing within ten yards of warships at high rates of speed, crossing the bows of warships, and occasionally training weapons on warships and military aircraft.⁷¹ The U.S. has characterized its response to similar actions as

⁶³ Perlez & Rosenberg, *supra* note 55.

⁶⁴ *See id.* (quoting a Chinese news source). Scholars have also advanced the argument that UUVs were (and remain) largely unregulated, both in treaty law and customary international law. *See generally* Michael Schmitt & David Goddard, *International Law and the Use of Unmanned Maritime Systems*, 98 INT’L. REV. RED CROSS 567; Craig Allen, *Determining the Legal Status of Unmanned Maritime Vehicles*, 49 J. MAR. L. & COM. 477 (2018).

⁶⁵ Robert P. Ashley, *Preface to* DEF. INTEL. AGENCY, IRAN: MILITARY POWER—ENSURING REGIME SURVIVAL AND SECURING REGIONAL DOMINANCE, at v. (2019).

⁶⁶ These vessels are also known as Fast Attack Craft/Fast Inshore Attack Craft.

⁶⁷ Ryan Pickrell, *Iranian Forces Have Been Harassing this British Warship Almost Daily in the Persian Gulf*, BUS. INSIDER (Sept. 3, 2019, 10:54 AM), <https://www.businessinsider.com/iranian-forces-have-been-tirelessly-harassing-this-one-british-warship-2019-9> [<https://perma.cc/9VTP-QXFJ>]; George Allison, *Royal Navy Warship Fires Flares at Iranian Naval Vessels*, U.K. DEF. J. (Sept. 3, 2019), <https://ukdefencejournal.org.uk/royal-navy-warship-fires-flares-at-iranian-naval-vessels/>.

⁶⁸ Pickrell, *supra* note 67.

⁶⁹ Allison, *supra* note 67.

⁷⁰ Javad Zarif (@JZarif), TWITTER (July 20, 2019), <https://twitter.com/JZarif/status/1152530835154833408> [<https://perma.cc/9RQZ-V8D4>]; *see also* *Iran Tanker Seizure: Radio Exchanges Reveal Iran-UK Confrontation*, BBC NEWS (July 21, 2019), <https://www.bbc.com/news/uk-49061675>.

⁷¹ One recent example occurred on April 15, 2020, when eleven Iranian armed small boats “repeatedly crossed the bows and sterns of the U.S. vessels at extremely close range and high speeds, including multiple crossings [within fifty yards] of the [USS] Puller . . . and within 10 yards of Maui’s bow.” Press Release, U.S. Fifth Fleet, IRGCN Vessels Conduct Unsafe, Unprofessional Interaction with U.S. Naval Forces in Arabian Gulf (Apr. 15, 2020),

“measured and muted,”⁷² consisting chiefly of public condemnation by labeling such behavior “unsafe and unprofessional.”⁷³ A statement by the U.S. Fifth Fleet also noted that such acts contravene “internationally recognized COLREGs ‘rules of the road’ [and] internationally recognized maritime customs, creating a risk for collision.”⁷⁴ For its part, Iran has long maintained that because the United States is not a party to the U.N. Convention on the Law of the Sea (UNCLOS), the United States is not entitled to transit passage through the Strait of Hormuz; thus, Iran argues, it is the United States’ actions that violate international law.⁷⁵

D. Summary

<https://www.cusnc.navy.mil/Media/News/Display/Article/2151642/irgc-vessels-conduct-unsafe-unprofessional-interaction-with-us-naval-forces-in/> [<https://perma.cc/BW2T-CH98>]. For other examples, see *Factsheet: Iran’s History of Naval Provocations*, U.S. DEP’T OF STATE (Apr. 22, 2020), <https://www.state.gov/irans-history-of-naval-provocations/> [<https://perma.cc/CWK9-S8N5>]; Gordon Lubold, *In Common Occurrence, Iranian Boats Veer Close to U.S. Warship*, WALL ST. J. (July 11, 2016), <https://www.wsj.com/articles/in-common-occurrence-iranian-boats-veer-close-to-u-s-warship-1468280546> [<https://perma.cc/2JS5-UJDU>]; Sam LeGrone, *Video: USS Thunderbolt Fired Warning Shots at Iranian Patrol Boat to Protect U.S. Guided Missile Cruiser Vella Gulf*, U.S. NAVAL INST. NEWS (July 25, 2017), <https://news.usni.org/2017/07/25/uss-thunderbolt-fired-warning-shots-iranian-patrol-boat-protect-u-s-guided-missile-cruiser-vella-gulf> [<https://perma.cc/V9J6-DF77>].

⁷² Paul C. Ney, General Counsel, U.S. Dep’t of Def., Remarks at Brigham Young University Law School: Legal Considerations Related to the U.S. Air Strike Against Qasem Soleimani, (Mar. 4, 2020), <https://assets.documentcloud.org/documents/6808252/DOD-GC-Speech-BYU-QS.pdf> [<https://perma.cc/KW3B-YNXF>]. An exception is President Donald Trump’s April 22, 2020 tweet indicating that he had “instructed the United States Navy to shoot down and destroy any and all Iranian gunboats if they harass our ships at sea” following another instance of Iranian armed small boat harassment. See Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 22, 2020), <https://twitter.com/realDonaldTrump/status/1252932181447630848> [<https://perma.cc/3HB6-NJNM>]. However, an accompanying fact sheet from the State Department described the incidents as “unsafe and unprofessional; the fact sheet does not use “threat of use of force,” “use of force,” or “armed attack” descriptors. See *Factsheet: Iran’s History of Naval Provocations*, *supra* note 71. The United States sent to the U.N. Security Council two letters reporting uses of force in self-defense: one following a July 2019 incident in which the United States destroyed an Iranian unmanned aerial system that approached *USS Boxer*, and the other following the January 2020 death of Qasem Soleimani. Neither mentioned the armed small boat harassment as part of the “escalating threats” from Iran. See Letter dated Aug. 1, 2019 from the Chargé d’affaires a.i. of the United States Mission to the United Nations addressed to the President of the Security Council, S/2019/624, Aug. 1, 2019; Letter dated Jan. 8, 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2020/20, Jan. 8, 2020.

⁷³ See LeGrone, *supra* note 71; see also Meghann Myers, *U.S. Warship Fires 3 Warning Shots as Iran Escalates Confrontations*, MILITARY TIMES (Aug. 25, 2016), <https://www.militarytimes.com/2016/08/25/u-s-warship-fires-3-warning-shots-as-iran-escalates-confrontations/> [<https://perma.cc/UK9A-5X7V>].

⁷⁴ LeGrone, *supra* note 71. “COLREGs” are the 1972 International Regulations for Preventing Collisions at Sea, which are published by the International Maritime Organization. The United States, United Kingdom, Russia, China, and Iran are all signatories. See *International Regulations for Preventing Collisions at Sea*, Oct. 20, 1972, 1050 U.N.T.S. 15824 [hereinafter COLREGs].

⁷⁵ See James Kraska, *Legal Vortex in the Strait of Hormuz*, 54 VA. J. INT’L L. 323, 327 (2014) (“Tehran asserts that the navigational regime of transit passage through straits used for international navigation is solely a feature of UNCLOS, and therefore the privilege of transit passage is unavailable to non-parties, such as the United States.”).

The above examples—Russia buzzing warships with military jets, China seizing the UUV, and Iran using armed small boats to harass warships—each involve some military action that exceeds accepted peacetime competition but fails to meet the threshold likely to trigger a military response from victim states. These actions thus exist somewhere on the spectrum between ordinary competition and conventional military conflict—but exactly where they sit on that continuum is unclear. This ambiguity is precisely what makes gray zone tactics so useful to the provoking state and so frustrating for the victim state. Because of this ambiguity, states confronted with similar military-on-military gray zone tactics may struggle to determine where these tactics fall within the use-of-force framework and how to respond effectively and legally.

IV. Gray Zone Tactics Under a Use of Force Framework

Gray zone tactics comprise a broad spectrum of conduct, including certain military-on-military tactics. Some of these tactics have the potential to rise to the level of a use of force or armed attack. As such, a use-of-force framework is an appropriate starting point when analyzing gray zone tactics.⁷⁶

A. Are Gray Zone Tactics Violations of Article 2(4)?

Do the Russian, Chinese, and Iranian actions violate the Article 2(4) prohibition on the threat of or use of force? Article 2(4) of the U.N. Charter specifically prohibits threats of or uses of force against other states, declaring that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁷⁷ The prohibition on the threat of or use of force is considered customary international law and a *jus cogens* norm.⁷⁸

Exactly what qualifies as a “threat of or use of force” remains unsettled in international law.⁷⁹ However, a use of force typically involves one state using

⁷⁶ The use-of-force analysis herein is neither extensive nor complete, as the principal focus of this Article is the application of the non-intervention principle to gray zone tactics. This analysis aims merely to identify potential issues that might arise when analyzing gray zone tactics under a use-of-force framework and flag what questions international law has and has not answered.

⁷⁷ U.N. Charter art. 2, ¶ 4.

⁷⁸ See TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE U.N. CHARTER 26 (2010). *Jus cogens* norms are “mandatory or peremptory norm[s] of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.” *Jus cogens*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁷⁹ See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 33–37 (4th ed. 2018) (noting that scholars “examine the same state practice, but come to radically opposing conclusions about its legal significance,” and suggesting “not only that the question is sensitive, but also that it is not straightforward”); OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 50 (2010) (“One of the main debates surrounding the interpretation of article 2(4) of the UN Charter is whether the ‘force’ prohibited is exclusively military force, or whether it can be extended to economic, political or ideological forces.”).

armed or physical force against another state, or threatening to do so.⁸⁰ Unlawful threats of a use of force cannot be “reduced to any particular behaviour.”⁸¹ They need not be expressly stated,⁸² but should not be vague.⁸³

Under the above parameters, it is unclear whether the Russian, Chinese, and Iranian actions qualify as threats of or uses of force. At least in the case of the Russian and Iranian tactics, no actual physical contact was made by either the Russian aircraft or the Iranian small boats and no shots were fired; China argued the seizure of the U.S. UUV was a harmless misunderstanding. None of the various statements made by the Russian, Chinese, and Iranian officials attempting to defend their respective actions appear to contain clear threats of a use of force.

Each of the above examples could arguably qualify as a threat of or use of force. The physical removal by Chinese military personnel of another state’s UUV from the high seas could be considered an actual use of force. If one state physically seized other military property from another state, such as a military aircraft, against that state’s active protests as the Chinese did in this case, international law could view this as violation of that aircraft’s sovereign immune status and an unlawful

⁸⁰ International Law Association, *Final Report on Aggression and the Use of Force*, at 4 (2018); See also CORTEN, *supra* note 79, at 93 (noting a general lack of consensus as to what constitutes an unlawful threat of use of force due to a general lack of “States speaking out” on the matter); RUYS, *supra* note 78, at 55 (“[I]t is generally accepted in legal literature that [force] refers to the use of ‘armed’ or ‘physical’ force only”); DINSTEIN, *supra* note 18, at 88 (“Still, when studied in context, the term ‘force’ in Article 2(4) must denote violence. It does not matter what specific means—kinetic or electronic—are used to bring it about, but the end result must be that violence occurs or is threatened.”). Cyber acts are unique in that the act itself often does not involve actual physical force. However, the *effects* of cyber acts can be similar to those of physical uses of force. As such, some have argued that a range of factors should be examined when determining whether a cyber act qualifies as a use of force, though the issue remains unsettled in international law. See Michael Schmitt & Durward Johnson, *Responding to Hostile Cyber-Operations: The “In-Kind” Option*, 97 INT’L L. STUD. 96, 110 (2021).

⁸¹ CORTEN, *supra* note 79, at 100.

⁸² *Id.* at 106.

⁸³ *Id.* at 94.

use of force.⁸⁴ That a UUV is smaller than an aircraft should not change this analysis.⁸⁵

The Russian tactic of repeatedly using military aircraft to buzz warships could be seen as a threat of the use of force, as such maneuvers bring armed aircraft dangerously close to warships and other aircraft, and certainly close enough to attack victim state assets. Similarly, the Iranian use of armed small boats to repeatedly approach and harass warships could be seen as a threat of the use of force, as such maneuvers bring armed vessels close enough to attack victim state warships. That neither the Russians nor the Iranians made explicit threats in conjunction with these actions does not change the fact that the Russians and Iranians purposefully and repeatedly brought their armed military assets within very close range of U.S. and U.K. military assets. Further, existing tensions between these states made the use of military-on-military gray zone tactics all the more provocative. While the above three examples are not indisputably threats of or uses of force, they each certainly toe—if not cross—the line.

B. *Do Gray Zone Tactics Trigger the Right to Self-Defense?*

Assume, for argument's sake, that the above examples meet the threshold to qualify as a violation of the prohibition on the threat of or use of force. Victim states are likely to next ask whether these actions also rise to the level of armed attack or imminent armed attack, potentially triggering the right to use force in self-defense under Article 51 of the U.N. Charter and customary international law.⁸⁶ The precise definition of armed attack remains unsettled in international law. In the *Nicaragua* case, the International Court of Justice (ICJ) differentiated between degrees of uses of force, describing armed attacks as “the most grave form[] of the use of force,”⁸⁷ and indicating that a use of force must have some scale and effects to rise to the level of an armed attack.⁸⁸ In the subsequent *Oil Platforms* case, the

⁸⁴ For example, in 2001 a U.S. Navy surveillance plane landed in China following a collision with a Chinese military aircraft in international airspace. Against U.S. protests, China seized and inspected the aircraft, justifying its actions by claiming that the United States had failed to secure permission to land in China. The United States argued that international law establishes sovereign immunity for military aircraft, making the Chinese seizure of the aircraft unlawful. See SHIRLEY KAN, CONG. RSCH SERV., RL30946, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 20 (2001), <https://crsreports.congress.gov/product/pdf/RL/RL30946> [<https://perma.cc/JQT3-X9JW>]. Though the status of customary international law regarding the seizure and inspection of military aircraft that land due to distress appears unsettled, the status of the law regarding the seizure and inspection of military vessels—regardless of their location—is clear: they are completely immune from foreign jurisdiction. See JAMES KRASKA & RAUL PEDROZO, THE FREE SEA: THE AMERICAN FIGHT FOR FREEDOM OF NAVIGATION 31–36 (2018).

⁸⁵ The size and capabilities of the seized asset may influence response options, such as affecting whether a particular response is proportionate, but should not change the nature of the seizure itself.

⁸⁶ See DINSTEIN, *supra* note 18 **Error! Bookmark not defined.**, at 187–94.

⁸⁷ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 191 [hereinafter *Nicaragua*].

⁸⁸ *Id.* at ¶ 195 (“The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such

Court affirmed this understanding of armed attack⁸⁹ and reserved the possibility that a series of smaller attacks,⁹⁰ or a particularly severe attack against “a single military vessel,”⁹¹ could be “sufficient to bring into play the ‘inherent right to self-defence.’”⁹²

Under the ICJ’s definition in *Nicaragua*, it is unlikely that the Russian, Chinese, and Iranian actions would be considered armed attacks.⁹³ Each case involves little, if any, harm to victim state personnel or property, and the Russian and Iranian scenarios did not even involve actual physical contact between Russian aircraft and Iranian small boats and victim state assets. As such, measures of self-defense, including the use of force, would not be permitted.⁹⁴ This result is not particularly surprising. As discussed above, states specifically design gray zone tactics to avoid triggering the ability to resort to force in self-defense.

An alternate view to that of the ICJ, and one most frequently associated with the United States, is that there is no gap⁹⁵ between an unlawful use of force and an armed attack for the purposes of self-defense; any unlawful threat of or use of force has the potential to trigger the right of self-defense under Article 51 and customary international law.⁹⁶ Under this view, if the United States considers the Russian,

an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”); *See also* DINSTEIN, *supra* note 18 **Error! Bookmark not defined.**, at 207–12 (“[A]n armed attack presupposes a use of force by producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property.”). Further, for the purposes of self-defense, armed attacks typically must be intentional. *See* RUYTS, *supra* note 78, at 166 (“In the end, the Definition of Aggression, the case law of the ICJ and customary practice provide credible indications that hostile intent is a relevant factor for determining whether an ‘armed attack’ has occurred.”); DINSTEIN, *supra* note 18, at 231.

⁸⁹ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 90, ¶ 51 [hereinafter *Oil Platforms*]. *See also* GRAY, *supra* note 79, at 156–57 (“[T]he Court applied the concept to limit the right of individual self-defence, and it accepted a general distinction between armed attacks and less grave forms of the use of force.”).

⁹⁰ *Oil Platforms*, *supra* note 89, ¶ 64.

⁹¹ *Id.* at ¶ 72.

⁹² *Id.*

⁹³ This is not to say that gray zone tactics could *never* rise to the level of armed attack. *See* RUYTS, *supra* note 78, at 157 (“[S]mall scale border attacks involving the use of lethal force are not automatically exempt from the notion of ‘armed attack’ and may sometimes trigger the right to self-defence.”). However, in general, gray zone tactics manage to avoid crossing this threshold.

⁹⁴ Though not without controversy, the prohibition against using force in self-defense in situations of uses of force not amounting to armed attacks currently represents the prevailing view within the international community. *See* CORTEN, *supra* note 79, at 403 (“[T]o give rise to a right of self-defence, an armed attack must present a certain degree of gravity. In other words, not just any violation of article 2(4) necessarily gives entitlement to a right of self-defence.”). Contrast this position with that of the United States in the *Oil Platforms* case. *See Oil Platforms (Iran v. U.S.)*, Rejoinder submitted by the United States of America, 2003 I.C.J. ¶ 5.16-5.18 (Mar. 23, 2001) (arguing “if ‘small attacks’ are not ‘armed attacks,’ at what point along the continuum from small-to-large do attacks merit characterization as ‘armed’ under Article 51?”).

⁹⁵ For a discussion on the “gap theory,” see DINSTEIN, *supra* note 18, at 207–12.

⁹⁶ *See* GRAY, *supra* note 79, at 156–57 (noting that the United States “rejected the proposition that the use of deadly force by a state’s regular armed forces, such as the attacks by Iran in this case,

Chinese, or Iranian actions described above to constitute threats of or uses of force—where threats of or uses of force and armed attacks are considered the same—then the United States could claim the right to respond in self-defense.⁹⁷

Further, certain interpretations of armed attack allow for the use of force in self-defense in response to imminent, in addition to actual, armed attacks.⁹⁸ Under this view, if a victim state considers any of the Russian, Chinese, or Iranian actions described above to constitute imminent armed attacks, then that state could claim the right to respond in self-defense.⁹⁹ For example, the United States might argue that Iran’s use of armed small boats to approach U.S. warships at a high rate of speed and bringing those boats within striking range of U.S. warships constitutes an imminent armed attack, potentially allowing for the use of force in self-defense in response.

Despite its rejection of the “gap” theory and its view that imminent armed attacks potentially allow for the use of force in self-defense, the United States has not responded with force to any of the above or similar grey zone tactics, according to publicly available sources. While official U.S. statements that follow such incidents sometimes accuse provoking states of violations of international law, the statements describe the incidents using the terms “unsafe and unprofessional” as opposed to the terms “threat of or use of force” or “armed attack.”¹⁰⁰ “[T]here are

does not qualify as an armed attack unless it reaches a certain level of gravity. Like the earlier critics of the *Nicaragua* case on this point, [the United States] claimed that the requirement that an attack reach a certain level of gravity before triggering a right of self-defence would make the use of force more rather than less likely, because it would encourage states to engage in a series of small-scale military attacks, in the hope that they could do so without being subject to defensive responses.”). Some might argue that the rise of gray zone tactics strengthens the U.S. argument regarding the risk inherent in distinguishing between an unlawful use of force and an armed attack.

⁹⁷ Further, under the U.S.’s Standing Rules of Engagement, commanders retain the “inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.” Whether hostile intent exists is determined based on all facts and circumstances known at the time. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, U.S. DEP’T OF DEF., *STANDING RULES OF ENGAGEMENT* 83 (2005).

⁹⁸ U.S. DEP’T OF DEF., *LAW OF WAR MANUAL*, §1.11.5.1 (2016). Scholars continue to disagree as to whether anticipatory self-defense has become universally accepted. Compare Michael Schmitt & Durward Johnson, *Iranian Gunboat Harassment and the Rules of Engagement*, JUST SEC. (May 7, 2020), <https://www.justsecurity.org/70049/iranian-gunboat-harassment-and-the-rules-of-engagement/> [<https://perma.cc/5WZH-7X4D>], with Craig Martin, *On Iranian Gunboats: Beware Conflating American and Mainstream Views of the Law*, JUST SEC. (June 2, 2020), <https://www.justsecurity.org/70414/on-iranian-gunboats-beware-conflating-american-and-mainstream-views-of-the-law/> [<https://perma.cc/42G9-JCAR>].

⁹⁹ Such use of force would remain subject to the requirements of necessity and proportionality. See DINSTEIN, *supra* note 18 **Error! Bookmark not defined.**, at 249–52.

¹⁰⁰ Even in its most aggressive written response to Iranian tactics, a fact sheet from the U.S. State Department continues to describe such incidents using “unsafe and unprofessional” language; the fact sheet does not use “threat of use of force,” “use of force,” or “armed attack” descriptors. See *Factsheet: Iran’s History of Naval Provocations*, *supra* note 71. See also U.S. European Command Press Release, *supra* note 36 (noting U.S. European Command’s “deep concerns about the unsafe and unprofessional Russian flight maneuvers.”); LeGrone, *supra* note 71 (citing the U.S. Fifth Fleet calling IRGC actions of coming within 150 yards of a U.S. warship and failing to respond to U.S. naval radio communications “unsafe and unprofessional.”).

many reasons for a failure to condemn,”¹⁰¹ and one can speculate as to why a state might choose to refrain from describing gray zone tactics as armed attacks or even as unlawful threats of or uses of force. These reasons may include a desire to avoid escalation, a desire to deny the tactics any hint of legitimacy, or a desire to preserve the ability to use similar tactics against one’s adversaries in the future. Perhaps despite its no “gap” and imminent armed attack views, even the United States recognizes that the above actions do not rise to the level that would warrant a use of force in response, at least not practically.

C. *Potential Consequences Under a Use of Force Framework*

If the acts described above are attributable to Russia, China, and Iran, the acts violate the prohibition on the threat of or use of force, and there are no legally justifiable excuses for these violations, then international law entitles victim states to seek consequences.¹⁰² As discussed above, even if gray zone tactics involve a threat of or use of force, they generally fall below the threshold of armed attack as contemplated by the ICJ. Indeed, this is their greatest advantage, as a result is that victim states typically would not be permitted to respond with force in self-defense¹⁰³ or through forcible countermeasures under current international law.¹⁰⁴ Despite these constraints, several other responses remain available. Even in cases where the exercise of the right of self-defense in response to gray zone tactics was lawful, some states may conclude that the potential consequences of responding with force outweigh the potential benefits or may lack the capabilities necessary to respond with force. Particularly for these states, the broadest array of non-forcible responses is critical.¹⁰⁵

Submitting the matter to a judicial process, including seeking relief through international courts such as the ICJ or International Tribunal on the Law of the Sea

¹⁰¹ GRAY, *supra* note 79, at 23.

¹⁰² Before considering legally permissible consequences, victim States would need to satisfy a State responsibility analysis, to include attribution, breach of obligation, and potential excuses precluding wrongfulness. Such an analysis is outside the scope of this Article, and the remainder of this section assumes a State responsibility analysis has been conducted and supports moving on to consideration of consequences.

¹⁰³ See CORTEN, *supra* note 79, at 403, 407. As discussed in Section III Part B, States that reject the “gap” theory or that adhere to the view that imminent armed attacks trigger the right to use force in self-defense would disagree with this conclusion, at least legally. For a variety of practical reasons, such States may still choose not to respond with force in self-defense.

¹⁰⁴ The question of forcible countermeasures in response to a use of force falling short of armed attack was left unanswered by the Court in *Nicaragua*, an omission that has been much criticized. See RUYSS, *supra* note 78, at 141 (“[I]t is rather flabbergasting that the Court creates a crucial potential gap in the rules on the use of force, which would seem to be prima facie incompatible with the comprehensive regime established by Articles 2(4) and 51 of the UN Charter, without providing any further guidance or supporting arguments.”). Though not without controversy, the international community generally accepts that forcible countermeasures are unlawful. See *id.* at 95 (“In times of peace, such reprisals involving the use of armed force are considered unlawful—this view has been confirmed by the ICJ, the General Assembly and the Security Council.”).

¹⁰⁵ In addition, pursuing non-forcible remedies would follow the spirit of Article 2(3) of the U.N. Charter, which requires that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”

(ITLOS), is one option. However, this route is impractical in many cases for several reasons. First, many of the key actors in the gray zone contest are not parties to potentially applicable international agreements, such as the United Nations Convention on the Law of the Sea (UNCLOS).¹⁰⁶ Second, provoking states are unlikely to submit to international jurisdiction willingly in these cases,¹⁰⁷ and are equally unlikely to respect decisions in cases of compulsory jurisdiction.¹⁰⁸ Third, victim states may be hesitant to submit such cases to international courts for fear of decisions that are broader than anticipated, or even out of a desire to preserve the ability to employ similar tactics themselves in the future. Finally, given that individual gray zone tactics typically do not cause substantial—if any—physical damage to the victim state, any resulting remedies are likely to be minimal.¹⁰⁹

Victim states may also consider referring the matter to the U.N. Security Council.¹¹⁰ Charged with “primary responsibility for the maintenance of international peace and security,”¹¹¹ the U.N. Charter states that the Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”¹¹² If the Security Council determined that gray-zone tactics were threats to or breaches of the peace, or were acts of aggression, it could direct several actions in response, including provisional measures;¹¹³ measures not involving armed force, such as interruption of economic relations or severance of diplomatic relations;¹¹⁴ or measures involving armed force.¹¹⁵

However, referral to the Security Council is, much like a referral to international courts, likely to be impractical for several reasons. First, permanent

¹⁰⁶ For example, neither the United States nor Iran are parties to UNCLOS. *See* United Nations Convention on the Law of the Sea, Oct. 12, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

¹⁰⁷ This is especially relevant in cases involving interactions at sea, as Article 298(1)(b) of UNCLOS specifically allows States to decline to accept dispute resolution for cases “concerning military activities.” *See id.*

¹⁰⁸ For example, China has stated that it does not recognize or intend to comply with a 2016 ITLOS opinion regarding the South China Sea. *See* Press Conference, Chinese Ministry of Foreign Affairs, Minister Liu Zhenmin Statement at the Press Conference on the White Paper Titled China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (July 13, 2016), https://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1381980.htm [<https://perma.cc/68BQ-U5ME>] (Chinese Vice Foreign Minister Liu Zhenmin stated “China’s position on the arbitration is clear. We do not recognize or implement the award. It is just a piece of waste paper. You may just chuck it in the bin, leave it on the shelf, or put it in archives.”).

¹⁰⁹ Securing the cessation of such actions would certainly be a valuable remedy.

¹¹⁰ *See* CORTEN, *supra* note 79, at 405.

¹¹¹ U.N. Charter art. 24, ¶ 1 (“In order to ensure prompt and effective action [by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

¹¹² *Id.* at art. 39.

¹¹³ *See id.* at art. 40.

¹¹⁴ *See id.* at art. 41.

¹¹⁵ *See id.* at art. 42.

Security Council members entitled to a veto include states—notably Russia and China—that currently employ gray zone tactics. To the extent a Security Council resolution challenged their own or similar tactics, these states would almost certainly exercise their veto. Further, because gray zone tactics are generally relatively minor acts, some states may conclude that they do not warrant Security Council involvement.¹¹⁶

A victim state could potentially resort to non-forcible countermeasures,¹¹⁷ which allow for the temporary non-performance of international obligations owed by the victim state to the responsible state.¹¹⁸ However, countermeasures may not prove a particularly effective means of addressing gray zone tactics, as they must not only be proportionate,¹¹⁹ they must cease once the breach itself has ceased.¹²⁰ In the case of many military-on-military gray zone tactics, the breach is typically complete within a matter of minutes. As such, the window for countermeasures is often too short to allow for a meaningful response. The exception could be when it is reasonable for the victim state to conclude that a provoking state's use of gray zone tactics will recur. Countermeasures could be appropriate and effective in such cases. For example, countermeasures could be an appropriate response to Russia's repeat warship buzzing or Iran's repeat warship harassment. Absent this repetition, retorsions¹²¹ and sanctions¹²² appear to be the only practicable responses available under current international law. Finally, public attribution of these acts to the provoking state may be of some diplomatic value.¹²³

Given the limited effectiveness of judicial process and countermeasures, the responses available to victim states struggling to counter gray zone tactics appear limited under a use-of-force framework. The available slate of responses may not only be unsatisfying, but also fail to stop the future use of such tactics. Eventually,

¹¹⁶ See RUYSS, *supra* note 78, at 179 (noting that international attorneys, at least, “seem to focus on those large-scale interventions that generate important shockwaves within the international community—e.g., the US-led intervention in Afghanistan of 2001 or the Israeli intervention in Lebanon in 2006—but tend to ignore less ‘high-profile’ instances of inter-State recourse to force that do not result in public legal claims and often take place in unclear circumstances.”).

¹¹⁷ See *supra* note 104 for a discussion on forcible countermeasures.

¹¹⁸ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supp. 10 (A/56/10), art. 49 (2001) [hereinafter ARSIWA] (“(1) An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations . . . (2) Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.”).

¹¹⁹ *Id.* at art. 51 (“Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”).

¹²⁰ *Id.* at art. 53 (“Countermeasures shall be terminated as soon as the responsible State has complied with its obligations . . . in relation to the internationally wrongful act.”).

¹²¹ Unlike countermeasures, retorsions do not entail the suspension of any international obligations. See *Retorsion, Dictionary of Law* (Jonathan Law, ed., 9th ed. 2018) (defining retorsion as “[a] lawful means of retaliation by one state against another”).

¹²² Some States may be reticent to resort to sanctions, given the potential negative effects on the provoking State's civilian population. For more, see Nigel D. White & Ademola Abass, *The Means of Dispute Settlement*, in INTERNATIONAL LAW 542 (Malcolm Evans, ed., 5th ed. 2018).

¹²³ Cf. Florian Egloff, *Public Attribution of Cyber Intrusions*, 6 J. Cybersecurity 1, 3 (2020).

victim states could reach a point of such exasperation that they may begin to treat gray zone tactics as warranting uses of force in response. For example, the United States may eventually tire of Russian buzzing tactics and begin to treat them as unlawful threats of or uses of force or imminent armed attacks to broaden response options.¹²⁴ This interpretation would be concerning to the broader international community, because while a majority of states may not consider a use of force in response to similar gray zone tactics lawful (or at least not *clearly* lawful), if a major military power such as the United States changes its approach, international norms may shift and become normalized if repeated and unchallenged.¹²⁵

Finally, it is not clear that gray zone tactics such as those employed by Russia, China, and Iran actually violate the prohibition on the threat of or use of force or qualify as imminent armed attacks. Absent this categorization, a use-of-force analysis is not helpful, and victim states will need to look elsewhere in international law to identify alternate theories of state responsibility and potential response options. Given the above issues associated with treating gray zone tactics under a traditional use-of-force framework, it is worthwhile to explore whether another legal framework—that of unlawful intervention—is better suited to analyze gray zone tactics.

V. Gray Zone Tactics Under an Unlawful Intervention Framework

A. *What Exactly is Unlawful Intervention?*

The principle of non-intervention is considered a cornerstone of international law, yet its precise meaning has been “nowhere set out clearly. This in itself goes far towards explaining the uncertainties surrounding the subject.”¹²⁶ The principle of non-intervention has been aptly described as:

[O]ne of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is

¹²⁴ As an example, following an incident on Apr. 15, 2020 where eleven Iranian armed small boats harassed U.S. warships, U.S. President Donald Trump tweeted “I have instructed the United States Navy to shoot down and destroy any and all Iranian gunboats if they harass our ships at sea.” See Donald J. Trump, *supra* note 72. See also Anne Gearan, John Wagner, Dan Lamothe & Carol Morello, *Trump instructs the Navy to ‘shoot down and destroy’ Iranian gunboats that ‘harass’ U.S. ships*, WASH. POST (Apr. 22, 2020), https://www.washingtonpost.com/politics/trump-instructs-the-navy-to-shoot-down-and-destroy-iranian-gunboats-that-harass-us-ships/2020/04/22/8db924c6-8499-11ea-ae26-989cfce1c7c7_story [<https://perma.cc/NF6R-DCDP>].

¹²⁵ In this way, customary international law surrounding appropriate responses to similar gray-zone tactics could rapidly evolve. See CORTEN, *supra* note 79, at 12–15, for a discussion on “instant” customary international law and the role major powers play in its development (noting that “customary rules can change very rapidly, with the law adapting itself instantaneously to the facts as they evolve,” and that the practice of certain States seems—rightly or wrongly—to matter more than the practice of other States); Brooks, *supra* note 27 (arguing that, when more powerful States act in ways that challenge the legal status quo, “other states face a choice. They can accept the ‘new’ interpretation of international law, in which case—if a sufficient number of states take the same route—international law will quietly change.”).

¹²⁶ Jamnejad & Wood, *supra* note 3, at 347 (citations omitted).

the exception; that it is never permissible at all. A reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland.¹²⁷

This vagueness has created a state of affairs that allows states to allege unlawful intervention in an extraordinarily wide variety of circumstances.¹²⁸

Scholars have broadly defined intervention as "interference by a state in the internal or foreign affairs of another state."¹²⁹ However, not every act of interference violates the principle of non-intervention. In order to rise to the level of unlawful intervention, the interfering act must (1) be directed at matters falling solely within the domestic affairs of the victim state and (2) be coercive.¹³⁰ This definition invites several questions. What exactly is encompassed within a state's domestic affairs? Does coercion require military force, or can economic or diplomatic acts also violate the principle of non-intervention? Must an act rise to a certain magnitude to be considered coercive? Must an act intend to impose a result of a certain magnitude to violate the principle?

Few of these questions have clear answers under existing international law. Much like gray zone tactics, some of the confusion regarding the precise meaning of the principle of non-intervention likely stems from a lack of consistent terminology among sources, and a lack of consensus regarding exactly what should qualify as a violation of the principle. This Article does not attempt a comprehensive examination of the history of the principle of non-intervention, but will examine several key sources in an effort to clarify the principle and analyze the Russian, Chinese, and Iranian gray zone tactics accordingly.¹³¹

1. International Agreements

The principle of non-intervention has appeared—albeit in slightly varying language—in numerous significant international agreements over the last century. While not expressly stated in the U.N. Charter, Article 2(1) implies the principle of non-intervention by stating that the U.N. is "based on the principle of the sovereign equality of all its Members."¹³² The principle of sovereign equality depends on a

¹²⁷ Winfield, *supra* note 4.

¹²⁸ Philip Kunig, *Prohibition of Intervention*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, ¶ 1 (2008).

¹²⁹ *Id.* See also W. E HALL, INTERNATIONAL LAW §10 (7th ed. 1917) (defining intervention as interference "in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it").

¹³⁰ See *Nicaragua*, *supra* note 87 at 205; Kunig, *supra* note 128; HALL, *supra* note 129; See also Michael Schmitt, *Prohibition of Intervention*, in TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 312–313 (2nd ed. 2017) [hereinafter Tallinn Manual].

¹³¹ For a more in-depth look at the history of the principle of non-intervention, see Winfield, *supra* note 4.

¹³² U.N. Charter art. 2, ¶ 1.

corresponding principle prohibiting infringement of that sovereignty; the principle of non-intervention fulfills this role.¹³³ Further, Article 2(7) makes clear that even the U.N. lacks authority to intervene in a state's affairs.¹³⁴ That the U.N. itself is generally not permitted to intervene in domestic affairs illustrates the importance states place on principles of sovereign equality and non-intervention.

Other international agreements are more explicit. For example, the Montevideo Convention states that “No state has the right to intervene in the internal or external affairs of another,”¹³⁵ and the Helsinki Final Act requires parties to “refrain from any intervention, direct or indirect, individual or collective, in the internal and external affairs falling within the domestic jurisdiction of another.”¹³⁶ The explicit mention of non-intervention in these important international agreements further reflect the principle's significance.

Non-intervention language also appears in numerous regional treaties. The Charter of the Organization of American States mentions the principle more than once, including stating “[n]o 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.”¹³⁷ Similarly, the Constitutive Act of the African Union includes explicitly as one of its principles “non-interference by any Member State in the internal affairs of another.”¹³⁸ The constitutive instruments of the Organisation of

¹³³ See Winfield, *supra* note 4, at 131 (“The general rule of nonintervention seems an obvious corollary from the state-independence rule”); OPPENHEIM'S INTERNATIONAL LAW 428 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

¹³⁴ U.N. Charter *supra* note 132, at art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.”). The single exception to the prohibition on intervention by the U.N. itself relates to U.N. Security Council authority to deal with threats to and breaches of the peace and acts of aggression under Chapter VII: “[T]his principle shall not prejudice the application of enforcement measures under Chapter VII.”

¹³⁵ Montevideo Convention on the Rights and Duties of States, art. 8, Dec. 26, 1933 [hereinafter Montevideo]. Note that the United States pointed out in its reservation that multiple terms used in the Convention—including those related to the principle of non-intervention—were left unclear: “[It is] unfortunate that . . . there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every government to proceed in a uniform way without any difference of opinion or of interpretations.” *Id.* at Reservations.

¹³⁶ Final Act of the Conference on Security and Co-Operation in Europe, pt. VI, Aug. 1, 1975, 14 I.L.M. 1293 [hereinafter Helsinki Final Act].

¹³⁷ Charter of the Organization of American States, art. 19, ¶ (e), Feb. 27, 1967, 25 I.L.M. 527 [hereinafter OAS Charter] (Article 19 clarifies that intervention includes not only armed force, but also other forms of intervention: “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.” Art. 3 states that “[e]very State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and must abstain from intervening in the affairs of another State.”).

¹³⁸ Constitutive Act of the African Union, art. 4, ¶ (g), July 11, 2000, 2158 U.N.T.S. 3 [hereinafter AU Act].

Islamic Cooperation and the Association of Southeast Asian Nations contain similar provisions.¹³⁹

The implicit and explicit inclusion of non-intervention in these important agreements supports a conclusion that states felt strongly about the principle. However, the variety and vagueness of language used to describe the principle and a lack of elaboration on what types of actions violate the principle makes it difficult to decipher precisely what actions states were attempting to prohibit. As further illustrated below, this is a theme common to many of the sources that touch upon the principle of non-intervention.

2. United Nations Resolutions and Other Documents

Since 1957, the U.N. General Assembly has passed more than thirty resolutions pertaining at least in part to the principle of non-intervention.¹⁴⁰ Several have gained widespread support and are thus relevant to a complete understanding of the principle.¹⁴¹ For example, the Draft Resolution of Rights and Duties of States declares that “[e]very state has the duty to refrain from intervention in the internal or external affairs of any other state.”¹⁴² The Declaration on Inadmissibility of Intervention reaffirmed the principle, condemning both armed and other forms of intervention, whether direct or indirect.¹⁴³

Most notably, the Declaration on Friendly Relations—which clarified and built upon the U.N. Charter and expressly says that states considered the Declaration a reflection of international law¹⁴⁴—devotes an entire section to the principle of non-intervention:

¹³⁹ See Charter of the Organisation of Islamic Cooperation, art. 2(4), Mar. 14, 2008 (“All 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.”); Charter of the Association of Southeast Asian Nations art. 2(2)(e)–(f), Nov. 20, 2007, 2624 U.N.T.S. 223 (including 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”).

¹⁴⁰ Jamnejad & Wood, *supra* note 3, at 350. However, few of these resolutions may be relied upon in clarifying the parameters of the principle, as the U.N. General Assembly adopted many by deeply split votes.

¹⁴¹ See *id.*

¹⁴² International Law Commission, Draft Declaration on Rights and Duties of States, art. 3 (1949).

¹⁴³ See G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (Dec. 21, 1965) (Operative paragraph 1 notes, “No State 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 condemned.” Operative paragraph 2 notes, “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 or to secure from it advantages of any kind.”).

¹⁴⁴ See G.A. Res. 2625 (XXV), The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United

No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, 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 . . . Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.¹⁴⁵

Taken together, these resolutions show that while the U.N. General Assembly has repeatedly addressed the principle, the resulting documents lack a consistent description of unlawful intervention and reveal that there was “profound disagreement” among states as to precisely what actions were being condemned.¹⁴⁶

3. Customary International Law

As noted above, the principle of non-intervention as a complement to the principle of sovereignty is foundational to international law.¹⁴⁷ With the Declaration on Friendly Relations, the U.N. General Assembly made clear that it considered the non-intervention principle an established tenet of international law; this resolution is now widely considered to reflect customary international law.¹⁴⁸ In *Nicaragua*, the ICJ declared the principle of non-intervention “part of parcel of customary international law.”¹⁴⁹

4. Judicial Decisions

A handful of international cases have examined the principle of non-intervention, most extensively in the *Nicaragua* case. There, the ICJ noted that the principle prohibits interference in another state’s affairs, asserting that “[t]he principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference.”¹⁵⁰ The Court attempted to clarify what exactly constitutes the “internal and external affairs” of a state by noting that a

Nations, General Part 3 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations] (“The principles of the Charter which are embodied in this Declaration constitute basic principles of international law”). See also GRAY, *supra* note 79, at 13; Jamnejad & Wood, *supra* note 3, at 353.

¹⁴⁵ *Id.* at 123.

¹⁴⁶ Lori Fisher Damrosch, *Politics Across Borders*, 83 AM. J. INT’L L. 1, 11 (1989).

¹⁴⁷ See *Nicaragua*, *supra* note 87, at ¶ 212 (“[T]he principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention.”).

¹⁴⁸ See *id.* at ¶ 264; Case Concerning Armed Activities in the Territory of the Congo (D.R.C. v. Uganda), Judgement, I.C.J. Rep. 2005, ¶ 162 (Dec. 19) [hereinafter *Armed Activities*].

¹⁴⁹ *Nicaragua*, *supra* note 87, at ¶ 202. See also Tallinn Manual, *supra* note 130, at 312.

¹⁵⁰ See *Nicaragua*, *supra* note 87, at ¶ 212.

“prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely.”¹⁵¹ The Court gave as examples “the choice of a political, economic, social and cultural system, and the formulation of foreign policy.”¹⁵² There is no indication that the Court considered this list exhaustive of all matters which could be the target of an unlawful intervention.¹⁵³

5. Defining Unlawful Intervention

Even when examining the above sources together, the exact content of the non-intervention principle remains vague with respect to both elements required to show a violation: (1) interference in a state’s domestic affairs through (2) a coercive act. The next Section of this Article seeks to clarify these elements.

a. Domestic Affairs

The first issue that the above sources leave unanswered is the precise bounds of a state’s domestic affairs. Declaration on Friendly Relations committee notes indicate that state representatives struggled among themselves to agree on what constituted a state’s domestic affairs.¹⁵⁴ Various sources describe this area as the “internal or external affairs of a State,”¹⁵⁵ “the internal or external affairs falling within the domestic jurisdiction of another,”¹⁵⁶ the “internal affairs of another,”¹⁵⁷ “matters within the domestic jurisdiction of any State,”¹⁵⁸ “matters in which each State is permitted, by the principle of State sovereignty, to decide freely,”¹⁵⁹ and “the *domaine réservé*” or reserved domain.¹⁶⁰

The Permanent Court of Justice’s Advisory Opinion in *Nationality Decrees Issued in Tunis and Morocco* is the authoritative case on what comprises a state’s domestic affairs and is thus protected by the principle of non-intervention.¹⁶¹ In that case, the Court considered whether France’s issuance of nationality decrees that

¹⁵¹ *Id.* at ¶ 205.

¹⁵² *Id.*

¹⁵³ *Id.* The Court indicates that this list is a non-exhaustive sampling of matters falling within a State’s internal and external affairs: “*One of these* is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.” (emphasis added).

¹⁵⁴ See Rep. of the 6th Comm., at ¶ 91, U.N. Doc. A/6955 (1967) (“Some representatives called on the Special Committee to attempt to define the limits of the principle of non-intervention by indicating what was to be regarded as falling within the domestic jurisdiction of States.”).

¹⁵⁵ Montevideo, *supra* note 135.

¹⁵⁶ Helsinki Final Act, *supra* note 136, at part VI.

¹⁵⁷ AU Act, *supra* note 138, at art. 4, ¶ (g).

¹⁵⁸ Declaration on Friendly Relations, *supra* note 144, at preamble.

¹⁵⁹ *Nicaragua*, *supra* note 87, at ¶ 205.

¹⁶⁰ Katja Ziegler, *Domaine Réservé*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 1 (2013).

¹⁶¹ *Nationality Decrees Issued in Tunis and Morocco* (Gr. Brit. v. France), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, (Feb 7) [hereinafter *Nationality Decrees*]; see also Rep. of the S.C., Friendly Relations, at ¶ 237, U.N. Doc. A/5746 (1964) (utilizing the *Nationality Decrees* Advisory Opinion when discussing the meaning of “domestic affairs”).

converted particular categories of British subjects living in Tunis and Morocco into French subjects fell within France's domestic affairs. The Court noted that "[t]he words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law."¹⁶² The Court also considered that a state's domestic affairs are not fixed, but fluctuate according to its treaty obligations and the continued development of customary international law: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."¹⁶³ Put more simply, domestic affairs are those matters in which states are currently free from international obligations.¹⁶⁴ For example, "the choice of a political, economic, social and cultural system, and the formulation of foreign policy" falls solely within a state's domestic affairs when that state has not entered into any international agreements related to those matters.¹⁶⁵

b. Coercion

Remember that not all interference into another state's domestic affairs is unlawful. In drafting the Declaration on Friendly Relations, certain states wanted to clarify that unlawful intervention does not include normal diplomacy.¹⁶⁶ That interference into a state's domestic affairs must be *coercive* to be unlawful is thus an essential requirement according to both the ICJ, which recognized coercion as the element that "defines, and indeed forms the very essence of, prohibited intervention,"¹⁶⁷ and the Declaration on Friendly Relations, which forbids "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

¹⁶² *Id.* at 23.

¹⁶³ *Id.* at 24; *see also* Tallinn Manual, *supra* note 130, at 314 ("[T]he precise contours and application of the prohibition of intervention are unclear in light of ever evolving and increasingly intertwined international relations.").

¹⁶⁴ *See* Ziegler, *supra* note 160, at ¶ 1.

¹⁶⁵ As examined in Section III, Part B of this Article, the ICJ indicated in *Nicaragua* that matters of domestic affairs include "the choice of a political, economic, social and cultural system, and the formulation of foreign policy." The Court's opinion does not indicate that this was meant as an exhaustive list. *See Nicaragua*, *supra* note 87, at ¶ 205.

¹⁶⁶ *See* Rep. of the S.C., Friendly Relations, *supra* note 161, at ¶ 245 ("Some representatives distinguished between 'permissible' and 'impermissible' intervention. It was said that, in the present-day world, States were increasingly interdependent, and that tendency was bound to become more pronounced. Thus, the risk must be avoided of seeming to thwart progress by categorizing as intervention what was in fact part of normal diplomatic activities. Without wishing to defend all forms of political, economic or material pressure, some representatives were of the opinion that certain forms of pressure promoted rather than hindered progress and could be advantageous to States."). This raises the question of what qualifies as "normal diplomatic activities," another matter on which States may not always agree.

¹⁶⁷ *Nicaragua*, *supra* note 87, at ¶ 205 ("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.").

secure from its advantages of any kind.”¹⁶⁸ Without the element of coercion, “any act which had an effect on another state could fall within the prohibition.”¹⁶⁹

International law has not clearly defined “coercion,”¹⁷⁰ but it is generally understood to involve “acts that to some degree ‘subordinate the sovereign will’ of another state.”¹⁷¹ In other words, coercive acts are those intended to cause the victim state to do or refrain from doing something, thus removing the victim state’s right to “decide freely.”¹⁷² So what measures qualify? Does the principle require a particular type of coercion? The Declaration on Friendly Relations seems to indicate that both armed and non-armed measures fall within the principle’s purview.¹⁷³ The Court in *Nicaragua* concurred, indicating that while coercion may be achieved through military force,¹⁷⁴ coercion is not limited to military force.¹⁷⁵ As such, armed, economic, diplomatic, subversive, and other types of coercion fall within the principle’s purview.¹⁷⁶

Whether an interfering act achieves its goal is not material to whether the act is coercive; it is the act itself and the coercive intent behind it that matters, not the outcome.¹⁷⁷ However, scholars disagree on how significant a particular intervening act must be in order to qualify as coercive. Some support the view that an interfering act must intend to force the victim state to do or refrain from doing an action that is of consequence in order to qualify as coercive.¹⁷⁸ Others argue that

¹⁶⁸ Friendly Relations, *supra* note 161.

¹⁶⁹ Jamnejad & Wood, *supra* note 3, at 381.

¹⁷⁰ See Mohamed S. Helal, *On Coercion in International Law*, 52 N.Y.U. J. INT’L L. & POL. 1, 3 (2019); Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579, 1581 (2017).

¹⁷¹ Jamnejad & Wood, *supra* note 3, at 381. This definition follows the plain language meaning of coerce, which is to “compel by force or threat.” *Coerce*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁷² *Nicaragua*, *supra* note 87, at ¶ 205. See also Jamnejad & Wood, *supra* note 3, at 381 (“[O]nly those [acts] that are intended to force a policy change in the target state will contravene the principle.”); Kunig, *supra* note 128, at ¶ 1; Michael Schmitt, *Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zone of International Law*, 19 CHI. J. INT’L L. 30, 51 (“At its core, a coercive action is intended to cause the State to do something, such as take a decision that it would otherwise not take, or not to engage in an activity in which it would otherwise engage.”).

¹⁷³ See Declaration on Friendly Relations, *supra* note 144, at 123 (“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 . . . Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”).

¹⁷⁴ The Court noted that military action constitutes a “particularly obvious” form of coercion. See *Nicaragua*, *supra* note 87, at ¶ 205.

¹⁷⁵ *Id.*

¹⁷⁶ See Kunig, *supra* note 128, at ¶ 22. See also Helal, *supra* note 170, at 75 (“[T]he 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.”). Cyber acts also likely fall within the principle’s purview. See Tallinn Manual, *supra* note 130, at 312–25.

¹⁷⁷ See Helal, *supra* note 170, at 79 (arguing the absurdity of an understanding of coercion that allows “intense and clearly unlawful pressure that fails to alter the behavior of the coerced state [to] be considered non-coercive and thus lawful, while minimal pressure that causes a state to alter its behavior would be unlawful.”); Tallinn Manual, *supra* note 130, at 321–22.

¹⁷⁸ See Kunig, *supra* note 128, at ¶ 1.

an interfering act itself must rise to some level of magnitude in order to qualify as coercive.¹⁷⁹ Neither proposal provides a clear answer, and both raise an additional question about accumulation: what of gray zone tactics that seem small and relatively inconsequential when considered individually, but if taken together, might rise to a sufficient level of consequence or magnitude? Future study of gray-zone tactics should evaluate these “gradualist” gray-zone tactics.

6. Summary

The principle of non-intervention remains an important tenet of international law. However, its meaning evades precise definition, allowing states to both allege unlawful intervention in a variety of situations and justify their own interference into other states’ affairs in a variety of situations.¹⁸⁰ Given the lack of consensus regarding the precise bounds of the principle, for purposes of the analysis that follows, this Article defines unlawful intervention as: coercive interference into matters falling solely within a state’s domestic affairs, with the intent to cause the victim state to do or refrain from doing something.

B. *Consequences Under an Unlawful Intervention Framework*

Suppose that the Russian, Chinese, and Iranian gray-zone tactics described above qualify as violations of the principle of non-intervention. Would this change the slate of responses available to victim states? The answer to this question matters, because if there is no difference in victim state response options under the non-intervention framework, then any application of the principle lacks practicality.

1. Cases of Dual Violations

In certain cases, a gray zone tactic might violate both the principle of non-intervention and the prohibition on the use of force.¹⁸¹ In general, an ability to allege violation of both principles does not significantly affect victim state response options. Responses involving force would remain limited by the requirements and barriers discussed above. Further, given the relatively minor nature of many military-on-military gray zone tactics, victim states may refrain from responding with force, even when official state policy holds that such a response would be lawful. Importantly, some victim states may lack the ability to mount forcible responses to such tactics. This inability might be due to a lack of the military capabilities, but it may also encompass other potential impediments, such as geopolitical constraints, that prevent a conventional response.

¹⁷⁹ See Jamnejad & Wood, *supra* note 3, at 348.

¹⁸⁰ Some argue that this manipulation of the principle undermines its legitimacy. See Damrosch, *supra* note 146, at 2–3 (noting that a “persistent pattern of conduct inconsistent with the norm would undermine at least to some extent the hypothesis that states consider themselves under a legal obligation to comply with it.”).

¹⁸¹ See Section III, Part A of this Article for a discussion on potential response options to gray zone tactics which violate art. 2(4)’s prohibition on the use of force.

Setting aside responses involving the use of force, any of the other response options discussed earlier under the use-of-force framework—including judicial involvement, U.N. Security Council referral, non-forcible countermeasures, retorsions, and sanctions—would remain available in cases of gray zone tactics that violate both the prohibition on the use of force and the principle of non-intervention. However, though each of these response options would theoretically be available in the case of dual violations, they are likely to face the same problems discussed above.

There is arguably at least some value in a victim state's ability to point to a violation of not just one, but two, foundational principles of international law in official statements and diplomatic interactions when dealing with gray zone tactics. Alternatively, for diplomatic reasons, some victim states may prefer to allege a violation of the principle of non-intervention alone, as it may be less likely to result in escalatory rhetoric or action than would allegations of an unlawful use of force. In terms of practical response options then, the key benefit of alleging a violation of the principle of non-intervention—whether in addition to or instead of a violation of the prohibition on the use of force—largely relates to providing the victim state with more options for public attribution and diplomatic messaging.

2. Cases of Unlawful Intervention Alone

Where a gray zone tactic does not violate the prohibition on the threat of or use of force, the ability to allege a violation of the principle of non-intervention is significant because it has the potential to allow for the lawful employment of many of the consequences explored above, where those options may not have otherwise been available. Thus, the ability to analyze gray zone tactics under the principle of non-intervention may indeed be of substantial value to states who find themselves facing similar tactics. Further, and as discussed in the case of dual violations, there is value in a state's ability to publicly point to breach of international law as part of its response arsenal. Doing nothing in response to gray zone tactics may embolden the provoking state. Thus, even if no other responses appear available or desirable, public attribution based on a violation of the principle of non-intervention may have a deterrent effect. As such, the international community should not discount the value of a victim state's ability to allege that gray zone tactics violate the principle of non-intervention.¹⁸²

C. *Can Gray Zone Tactics Violate the Principle of Non-Intervention?*

¹⁸² Of course, a victim State could claim a violation of some international obligation other than the prohibition on the threat of or use of force or the principle of non-intervention. In the cases of the Russian, Chinese, and Iranian gray zone tactics, for example, victim States could seek to hold the provoking State internationally responsible for the breach of a host of other international obligations, including UNCLOS and the COLREGs. As this would necessarily mean that the victim State believed a particular international regulation sufficiently governed the tactic at issue, this would take violation of the principle of non-intervention off the table, given its requirement that the interfering act affects matters *solely* within a victim State's domestic affairs, *not* subject to international regulation. Such an inquiry falls outside the scope of this Article.

As explored above, a violation of the principle of non-intervention requires coercive interference into matters falling solely within a state's domestic affairs. With that definition in mind, can gray zone tactics violate the principle? It appears that at least some gray zone tactics can be said to rise to unlawful intervention.

For example, Russia's use of "little green men" in Crimea arguably qualifies. Russia used military personnel lacking identifying insignia to support insurgent forces in Ukraine, which resulted in the successful annexation of Crimea, all without Russia going to war.¹⁸³ The use of military forces in this manner was coercive (it deployed military and subversive means to cause a specific outcome) and affected matters falling solely within Ukraine's domestic affairs (political and territorial sovereignty).¹⁸⁴ Another example is Russia's interference in the 2016 U.S. elections, a matter quite clearly falling within the United States' domestic affairs.¹⁸⁵ Here, Russia used coercive cyber operations to "manipulate[] the process of elections and therefore cause[] them to unfold in a way that they otherwise would not have."¹⁸⁶ Finally, Iran's support of various proxies throughout the Middle East might also be said to violate the principle of non-intervention, in that it seeks to encourage resistance towards and create instability in competitor governments without deploying Iranian forces.¹⁸⁷

These examples of gray zone tactics differ from the Russian, Chinese, and Iranian actions described earlier in a significant way: the use of "little green men," the election interference, and the use of proxies each took place or had effect *within* victim state territory. By contrast, the Russian, Chinese, and Iranian actions that are the focus of this Article each took place in international airspace and the ocean, domains quite famously governed by international law through UNCLOS, ample additional international agreements, and customary international law. As such, one perspective is that the majority of similar military-on-military gray zone tactics cannot violate the principle of non-intervention, because they by definition do not

¹⁸³ See STACIE PETTYJOHN & BECCA WASSER, *COMPETING IN THE GRAY ZONE: RUSSIAN TACTICS AND WESTERN RESPONSES*, 28-29 (2019); Morris, *supra* note 2, at 17.

¹⁸⁴ See Morris, *supra* note 2, at 17.

¹⁸⁵ See Nicaragua, *supra* note 87, at ¶ 205 (specifically listing the choice of political system as a matter of domestic affairs).

¹⁸⁶ Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 *YALE J. INT'L L.* 1, 8 (2017); see also Michael N. Schmitt, *Virtual Disenfranchisement: Cyber Election Meddling in the Grey*

Zones of International Law, 19 *CHI. J. INT'L L.* 30, 51 (2018) (pointing to the "cyber activities that feigned American citizenship and the hacking and subsequent release of private data" as the most likely of the Russian actions to qualify as violations of the principle of intervention). Other scholars have argued the scope of unlawful intervention as applied to elections to be much greater. See Harold Koh, *The Trump Administration and International Law*, 56 *WASHBURN L.J.* 413, 450 (2017) ("[E]ven if the Russians did not actually manipulate polling results, illegal coercive interference in another country's electoral politics—including the deliberate spreading of false news—constitutes a blatant intervention in violation of international law.").

¹⁸⁷ See Freier, *supra* note 30, at 51; Ney, *supra* note 72; David Daoud, *Meet the Proxies: How Iran Spreads its Empire Through Terrorist Militias*, *TOWER* (Mar. 2015), <http://www.thetower.org/article/meet-the-proxies-how-iran-spreads-its-empire-through-terrorist-militias/> [<https://perma.cc/V7VZ-SX44>].

touch on matters falling *solely* within the victim state's domestic affairs. Proponents of this argument would contend that, as a result, victim states facing similar tactics cannot invoke the principle of non-intervention and resulting remedies.

However, because there is not consensus among states or scholars about the precise bounds of the principle of non-intervention, this Article argues that it cannot so easily be said that these types of gray zone tactics clearly fall outside of the principle's protection. Another perspective is that gray zone tactics very well may affect matters falling solely within a victim's state's domestic affairs. For example, the Russian, Chinese, and Iranian gray zone tactics involve acts directed against a victim state's sovereign immune vessel, subject exclusively to flag state jurisdiction. Do such acts thus affect matters falling solely within the victim state's domestic affairs? As the heart of the principle of non-intervention is the protection of state sovereignty, perhaps there is a space in which international jurisdiction bumps up against domestic affairs, and in which the principle of non-intervention might, in certain circumstances, be applicable. The remainder of this section will examine this proposal's strength as applied to the Russian, Chinese, and Iranian gray zone tactics described above.

1. Russian Buzzing of Warships

a. Coercion

There are arguments on both sides as to whether using military aircraft to buzz warships is coercive as contemplated under the principle of non-intervention. One could argue that such antics, while annoying, involved no contact and have been only mildly condemned by the United States.¹⁸⁸ Further, establishing that Russia intends to cause the United States to do or not do something through these tactics may prove difficult, as Russia has publicly stated it believes its actions conform to the law, and Russian officials have downplayed the significance of such tactics.¹⁸⁹ These factors weigh against a conclusion that the Russian tactics rise to the level of coercion contemplated by the principle of non-intervention.

The more realistic argument is that the Russian buzzing tactics are coercive and intended to cause the United States to modify or cease its operations in the Baltic Sea. Buzzing is dangerous to personnel and disruptive to operations, and the Russian tactics have disrupted U.S. military operations in an area known to be diplomatically sensitive.¹⁹⁰ Further, Russia has repeatedly used its military to

¹⁸⁸ See U.S. European Command Press Release, *supra* note 36 (noting that though the United States condemned the Russian tactics, official statements categorized the tactics as "unsafe and unprofessional.").

¹⁸⁹ See TASS Article, *supra* note 43 (For example, a Russian Defense Ministry spokesperson reportedly commented that "frankly speaking, [Russia] does not understand the reason for such a painful reaction of our American colleagues . . . The principle of freedom of navigation for the US destroyer, which is staying in close proximity to a Russian naval base in the Baltic Sea, does at all not cancel the principle of freedom of flight for Russian aircraft.").

¹⁹⁰ See Karimi & Melvin, *supra* note 41 (reporting that U.S. and Polish joint operations "were interrupted because one of the [Russian] overflights was so close.").

employ this tactic against the United States in recent years.¹⁹¹ Recall that the Court in *Nicaragua* noted that military action constitutes a “particularly obvious” form of coercion.¹⁹² On the matter of intent, it is not a great leap to infer that Russia is using these tactics as a means of intimidation, intended to cause the United States to modify or cease its operations in the Baltic Sea. Indeed, some news sources reported that Russian officials have stated explicitly that Russia intends to “respond with all necessary measures” to what Russia perceives as antagonistic U.S. operations in the Baltic.¹⁹³

b. Domestic Affairs

It is less clear whether the buzzing of warships interferes in a matter falling solely within the domestic affairs of the flag state. The principle of non-intervention seeks to protect sovereignty by prohibiting coercive interference into matters falling solely within a state’s domestic affairs, or those areas not regulated by international law. Thus, for the principle to apply to Russian buzzing of U.S. warships, the Russian acts must interfere with an area falling exclusively within the United States’ domestic affairs. For several reasons, this may be a difficult requirement to meet when Russia perpetrates these acts in international spaces. Though the United States is not a party to UNCLOS, Russia is,¹⁹⁴ and as most UNCLOS provisions are considered to reflect customary international law, its pertinent provisions on freedom of navigation¹⁹⁵ and due regard¹⁹⁶ are applicable to both Russia and the United States in this scenario. In addition, several other international agreements are likely applicable in this case, including the Prevention of Incidents On and Over the High Seas (INCSEA),¹⁹⁷ the International Regulations for Preventing Collisions

¹⁹¹ See generally Fahey, *supra* note 35 (summarizing Russia’s use of the buzzing tactic against the United States in recent years).

¹⁹² *Nicaragua*, *supra* note 87, at ¶ 205.

¹⁹³ See Robin Emmott, *Russia Warns U.S. Over Naval Incident as NATO Tensions Laid Bare*, REUTERS (Apr. 20, 2016), <https://www.reuters.com/article/us-russia-nato-envoy-idUSKCN0XH1O3> [<https://perma.cc/DD94-2VDS>] (“Russia accused the United States on Wednesday of intimidation by sailing a U.S. naval destroyer close to Russia’s border in the Baltics and warned that the Russian military would respond with ‘all necessary measures’ to any future incidents.”)

¹⁹⁴ See U.N. Division for Ocean Affairs & the Law of the Sea, Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements (Mar. 9, 2020), https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [<https://perma.cc/37A3-5CJA>].

¹⁹⁵ See UNCLOS, *supra* note 109 (“Freedom of the high seas . . . comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight”).

¹⁹⁶ *Id.* (“[Freedom of navigation] shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas.”).

¹⁹⁷ Prevention of Incidents On and Over the High Seas, U.S.-U.S.S.R., May 25, 1972. (In an effort to “assure the safety of navigation of the ships of their respective armed forces on the high seas and flight of their military aircraft over the high seas,” the United States and the Soviet Union entered into this agreement in 1972. Art. IV appears to be most relevant to buzzing of warships: “Commanders of aircraft of the Parties shall use the greatest caution and prudence in approaching aircraft and ships of the other Party operating on and over the high seas, in particular, ships engaged in launching or landing aircraft, and in the interest of mutual safety shall not permit: simulated attacks by the simulated use of weapons against aircraft and ships, or performance of various

at Sea (COLREGs),¹⁹⁸ and the Code for Unplanned Encounters at Sea (CUES).¹⁹⁹ As such, it is a stretch to argue that these particular gray zone tactics fall entirely outside the purview of international law.

One counterargument would emphasize the legal status of a state's warship as a floating extension of the state itself, immune from any jurisdiction or interference other than its own and thus falling within its "domestic affairs" as contemplated by the principle of non-intervention. Historically, there was some support for the idea that a ship was "an ambulatory province," and "a portion of the territory whose flag it flies, even when it is in a foreign sea."²⁰⁰ However, this interpretation of the status of ships has since been discredited for several practical reasons, including the idea that, if this interpretation was accurate, nongovernment ships might theoretically be immune from coastal state regulations within internal and territorial waters, an interpretation that would topple fundamental protections guaranteed to coastal states under UNCLOS.²⁰¹

Despite a move away from the "floating territory" interpretation of sovereignty for all ships, the sovereignty of warships is still considered broad and inviolable.²⁰² The U.S. Supreme Court touched on the significance of such sovereignty in an 1812 decision, observing that a warship is:

[A] part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign

aerobatics over ships, or dropping various objects near them in such a manner as to be hazardous to ships or to constitute a hazard to navigation.").

¹⁹⁸ COLREGs, *supra* note 74. (The COLREGs entered into force on July 15, 1977, and the United States, Russia, China, and Iran are all parties. Art. 2 states that "due regard shall be had to all dangers of navigation and collision." For a current list of signatories, see <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800fcf87> [<https://perma.cc/45VR-46ZL>]).

¹⁹⁹ Code for Unplanned Encounters at Sea, (Apr. 22, 2014), https://www.jag.navy.mil/distrib/instructions/CUES_2014.pdf [<https://perma.cc/X4KJ-7XJA>] [hereinafter CUES]. The United States, Russia, and China are all parties to this 2014 non-binding agreement designed "to limit mutual interference, to limit uncertainty, and to facilitate communication when naval ships or naval aircraft encounter each other in an unplanned manner." Part 2.8 specifically recommends that "prudent" commanding officers avoid "[a]erobatics and simulated attacks in the vicinity of ships encountered."

²⁰⁰ D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 735 (1982); *see also* DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 159 (2d ed. 2010).

²⁰¹ *Id.* at 159 (noting that ideas of "a ship being equivalent to 'floating territory' on the high seas have been discredited").

²⁰² UNCLOS, *supra* note 195, at art. 95 (stating that "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." Article 32 confirms this with regard to the territorial seas, stating that with few exceptions, "nothing in this Convention affects the immunities of warships.").

state. Such interference cannot take place without affecting his power and his dignity.²⁰³

More recently, ITLOS confirmed broad warship immunity in a provisional order issued in 2015 in the case of *ARA Libertad*, an Argentinian naval frigate being held by Ghanaian port authorities to satisfy a judgement against Argentina.²⁰⁴ Calling a warship an “expression of the sovereignty of the State whose flag it flies,”²⁰⁵ the case supports a broad reading of how far a warship’s sovereign immunity extends.²⁰⁶ In observing that “in accordance with general international law, a warship enjoys immunity,”²⁰⁷ and “any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States,”²⁰⁸ the Tribunal affirmed the expansive sovereignty enjoyed by warships, going so far as to state that this sovereignty extends into a port state’s internal waters.²⁰⁹

Given such expansive warship sovereignty, one argument in the case of the Russian buzzing tactics is that, because a warship enjoys such broad sovereignty and the buzzing is directed against a warship, the Russian tactics do interfere with a matter falling solely within the domestic affairs of the United States. Further, although the interactions at issue take place in international spaces, the Russian tactics affect the warship itself, further support for the position that the tactics interfere with a matter falling solely within the domestic affairs of the United States.

2. Chinese Seizure of UUV

c. Coercion

Seizure of a state’s military property may also be considered coercive under the principle of non-intervention. Definitively proving that the Chinese seizure of the U.S. UUV was coercive could be somewhat difficult, particularly given the mixed messaging from Chinese sources. Official Chinese statements attempted to portray the whole incident as a misunderstanding, and China’s actions of retrieving and examining an unidentified object it happened upon at sea as entirely reasonable and handled professionally.²¹⁰ Some Chinese news outlets took a similar approach and noted that because the law regulating UUVs is unsettled, China did nothing

²⁰³ *Schooner Exchange v. McFaddon*, 11 U.S. 116, 144 (1812).

²⁰⁴ See James Kraska, *The “ARA Libertad” (Argentina v. Ghana)*, 107 AM. J. INT’L L. 404, 404 (2013).

²⁰⁵ *ARA Libertad* (Arg. v. Ghana), Case No. 20, Request for the Proscription of Provisional Measures, ¶ 94 (ITLOS Dec. 15, 2012) [hereinafter *Libertad*].

²⁰⁶ See Kraska, *supra* note 204, at 408 (noting that, in addition, a “strong case can be made that Article 32 affirmatively preserves warship immunity under customary international law, rather than that the issue lies entirely outside [UNCLOS] and is therefore dependent on customary law.”).

²⁰⁷ *Libertad*, *supra* note 205, at ¶ 95.

²⁰⁸ *Id.* at ¶ 97.

²⁰⁹ See Kraska, *supra* note 204, at 408.

²¹⁰ See China Defense Ministry’s Regular Press Conference on Dec. 29, *supra* note 54.

wrong by taking and examining the U.S. UUV.²¹¹ One could speculate that the Chinese action was motivated by considerations other than an intent to cause United States to do or refrain from doing something, such as intelligence gathering. Finally, there is a question as to whether merely removing a small UUV from the ocean rises to the level of coercion contemplated by the principle of non-intervention, even when a state's military does the taking.

However, there are ample facts that support a conclusion that the Chinese actions were coercive and intended to cause the United States to modify or cease its operations in the South China Sea, a diplomatically sensitive and strategically significant maritime area. For example, some official Chinese statements attempt to justify the Chinese action and criticize the United States' "longstanding practice of conducting 'close-in reconnaissance and military surveys' in waters claimed by China."²¹² Moreover, curious fisherman or leisure sailors did not seize the UUV. Chinese naval personnel operating a Chinese naval vessel²¹³ in disputed waters seized it,²¹⁴ while the crew of a U.S. naval vessel was actively attempting to recover the UUV.²¹⁵ A Pentagon spokesperson claimed that immediately following the UUV's seizure, the U.S. crew made radio contact with the Chinese crew and requested the return of the UUV.²¹⁶ The Chinese reportedly acknowledged the communication but ignored the request and departed the area with the UUV in Chinese custody.²¹⁷

d. Domestic Affairs

Even if China's seizure of the UUV was coercive and intended to alter U.S. operations in the South China Sea, in order to violate the principle of non-intervention the act must still be directed at matters falling solely within the domestic affairs of the United States. As in the case of the Russian buzzing, this element is the higher hurdle, because state interactions at sea are generally governed by UNCLOS, other international agreements, and customary international law.²¹⁸

Again, though the United States is not a party to UNCLOS, most UNCLOS provisions are considered as reflecting customary international law and thus its

²¹¹ See Perlez, *supra* note 56.

²¹² *Id.*; see also ROTHWELL & STEPHENS, *supra* note 200, at 357 (detailing China's claim that all surveying activities conducted within China's exclusive economic zone require prior authorization).

²¹³ See Cronk, *supra* note 57.

²¹⁴ See Julian Ku, *The Nonexistent Legal Basis for China's Seizure of the U.S. Navy's Drone in the South China Sea*, LAWFARE (Dec. 16, 2016), <https://www.lawfareblog.com/nonexistent-legal-basis-chinas-seizure-us-navys-drone-south-china-sea> [https://perma.cc/MSB4-9SDN].

²¹⁵ See Cronk, *supra* note 57; see also *Nicaragua*, *supra* note 87, at ¶ 205 (regarding the Court's opinion in *Nicaragua* that military force constitutes a "particularly obvious" form of coercion).

²¹⁶ See Cronk, *supra* note 57.

²¹⁷ *Id.*

²¹⁸ Though the United States is not a party to UNCLOS, China is, and at any rate, scholars and practitioners generally consider most of UNCLOS to be reflective of customary international law. See ROTHWELL & STEPHENS, *supra* note 200, at 22–23.

pertinent provisions are applicable in this case.²¹⁹ For example, if we accept that the UUV is a “vessel,”²²⁰ multiple UNCLOS provisions could potentially apply in this situation, including Articles 87 and 58,²²¹ and the recurring requirement that all states act with “due regard to the rights and duties of other States” in exercising their own rights.²²² In addition to UNCLOS, both COLREGs and CUES apply to this scenario. In particular, COLREGs requires vessels to “take affirmative steps to avoid closing on other vessels in the water,”²²³ and CUES requires that vessels “at all times maintain a safe separation between their vessel and those of other nations.”²²⁴ Finally, one could argue that China’s actions may also be regulated by general principles of international law proscribing theft.²²⁵ As such, it appears that the incident is regulated by international law, eliminating the proposal that the incident falls solely within the United States’ domestic affairs.

As with the Russian buzzing, one counterargument might focus on the UUV as an extension of U.S. sovereignty, immune from foreign-state jurisdiction and thus falling solely within the United States’ domestic affairs. Suppose the UUV can

²¹⁹ China is a party to UNCLOS. See *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, U.N. Division for Ocean Affairs & the Law of the Sea (Mar. 9, 2020), https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [<https://perma.cc/C753-TW3N>].

²²⁰ See James Kraska & Pete Pedrozo, *China’s Capture of U.S. Underwater Drone Violates Law of the Sea*, LAWFARE (Dec. 16, 2016), <https://www.lawfareblog.com/chinas-capture-us-underwater-drone-violates-law-sea> [<https://perma.cc/8XPM-L9XY>] (noting that “[v]essels are broadly defined in international maritime law, and are generally synonymous with ‘ships,’” and “variation between manned systems and unmanned systems, such as size of the means of propulsion, type of platform, capability, endurance, human versus autonomous control and mission set, has not been a defining character of what constitutes a ‘vessel’ or ‘ship.’”). The U.S. Supreme Court defined a vessel as including “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” *Lozman v. City of Riviera Beach*, 568 U.S. 115, 118 (2013) (citing 1 U.S.C. §3 [the Rules of Construction Act]).

²²¹ UNCLOS, *supra* note 195, at art. 87 (noting that “the high seas are open to all States,” and include a right of freedom of navigation) and art. 58 (extending the right of freedom of navigation to exclusive economic zones. This is relevant because China has claimed that large portions of the South China Sea fall within China’s exclusive economic zone). See *generally* Press Release, Permanent Ct. of Arb., *The South China Sea Arbitration*, *supra* note 106.

²²² UNCLOS, *supra* note 195, at arts. 56, 58, 87.

²²³ Kraska & Pedrozo, *supra* note 220.

²²⁴ CUES, *supra* note 199, at rule 2.6.2. Further, a Memorandum of Understanding between the United States and China regarding “Rules of Behavior for Safety of Air and Maritime Encounters” may also be of interest; though, like CUES, is not binding under international law. See Memorandum of Understanding Between the Department of Defense of the United States of America and the Ministry of National Defense of the People’s Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, U.S.-China, Nov. 9–10, 2014, https://archive.defense.gov/pubs/141112_MemorandumOfUnderstandingRegardingRules.pdf [<https://perma.cc/7N29-4CNU>].

²²⁵ Statute of the International Court of Justice, art. 38, ¶ 1, June 25, 1945 (noting that, along with treaties and customary international law, “general principles of law recognized by civilized nations” are recognized as valid sources of international law). It does not seem a stretch to contend that most States recognize a general principle against theft.

be fairly classified as a warship or other government vessel.²²⁶ It would then accordingly enjoy sovereign immunity, and the Chinese action of physically seizing the UUV would qualify as a violation of that sovereign immunity—and, by extension, interfere in a matter falling solely within U.S. domestic affairs.²²⁷ Another argument is that, given the general lack of settled law—both treaty law and customary international law—regarding UUVs, UUVs are one area that can still be said to be unregulated by international law, thus falling solely within domestic affairs.²²⁸

3. Iranian Armed Small Boat Harassment of Warships

a. Coercion

Of the three examples of gray zone tactics explored in this Article, the case of Iranian armed small boat harassment of U.K. and U.S. warships presents the strongest argument that such actions are coercive and intended to cause the victim states to do or refrain from doing something. In the case of the United Kingdom, the combination of the sheer number of times Iranian small boats approached the British warship *HMS Montrose*, the fact that on several occasions the small boats came so close as to prompt the U.K. ship to fire warning flares, and Iran’s message to the United Kingdom via Twitter to “cease being an accessory to #EconomicTerrorism of the US,”²²⁹ support a conclusion that the Iranian actions were coercive and specifically intended to affect U.K. military operations and foreign policy in the region. Similarly, in the case of the United States, the sheer number of times Iran has used armed small boats to approach U.S. warships, and the nature of those approaches—including approaching at high rates of speed, coming to within ten yards of U.S. warships, crossing the bows of those warships at close distance—support a conclusion that the Iranian actions were coercive and

²²⁶ The United States has publicly stated that it considered the UUV to be a sovereign immune vessel. See *Statement by Pentagon Press Secretary Peter Cook on Return of U.S. Navy Unmanned Underwater Vehicle*, *supra* note 51. See also *The Commander’s Handbook on the Law of Naval Operations*, COMDTPUB P5800.7A, section 2.3.6 (2017) (“UUVs engaged exclusively in government, noncommercial service are sovereign immune craft . . . UUV status is not dependent on the status of its launch platform.”).

²²⁷ See UNCLOS, *supra* note 195, at art. 32. Additionally, under article 95 “warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.” As per article 29, a warship is “a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.” The UUV may or may not qualify as a “warship” under this definition. Questions, including whether such a vehicle can be said to be “manned by a crew,” remain unsettled in international law.

²²⁸ For a discussion on the many unresolved legal questions related to UUVs and other unmanned maritime vehicles, see generally Schmitt & Goddard, *supra* note 64; Allen, *supra* note 64.

²²⁹ See Zarif, TWITTER (July 20, 2019), *supra* note 70; *Iran Tanker Seizure: Radio Exchanges Reveal Iran-UK Confrontation*, *supra* note 70.

specifically intended to affect U.S. military operations and foreign policy in the region.²³⁰

A less convincing counterargument might assert that the tactics, while annoying to U.K. and U.S. forces, involved no physical contact and caused no collisions, and thus were not “coercive” as contemplated by the principle of non-intervention. In terms of intent, this argument would hold that Iran is just as entitled to operate in the Arabian Gulf as any other state, and the incidents in question are simply examples of Iran exercising that right and not intended to cause the United Kingdom or United States to do or refrain from doing anything. Alternate motivations for the tactics could include attempting to show force to the Iranian public to inspire national confidence, or employing lawful countermeasures to stop genuine breaches of international law.²³¹ Because Iran has asserted that its actions are meant to “uphold international maritime rules” in the region, the argument that its actions are actually lawful countermeasures appears at least somewhat plausible.²³²

b. Domestic Affairs

Even if the coercion requirement is satisfied, the requirement that the Iranian gray zone tactics be directed at matters solely within the United Kingdom’s and United States’ domestic affairs remains. The arguments here largely mirror those explored in the Russian and Chinese examples. Though Iran and the United States are not parties to UNCLOS, most of the treaty is considered to be reflective of customary international law²³³ and likely governs U.K., U.S., and Iranian conduct at sea. In addition to the articles explored above related to warship

²³⁰ See *Factsheet: Iran’s History of Naval Provocations*, *supra* note 70. See also *Iran Says US ‘Got the Message’ on Tense Exchanges in Persian Gulf After Navy’s Admiral’s Remarks*, ASSOCIATED PRESS (Dec. 7, 2020) <https://www.militarytimes.com/news/your-military/2020/12/07/iran-says-us-got-the-message-on-tense-exchanges-in-persian-gulf-after-navy-admirals-remarks/> [<https://perma.cc/2LWY-9CHJ>] (reporting that an Iranian Foreign Ministry spokesman stated Iran was “happy that the [United States] has got the message and made its behavior more respectful.”).

²³¹ See *Iran Tanker Seizure: Radio Exchanges Reveal Iran-UK Confrontation*, *supra* note 70 (The BBC reported that Iran has justified some of its actions against the United Kingdom by claiming those actions “guarantee[] the security of the Gulf and the Strait of Hormuz, and insisted its actions were to ‘uphold international maritime rules.’”). Similarly, in the case of United States-Iran interactions in this region, Iran has indicated that its actions were in response to unlawful actions by the United States. See *Iran Cites Change in U.S. Navy Behavior in Gulf, U.S. Denies*, REUTERS (Jan. 29, 2018), <https://www.reuters.com/article/us-iran-usa-gulf/iran-cites-change-in-u-s-navy-behavior-in-gulf-u-s-denies-idUSKBN1F1IUP> [<https://perma.cc/C9U9-NY5N>] (“Iranian Revolutionary Guards commander, Rear Admiral Ali Ozmaei, responded on Monday by saying that the ‘Americans’ behavior had changed. ‘They pay more attention to international regulations and avoid approaching Iran’s territorial waters.’”).

²³² See Zarif, *supra* note 70. Whether Iran’s use of armed small boats would actually be considered a legally valid countermeasure is beyond the scope of this Article.

²³³ See, e.g., J. Ashley Roach, *Today’s Customary International Law of the Sea*, 45 *Ocean Dev. & Int’l L.* 239, 239 (2014).

immunity,²³⁴ high seas freedoms,²³⁵ and due regard,²³⁶ articles concerning transit passage through international straits may also apply, given the proximity of the Strait of Hormuz to many instances of warship harassment.²³⁷ Article 39 of UNCLOS calls on all ships transiting through straits to “refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait.”²³⁸ Iran could theoretically invoke this Article’s counterpart under customary international law to support its claim that its actions are a lawful response to U.K. and U.S. violations of international law.²³⁹ Finally, as discussed in the cases of Russia and China, the United Kingdom, United States, and Iran are all parties to the COLREGs, which appear to contain numerous provisions applicable to this situation. In particular, rule 6 regarding maintaining safe speed,²⁴⁰ and rule 8 regarding actions to avoid collisions²⁴¹ may govern Iran’s conduct.

The United Kingdom and the United States could make the argument explored above that warships are an expression of state sovereignty, subject to flag state jurisdiction alone. Because Iran directs its tactics against warships, and those warships suffer the effects of the tactics, the Iranian actions could be considered to fall solely within U.K. and U.S. domestic affairs. However, this argument continues to seem somewhat weak in light of the numerous international agreements and customary rules that appear to be directly applicable to similar situations.

VI. Barriers to a Non-Intervention Approach: Stretching the Principle Too Far?

As illustrated above, analyzing gray zone tactics under a principle of non-intervention framework meets with several barriers, at least when the acts at issue occur in international spaces such as the sea. While in some circumstances victim states may struggle to establish that an act was coercive, the greater barrier is the requirement to show that the gray zone tactic touched on matters of domestic affairs.

A. *The Coercion Requirement*

²³⁴ UNCLOS, *supra* note 195, at arts. 95 & 32.

²³⁵ *Id.* at art. 87.

²³⁶ *Id.* at arts. 56, 58, 87.

²³⁷ *Id.* at arts. 38 & 44 (Article 38 guarantees transit passage through international straits, and Article 44 prohibits States that border straits from impeding transit passage through those straits).

²³⁸ *Id.* at art. 39.

²³⁹ Iran is not a party to UNCLOS and has frequently maintained that only parties to UNCLOS are entitled to its benefits. However, Iran has also repeatedly invoked certain provisions of UNCLOS favorable to its policies, including the claim of a twelve nautical mile territorial sea. Similarly, one could imagine Iran invoking art. 39 in an attempt to argue that the mere presence of warships in the Strait of Hormuz qualifies as a threat of a use of force against Iranian sovereignty or territorial integrity. For more on Iran’s interpretations of UNCLOS, see Kraska, *Legal Vortex*, *supra* note 75.

²⁴⁰ COLREGs, *supra* note 74, at rule 6 (“Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.”).

²⁴¹ *Id.* at rule 8 (concerning “passing at a safe distance,” ensuring safe passage, and not impeding the passage of another vessel).

States attempting to invoke the principle of non-intervention against gray zone tactics must establish that the act in question was actually intended to cause the victim state to do or refrain from doing something. Given the inherently ambiguous nature of gray zone tactics and the often-conflicting messaging from provoking states, analysis of such intent may require ample speculation. As discussed above, a strong argument exists that Russia is using its buzzing tactic in an attempt to force the United States to alter its operations in the Baltic Sea; that China took the UUV out of the water in an attempt to force the United States to alter its operations in the South China Sea; and that Iran is using its armed small boats in an attempt to force the United Kingdom and United States to alter their operations in the Arabian Gulf and foreign policy within the region.

However, one could also craft explanations for these acts that do not involve any intent to cause the victim state to do or refrain from doing anything. For example, China has argued that the entire UUV incident was a misunderstanding; it could also have been an intelligence-gathering operation, not intended to cause the United States to do or refrain from doing something, but instead intended to strengthen China's own military intelligence. Russia and Iran could both argue that their tactics are not actually dangerous and are simply instances where they were exercising their own right to operate in disputed regions; the United States and United Kingdom just also happened to be present at the same time. Because the principle of non-intervention seeks to protect a state's right to "decide freely" matters of domestic affairs, the lack of conclusive evidence of the provoking state's intent to subvert this freedom of choice would make claims under the principle difficult, though not impossible.²⁴²

B. *The Domestic Affairs Requirement*

Without question, the requirement that an interfering act be directed at matters falling solely within the victim state's domestic affairs is the more difficult hurdle for victim states to clear. This is because there is very little in today's interconnected world that international law does not touch, and so fewer and fewer matters may truly be said to fall solely within a state's domestic affairs.²⁴³

For example, all of the vessels examined in this Article were operating in the sea, which is governed by UNCLOS, other international agreements, and customary international law. While the argument that a warship is a floating extension of a state and thus falls within the flag state's "domestic affairs" is intriguing, it seems that such sovereignty is unlikely to extend past the warship

²⁴² See *Nicaragua*, *supra* note 87, at ¶ 205. Given that individual States routinely make subjective determinations in many areas of international law, that establishing the intent behind gray zone tactics may require speculation is not necessarily fatal to the analysis. However, reliance on speculation could weaken that analysis.

²⁴³ See Ziegler, *supra* note 160, at ¶ 3 ("[T]here are hardly any subject-matters or policy areas today that are inherently removed from the international sphere. . . . Because of the evolution and growth of international law and the increasing 'entanglement' of international and domestic situations, it is impossible to say that a certain area *per se* is removed from the scope of international law.").

itself to the airspace above it and the sea column below it to the exclusion of existing international regulations.²⁴⁴ As such, while a particular vessel may indeed be entirely immune from the jurisdiction of other states, it does not necessarily follow that warship interactions ostensibly covered by international law can be considered to fall solely within the flag state's domestic affairs. Further, while international law surrounding UUVs remains unsettled,²⁴⁵ the domain in which UUVs operate—the sea—is highly regulated by international law. Thus, while gray zone tactics may touch upon matters that could be considered domestic affairs, it is a stretch to argue that the Russian, Chinese, and Iranian gray zone tactics fall solely within victim states' domestic affairs.

At a minimum, the above arguments do highlight a murky area wherein international law and domestic affairs bump up against each other, and where one ends and the other begins is not entirely clear. However, in interpreting such murkiness and where an international agreement *might* be applicable, a court may err on the side of finding the issue one regulated by international law. In its Advisory Opinion in the *Nationality Decrees Issued in Tunis and Morocco* case, the Permanent Court of International Justice held that, even in the case of matters traditionally considered to fall solely within a state's domestic jurisdiction, when a treaty may apply, “a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law” and thus no longer considered a matter of domestic jurisdiction.²⁴⁶ Given the host of international agreements and customary international law potentially applicable to gray zone tactics, it is therefore unlikely that a court would find that these tactics are entirely unregulated by international law. So long as “domestic affairs” remains an essential element of unlawful intervention, such a finding would prove fatal to attempts to allege that similar gray zone tactics violate the principle of non-intervention.

C. Summary

While the unlawful intervention paradigm may be an appealing framework for addressing gray zone tactics because it has the potential to strengthen victim state response options, the principle is unlikely to consistently encompass military-on-military gray zone tactics when they occur in international spaces. Though a warship is immune from the jurisdiction of any state other than the flag state, it does not follow that all interactions at sea between that warship and other states fall solely within the flag state's domestic affairs to the exclusion of existing international regulations. Further, given that states are often purposefully secretive about the motives behind their gray zone tactics, a victim state may sometimes struggle to make a strong showing that the tactics are intended to cause the victim state to do or refrain from doing something. While an interesting concept, it appears that attempting to fit gray zone tactics—at least many military-to-military gray zone

²⁴⁴ See, e.g., UNCLOS, *supra* note 195, at art. 87 (“The high seas are open to all States, whether coastal or landlocked.”). High seas freedoms include those of navigation and overflight.

²⁴⁵ For a discussion on the many unresolved legal questions related to UUVs and other unmanned maritime vehicles, see generally Schmitt & Goddard, *supra* note 64; Allen, *supra* note 64.

²⁴⁶ *Nationality Decrees*, *supra* note 161, at 24.

tactics occurring in international spaces—into a principle of non-intervention paradigm may stretch the principle too far.

VII. Conclusion

Given the high costs of conventional military competition, states are increasingly turning to non-conventional strategies—including gray zone tactics—in order to pursue strategic goals, and are likely to continue to do so in coming years.²⁴⁷ This is a troubling development, because precisely how international law understands gray zone tactics is unclear. As a result, victim states may struggle to analyze and effectively respond to these tactics, and responses among states may not be consistent.

Because many gray zone tactics involve one state employing its military forces against another state's military forces, a use-of-force framework is a logical place to begin a legal analysis to determine available response options. However, this framework may be unsatisfying to victim states for several reasons, and may raise broader concerns for the international community in general. First, not all military-on-military gray zone tactics are clear violations of the prohibition on the use of force. In those cases, a use-of-force framework will not provide victim states with any response options. Further, even where these tactics do appear to be unlawful threats of or uses of force, they often do not rise to the level of armed attack, thus eliminating a use of force in purported self-defense as a viable response option for most states.²⁴⁸ Even if a use of force in self-defense was valid, some states may be incapable of or unwilling to use forcible responses, and so additional, meaningful response options are crucial to effectively address the gray zone problem. Finally, gray zone tactics are often objectively minor acts which are completed in a matter of minutes, making non-forcible response options under this framework, such as referral to the U.N. Security Council or countermeasures, potentially unrealistic.²⁴⁹ As a result, victim states facing tactics such as those employed by Russia, China, and Iran may be frustrated with the use-of-force framework's failure to offer effective response options.

As an alternative, this Article analyzed military-on-military gray zone tactics under an unlawful intervention framework. The ability to invoke the principle of non-intervention is noteworthy because it adds to victim state response options, particularly those involving public attribution and diplomatic messaging. However, successful application of this principle—at least in its classical

²⁴⁷ See Wirtz, *supra* note 3, at 110.

²⁴⁸ As discussed in note 32, *supra*, the United States in particular asserts the view that no gap exists between an unlawful use of force under article 2(4) of the U.N. Charter and an armed attack as contemplated by article 51 of the U.N. Charter, and that imminent armed attacks also trigger the right of self-defense. However, the United States has thus far refrained from responding to the gray zone tactics referenced above with force.

²⁴⁹ There may be an exception in the case of repeated gray zone tactics. In cases where victim States have reason to believe gray zone tactics will be repeated in the future (perhaps as in the case of the Russian buzzing or Iranian armed small boat harassment), countermeasures may be feasible.

elaboration—is likely to be difficult. In particular, victim states may struggle to show that a gray zone tactic was directed at matters falling solely within the victim state’s domestic affairs. As such, attempts to use the principle of non-intervention to hold provoking states internationally responsible for their tactics likely asks too much of the principle when the incidents at issue take place in international spaces such as the sea.

Another possibility is that a victim state could seek to hold the provoking state internationally responsible for the breach of international obligations other than the prohibition on the use of force or the principle of non-intervention. For example, the United States might pursue a claim against Russia for violations of the Prevention of Incidents On and Over the High Seas agreement, and the United Kingdom might pursue a claim against Iran for violations of the customary law of the sea. Victim states have thus far elected not to pursue this option, perhaps for a range of diplomatic, political, and other reasons. Though victim states have declined to take this route, their declination does not mean that this option should be discounted, as it has the potential to allow for a range of non-forcible countermeasures—a response option often ignored.

However, if one is of the opinion that existing agreements and international norms fail to adequately encompass and offer meaningful responses to the gray zone problem, a new approach should be considered. At their heart, gray zone tactics are frustrating because they are individually so minor as to make most response options seem excessive. In this way, gray zone tactics are clever campaigns of harassment, which, over time, have the potential to erode the legal status quo between states. Perhaps the international community should consider a new norm against harassment or nuisance as a way to address these tactics.

At a minimum, the problem of gray zone tactics is more complex than may appear at first glance. That the legal status of, appropriate analytical framework for, and response options to gray zone tactics remain unclear and unsatisfying is concerning, both for victim states and for international law. A victim state’s mischaracterization of or hasty response to such tactics has the potential to trigger the escalation of military engagements, resulting in serious consequences. Further, victim states that conclude that current international law provides no meaningful response options may eventually tire of enduring these tactics, and begin to stretch their determinations of ‘use of force’ and ‘armed attack’ in order to encompass gray zone tactics and provide additional response options.²⁵⁰ If powerful states take this approach, there is the potential that such responses may become normalized, a development that would weaken international norms designed to restrain the use of

²⁵⁰ An example of this sort of shift may currently be emerging: On April 22, 2020, President Donald Trump tweeted that he had “instructed the United States Navy to shoot down and destroy any and all Iranian gunboats if they harass our ships at sea.” Donald J. Trump, TWITTER (Apr. 22, 2020), *supra* note 72. An accompanying fact sheet from the U.S. State Department noted that President Trump “will not tolerate or appease Iran’s foreign policy of violence and intimidation.” *Factsheet: Iran’s History of Naval Provocations*, *supra* note 71.

force.²⁵¹ Equally objectionable, gray zone tactics themselves may become normalized if victim states are repeatedly left without effective response options. Given these stakes, the international community should clarify the legal issues surrounding gray zone tactics. To do otherwise risks allowing the potential reshaping of international norms regarding acceptable interactions between states—including those involving the use of force.

²⁵¹ A counterargument is that a majority of gray zone tactics actually *enforce* existing norms against the threat of or use of force, as they tend to avoid rising to the level of armed attack and thus any resulting uses of force in self-defense. However, while a majority of gray zone tactics may avoid rising to the level of actual armed attacks, they do not as clearly also avoid violating the prohibition on the threat of or use of force or rising to the level of imminent armed attacks, a transgression that must be taken seriously.