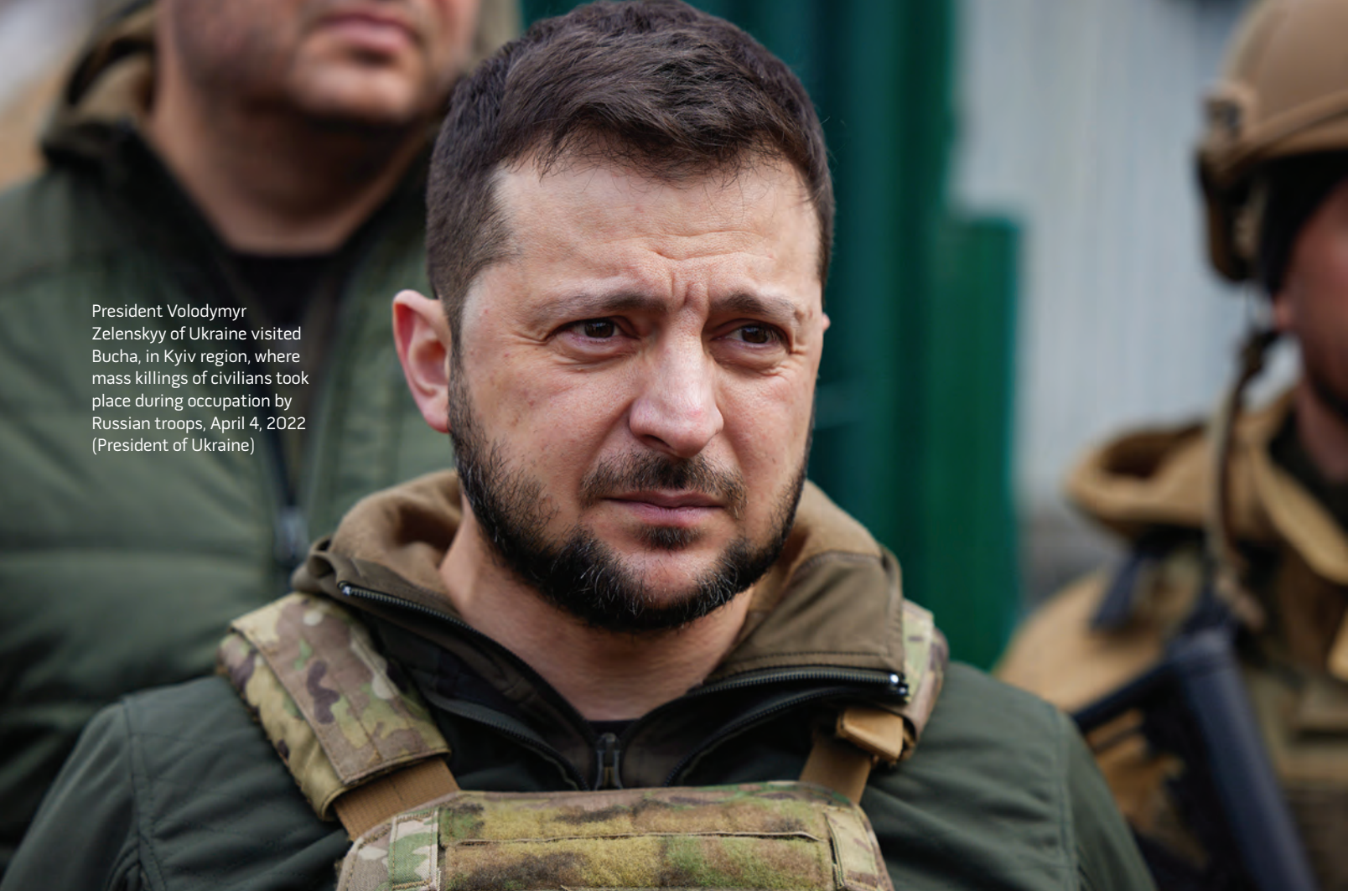

President Volodymyr Zelenskyy of Ukraine visited Bucha, in Kyiv region, where mass killings of civilians took place during occupation by Russian troops, April 4, 2022 (President of Ukraine)

The Rules of the Game

Great Power Competition and International Law

By Durward Elton Johnson

The varieties of skullduggery which make up the repertoire of the totalitarian government are just about as unlimited as human ingenuity itself, and just about as unpleasant. For, as you know, no holds are barred. There are no rules of the game. They can do anything that they think is in their interests.

—George F. Kennan

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These words were delivered by U.S. diplomat George Kennan during lectures at the National War College to describe the Soviet Union in 1946. It was the beginning of the Cold War and the U.S. policy of containment. The case is being made that these words still apply today. Consider the National Security Strategy,[1] National Defense Strategy,[2] and operational concepts in

joint military doctrine[3] painting a bleak picture of global threats and persistent competition. In fact, these documents portray the United States as being at another inflection point in modern conflict with a return to Great Power competition. For the Department of Defense (DOD), a renewed focus on state-on-state strategic competition is premised on revisionist powers, such as Russia and China, and rogue regimes, such as Iran and North Korea, exploiting U.S. vulnerabilities by taking deliberately malicious actions carefully crafted to avoid armed conflict and a powerful military response.[4] This is a problem.

U.S. military operational concepts describe the notion of a competition continuum—"a world of enduring competition"[5]—acknowledging the need for the U.S. military to reframe how it competes in the space between peacetime and armed conflict, commonly known as the gray zone.[6] To do so, DOD calls for a more nuanced approach, characterizing the traditional peace/war binary model as an artificial distinction in today's global environment. Military doctrine portrays strategic, operational, and legal uncertainty in the gray zone, making it difficult to respond, fight, and win. In this space, a critical first step is identifying whether a legal framework can enable strategic and operational solutions within the boundaries of the law. This is especially true for nations such as the United States that promote the rule of law and advocate compliance with international law.

Indeed, if the United States failed to advocate the rule of international law, Kennan's observations that "[t]here are no rules of the game" and that states will "do anything that they think is in their interests" would become the reality of Great Power competition, dissolving the international rules-based order. While there are scores of international law rules, three loom large within the gray zone. Within this space, international law can be reframed as a triad—composed of sovereignty, nonintervention, and the proscription on the use of force—offering the United States a better foundation for developing new national security strategies to compete outside traditional armed conflict while upholding its position as a standard-bearer for the rule of law. The triad framework also provides the basis for measures of self-help, arming the United States with a menu of response options to counter malign behavior.

Removing the veil of legal uncertainty gives U.S. competitors less opportunity to exploit perceived gaps in international law. While specific application of international law to specific activities requires careful legal analysis, understanding the basis for lawful action enables the development of new national security strategies to counter malign behavior. This article does not address domestic law or policy. Instead, it explores *international* legal obligations to provide a prism through which domestic law and policy can be fashioned to meet U.S. national security objectives.

Freedom to Act

The modern state system derives from the Peace of Westphalia in 1648, which recognized that states are sovereign and generally not subject to the jurisdiction of others.[7] Absent international obligations generally formed through treaties or customary international law, states generally have the right to engage in any national security activity subject only to internal domestic law and policy. This concept, also known as the Lotus principle, is reflected in the 1927 S.S. *Lotus* case in which the Permanent Court of International Justice recognized that

> [i]*nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed*.[8]

Thus, unless the United States chooses to ratify a treaty or accept a certain activity as prohibited under customary international law, almost nothing in international law forbids that activity. This is true even when other states claim an activity is customary, so long as the United States has consistently objected to that emerging norm—in other words, a persistent objector.[9]

Consider treaties such as the Charter of the United Nations (UN Charter), the Statute of the International Court of Justice, and the Geneva Conventions I through IV. The United States ratified these treaties, creating international obligations. In contrast, the United States has not ratified other multilateral treaties such as the two Protocols to the Geneva Conventions and the Vienna Convention on the Law of Treaties. Since those treaties were not ratified, the United States is not bound by them, except where the United States treats certain aspects as customary international law.[10] Where certain aspects are considered customary by other states, the United States only needs to persistently object to ensure that it is not bound by the rule.

Customary international law is described as "a general practice accepted as law." This description is derived from Article 38 of the Statute of the International Court of Justice, a treaty the United States ratified along with all other UN member states—193 to be exact.[11] Essentially, states make binding customary international law through consistent practice combined with a sense of legal obligation—that is, *opinio juris*.[12] State practice, by itself, is not enough. Colloquially, states must practice what they preach. If enough states replicate the same behavior, it becomes custom subject to the exceptions of persistent objectors. Requiring these two aspects is generally accepted by most prominent legal scholars and illuminated in seminal works such as *Oppenheim's International Law* and *Brownlie's Principles of Public International Law*. A review of the *Department of Defense Law of War Manual* affirms the United States shares this view. Well-known sources of customary international law are found in official opinions of government legal advisers, rules of engagement, domestic court opinions, military manuals, and certain treaties and other international

instruments.[13] The bottom line is that states, and no one else, make international law. The United States subjects itself to certain international obligations of its own choosing. The only exceptions to this essential aspect of creating international law are peremptory norms, also called *jus cogens*, which are fundamental principles, such as the prohibition against slavery, genocide, and crimes against humanity.[14]

Across the Competition Continuum

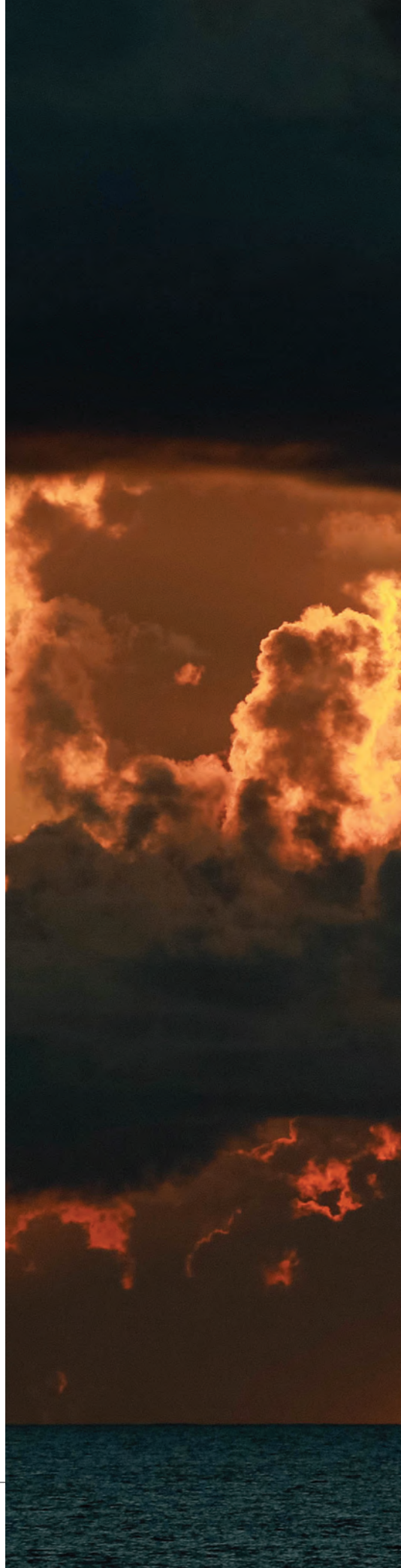
U.S. military operational concepts rightly argue that competition across the continuum requires more nuance, especially in the space between peacetime and armed conflict. International law is the foundation to enable new strategic and operational solutions. Arguably, gaps exist in current national strategy, policy, and domestic legal authorities to address hostile activities outside of armed conflict. However, international law is generally more permissive in allowing states to engage in national security activities as well as respond to other states' hostile behavior outside of armed conflict. There is no gap and certainly no gray zone in international law—just the need to understand, apply, and interpret the correct body of international law.

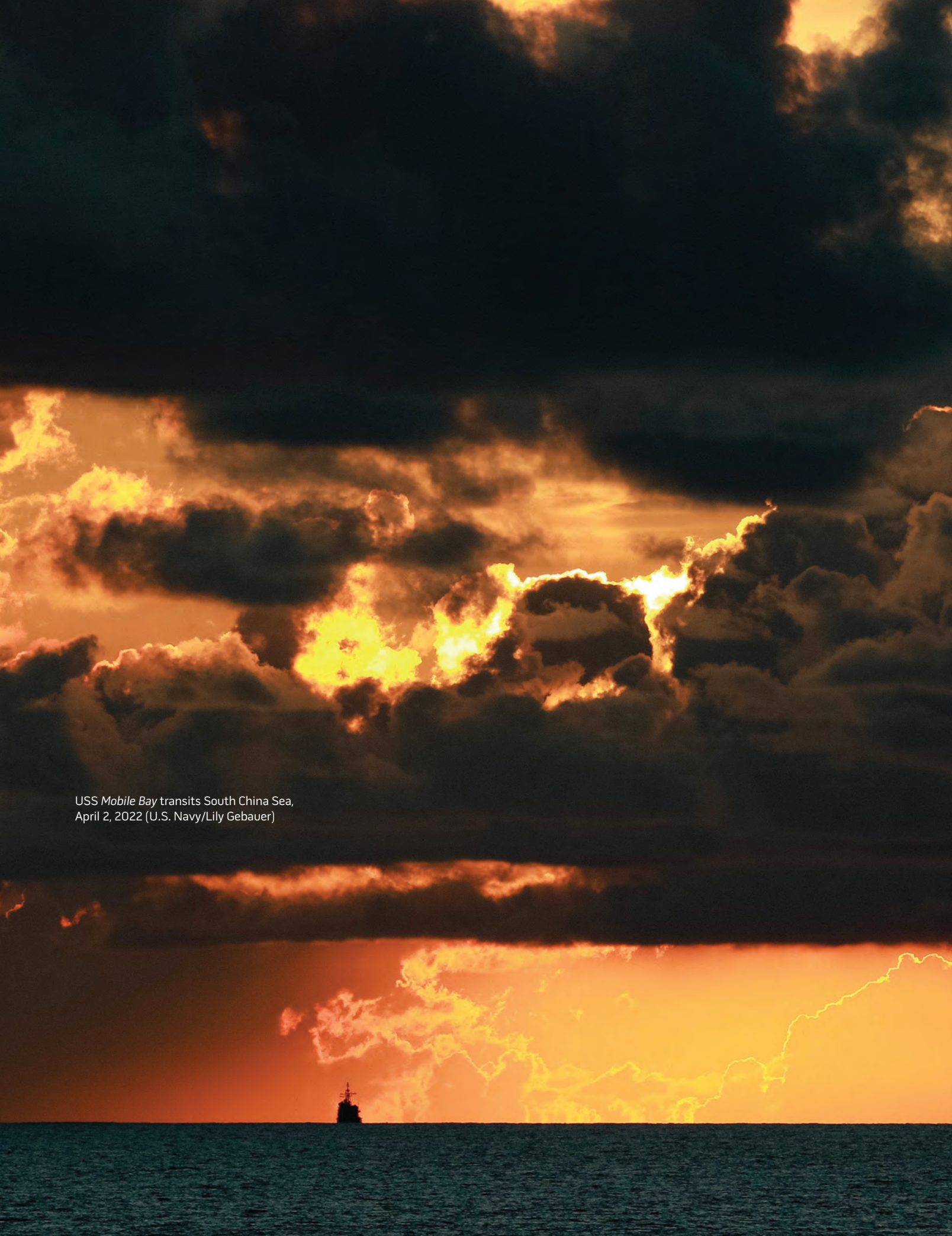
State-on-state behavior, whether during an armed conflict or outside of one, is regulated by primary rules of international law. These rules establish international obligations between states.[15] This article does not address international human rights law and its application to state behavior toward individuals. The law of armed conflict (LOAC), also known as international humanitarian law or the law of war, regulates the activities of states that are part of an armed conflict. LOAC is primarily found in customary international law and treaties such as the Geneva Conventions I through IV. Outside of armed conflict, the use of interstate force is primarily regulated by the UN Charter and customary international law. Outside of armed conflict and the use of interstate force, customary international law applies to state-on-state behavior.

However, secondary rules of international law, commonly known as Responsibility of States for Internationally Wrongful Acts, begin when international obligations are violated and measures of self-help available to an affected state are limited.[16] In 2002, the UN General Assembly adopted a report of the International Law Commission that contained draft articles on state responsibility never ratified by any state.[17] The consensus among scholars and states is the draft articles on state responsibility generally codify customary international law principles describing what are termed *internationally wrongful acts*.[18] The draft articles also provide states injured by internationally wrongful acts attributable to other states with response options to counter and stop the unlawful activity. Call it measures of self-help. When considering the customary state responsibility rules, along with treaty and customary international law obligations that apply to state-on-state behavior, an international legal framework can be applied across the competition continuum. Think of it as a triad framework in the space between peacetime and armed conflict. Understanding and applying the triad framework provide a legal basis for the United States to engage in national security activities outside of armed conflict and to counter activities that harm U.S. national security regardless of whether the malign behavior falls in the gray zone.

The Triad Framework

This framework involves three distinct and overlapping concepts that create international obligations and regulate state-on-state activity: the principles of sovereignty and nonintervention and the proscription on the use of armed force. Generally, if a state's activities comply with these three concepts, those activities are unregulated under international law, providing freedom to engage in those activities. If a state violates an aspect of the triad, however, it commits an internationally wrongful act, triggering the right for an injured state to respond. While there are exceptions to these guidelines and differing interpretations on the peripheries of the





USS *Mobile Bay* transits South China Sea, April 2, 2022 (U.S. Navy/Lily Gebauer)

American and German crew members sit side-by-side working onboard North Atlantic Treaty Organization E-3A Airborne Warning & Control System, patrolling Allied airspace in Eastern Europe in wake of Russia's attack on Ukraine, March 1, 2022 (NATO)

rules, the triad framework provides a baseline for U.S. national security strategy to counter malign behavior.

The principle of sovereignty is perhaps the most fundamental international law principle in the triad framework and undergirds the other two. Sovereignty connotes a state's independence over its territory and freedom to choose how to conduct its affairs inside and outside its own borders. Territorial sovereignty applies to a state's control over the people, objects, resources, and state activities within its own borders. Classic violations of territorial sovereignty include a state sending "its troops, its warships, or its police forces into or through foreign territory, or its aircraft over it."[19]

Returning to the Lotus principle, the Permanent Court of International Justice affirmed a state "may not exercise its power in any form in the territory of another State."[20] The rule, however, is not absolute, as not all activities a state conducts inside another state violate sovereignty.

Consider the concept of innocent passage.[21] As an exception to violating territorial sovereignty, the UN Convention on the Law of the Sea allows for a ship to transit through another state's territorial sea without that state's consent. Disagreements between leading international cyber law scholars on whether a state violates another state's sovereignty if engaged in unknown or nonconsensual cyber activities on its territory are a more contemporary example.[22] Does emplacing not-yet-activated malware into another state's cyber infrastructure, in and of itself, violate sovereignty?

Consider also espionage. Most leading scholars have long asserted espionage either does not violate sovereignty or has become a carved-out exception based on overwhelming state practice. In fact, DOD in its "Assessment of International Legal Issues in Information Operations" expressly stated the lack of international legal sanctions for espionage may be due to the international law doctrine of "'*tu quoque*' (roughly, a nation has no standing to complain about a practice

in which it itself engages)."[23] Moreover, when a state receives the consent of another state to conduct a myriad of activities on its territory, there can be no violation of sovereignty.[24]

Somewhat interdependent with sovereignty is the overlapping primary rule of nonintervention. There is general agreement supported by leading scholars and further confirmed in opinions of the International Court of Justice that nonintervention is a rule of customary international law.[25] In its 1986 judgment in the Nicaragua case, the International Court of Justice confirmed "the right of every sovereign state to conduct its affairs without outside interference."[26] This right prohibits states from intervening "directly or indirectly in internal or external affairs of other States."[27] This is commonly known as a state's *domaine réservé*. While the use of interstate armed force under Article 2(4) of the UN Charter is the most obvious example, activities that do not rise to the level of armed force may be wrongful intervention in another state's internal affairs. The critical requirement to violate this rule is coercion affecting a state's *domaine réservé*.[28] While there are differing interpretations on the fringes of the meaning of coercion, the prevailing view among scholars is that coercion simply means the affected state has no "control over the matter in question."[29] It is more than just interference with state affairs; it must be "dictatorial," depriving the affected state of its free will.[30]

The third component of the triad framework is the proscription on the use of armed aggression against another state. Pursuant to Article 2(4) of the UN Charter, "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." This fundamental treaty rule is also customary international law. However, the charter does not define the term *force*. In fact, there is no authoritative definition of or criteria for a prohibited *use of force*. Some scholars view that such force is limited to armed—or military—action.[31] Others argue that Article 2(4) also covers physical force of a nonmilitary nature.[32] For example, former Department of State legal advisor Abraham Sofaer defines force as any manner of physical violence.[33] At a minimum, there is broad consensus that actions that injure or kill people, or physically damage or destroy objects beyond a *de minimis* level, amount to a use of force. Other forms of coercion, such as economic, political, or psychological campaigns, are not prohibited under Article 2(4), although they still might violate the principle of sovereignty.[34] These coercive measures also have the potential to violate other international obligations formed through other treaties or customary international law such as the nonintervention rule, but they fall outside the scope of Article 2(4).

Understanding the triad framework serves as the international legal foundation for the United States to engage in national security activities around the globe outside of armed conflict. If U.S. national security activities do not violate another state's sovereignty, coercively intervene in another state's affairs, or are not a prohibited use of force outside its own borders, then the activity may be used lawfully under international law to achieve national strategic objectives absent any specific treaties the United States may have with the target state. Yet international law provides exceptions to compliance with the triad framework, absent any other relevant international agreements, instruments, or customary international law.

Countering Malign Behavior

Where another state, such as Russia or China, engages in internationally wrongful acts that injure the United States, a menu of response options is available to counter the behavior. In fact, many of these measures would be considered violations of the triad. However, they are lawfully justified when used to counter an internationally wrongful act. Think of these options as lawful measures of self-help. There are four major response options relevant to counter hostile and malicious activities below the threshold of armed conflict. The four response options are retorsion, countermeasures, self-defense, and the legal doctrine of necessity.

First, the United States always has the right to retorsion. Examples of retorsion include expulsion of diplomats, economic sanctions, embargoes, and the withdrawal of aid.[35] These are perhaps the most common unilateral measures taken by states. Retorsion options are normally done in response to an internationally wrongful act of another state, yet they need not be.[36] Retorsion may be used in response to any undesired conduct of another state. But it must be in response. They are lawful measures used to compel other states to cease certain activities because the activities, in and of themselves, do not breach an international obligation as defined in the triad framework. They also cannot violate any treaties or international agreements the United States may have with another state, such as the United States–Mexico–Canada Agreement[37] or the U.S. and China Phase One Trade Agreement.[38] Indeed, because they are lawful measures, albeit unfriendly or unwelcome conduct, states are free to engage in retorsion.

Consider the removal of 60 Russian officials from the United States in 2018 after the poisoning of former Russian spy Sergei Skripal and his daughter in the United Kingdom. Senior U.S. officials stated the measure was taken due to Russia's use of a military-grade chemical weapon in the territory of another state—the United Kingdom.[39] Or consider a series of additional economic sanctions by the United States against Iran in response to Iran and its proxy attacks against U.S. forces and interests in Iraq. According to the State Department, the United States initiated new sanctions against senior Iranian leaders and numerous sectors of the Iranian economy including construction, manufacturing, textiles, and mining.[40] While the United States took measures of retorsion against Russia and Iran, the events in question also arguably provided other avenues of self-help, such as countermeasures and self-defense.

Countermeasures are a broad and flexible concept. This legal doctrine

allows the United States to counter internationally wrongful acts committed by another state with a response, except armed force, that under other circumstances would be considered unlawful. They can be employed solely to stop hostile or malicious activity, not for purposes of retribution. Countermeasures may be used to compel and convince adversaries to cease their activity. The doctrine justifies or excuses violating portions of the triad framework, including the offending state's sovereignty or coercively intervening to counter the malign behavior. It also allows a state to violate any other international obligation formed through treaties or other international instruments, except the use of force under Article 2(4) of the UN Charter. However, certain conditions apply. Normally, states are required to provide advanced notice to the offending state to give it an opportunity to cease the activity. Yet this may be impractical when "urgent countermeasures" are necessary to avoid further injury or may give the offending state an opportunity to defeat the countermeasure.[41] The countermeasure must also be proportionate. In this sense, the response must be "commensurate with the injury suffered." If the response is comparable in size and degree considering the gravity of the internationally wrongful act, it does not matter the means or methods of the response. The response is not limited to the same type of activity the offending state engaged in. The response can also be one measure or multiple measures if it is proportionate.[42]

Consider the events during the 2018 U.S. midterm elections. According to the *Washington Post* and multiple other news outlets, the United States blocked Internet access of the Russian Internet Research Agency (IRA). The IRA was offline during the day of the midterm elections and a few days after until tallying of the votes was complete to ensure the IRA did not interfere.[43] Let us assume the cyber operation, without justification, would be an internationally wrongful act, either by violating Russia's sovereignty or the rule of intervention. U.S. officials assessed the IRA works on behalf of the Russian government and concluded it was partly responsible for Russian interference in the 2016 U.S. Presidential elections. Assuming Russia, through the IRA, was engaged in a disinformation campaign to disrupt the 2018 midterm elections and it was deemed an internationally wrongful act, taking the IRA offline is likely a valid countermeasure. Making these assumptions, the United States is not limited to an in-kind response. If the Russians committed an internationally wrongful act by interfering in U.S. elections, the United States could resort to any measures short of armed force to stop the malicious activity subject to the requirements for countermeasures. In this case, blocking Internet access was enough.

The most powerful response option is self-defense. Unlike countermeasures, the principle of self-defense allows the United States to respond with interstate armed force only subject to certain requirements. Based on treaty law under Article 51 of the UN Charter and customary international law, the United States has the "inherent right" to defend itself against an armed attack. The term *armed attack*, however, is subject to some debate. There is a prevailing view recognized by the International Court of Justice in the aforementioned 1986 Nicaragua case that the notion of an armed attack is always a prohibited use of force under Article 2(4), but not all uses of force falling within the Article 2(4) prohibition qualify as an armed attack.[44] Accepting this view creates a gap where malicious state actors could engage in forceful actions in violation of Article 2(4) of the UN Charter without triggering the right of an injured state to forcefully respond; those hostile forceful actions are not considered severe enough to constitute an armed attack. This is significant because U.S. competitors would rather engage in hostile and malicious activities without generating a powerful military response. Instead, the United States would be relegated to only nonforceful countermeasures to stop forceful actions of a malicious state actor.

As expressed in the *DOD Law of War Manual*, however, the United States "has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force."[45] Thus, the U.S. view most aptly reflects the notion that no gap exists between a "use of force" and an "armed attack"—a position not expressly shared by other states. Most notably, Japan appears to be inching closer to the U.S. view.[46] Other U.S. allies and partners, nevertheless, do not openly share this view, which may create a dilemma. Where there is disagreement about whether hostile actions qualify as an armed attack during combined operations or other activities that involve other states, the availability of forceful response options may be limited.

Yet assuming a malicious state actor illegally uses force, the United States reserves its right to respond with armed force only subject to the requirements of necessity and proportionality.[47] *Necessity* essentially means that no reasonable alternative means other than armed force are available to deter or defeat the armed attack.[48] Proportionality in the self-defense context is different from required in countermeasures or during armed conflict. *Proportionality* for purposes of self-defense allows the use of armed force "to the extent that it is required to repel the armed attack and to restore the security of the party attacked."[49] While proportionality in the context of countermeasures must be commensurate in scale and intensity, a defensive forceful measure may be disproportionately larger or smaller depending on what is needed to defeat the armed attack. There can be multiple measures or one large-scale response, so long as it satisfies the requirements of necessity and proportionality.

To illustrate, the United States targeted and killed Major General Qasem Soleimani, a senior Iranian military commander in charge of the Quds Force within the Islamic Revolutionary Guard Corps. The United States justified this use of armed force as a self-defense measure against a persistent and continuing threat. The initial statement by DOD confirms that Soleimani "was actively developing plans to attack" U.S. personnel, was "responsible for the deaths of hundreds" of troops, and "orchestrated attacks" against U.S. interests in Iraq over the preceding months.[50] While there is significant disagreement in blog posts and

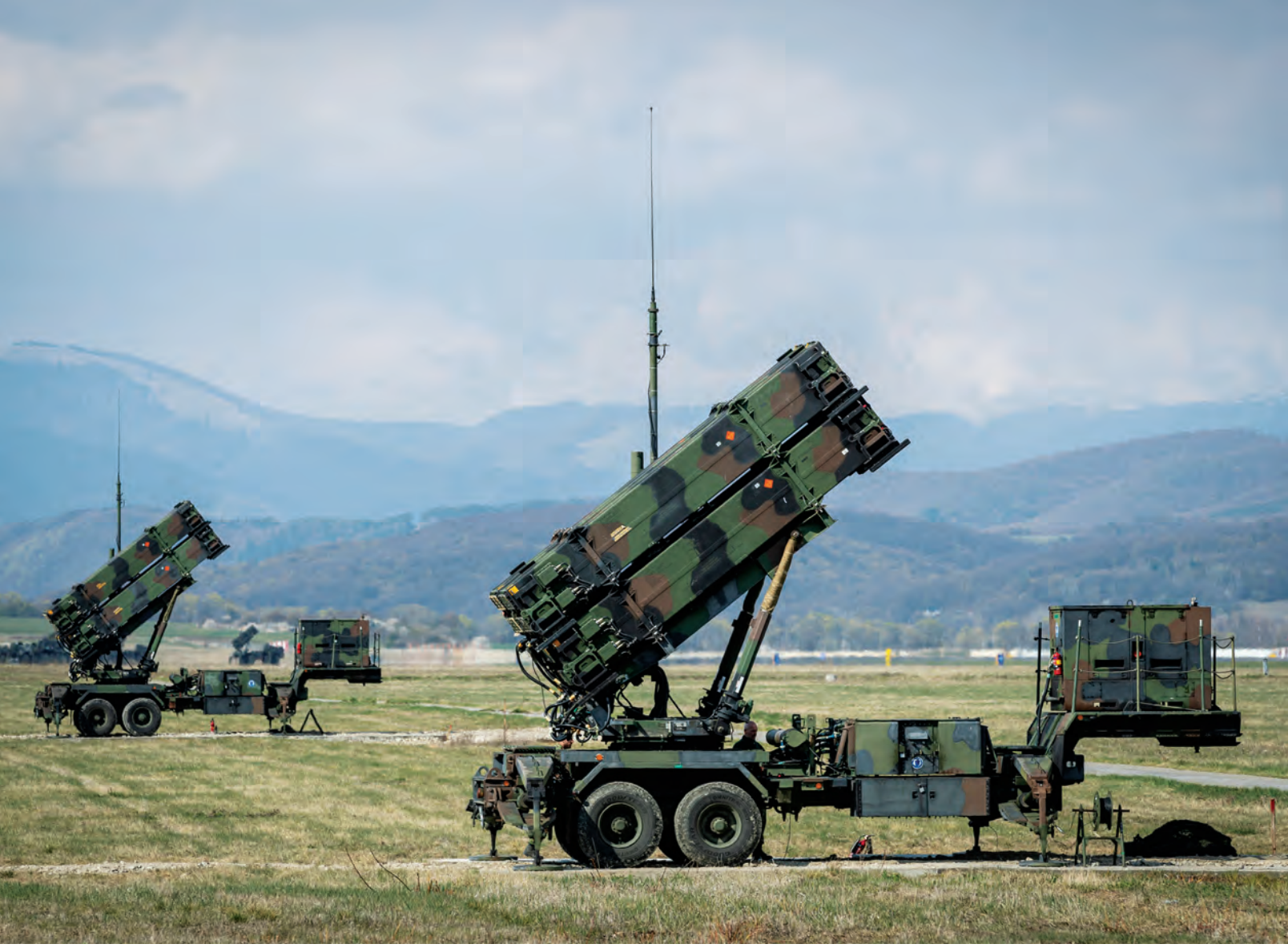
Standing NATO Maritime Group 2 ships and submarines sail in formation in Ionian Sea off coast of Sicily, February 21, 2022, during exercise Dynamic Manta 22 (Courtesy French Navy/Stephane Dzioba)

academic circles regarding the legality of the strike, these analyses are based on incomplete information and a lack of access to the intelligence that likely informed the U.S. decision to forcefully respond. Employment of forceful defensive measures must be analyzed case by case on all available information known at the time of the decision, not *ex post facto*.

The final and seldom-used response option is based on the plea of necessity. The response may be of any nature, means, or methods, subject only to the requirements to invoke the doctrine. Necessity may be justified in situations that create a "grave and imminent peril" to an "essential interest" of the state. Threats to the existence of the state are the most obvious case but may apply in the absence of an existential threat. Simply, it depends on all the circumstances. The response must also be the only means available to defend the essential interest and cannot "seriously impair" an essential interest of another state. Given these high standards, the doctrine of necessity is rarely used. In situations that may apply, necessity likely overlaps with other lawful response options, such as countermeasures or self-defense. However, the doctrine of necessity provides some flexibility as there is no requirement that the triggering situation be deemed an internationally wrongful act or attributable to another state.[51]

The Starting Point

With a renewed focus on Great Power competition, how the United States reframes competition across the continuum is vital, most notably, in the space between peacetime and armed conflict. This gray zone is being leveraged to diminish U.S. global reach and power while creating discord among the United States, its allies, and partners. For the United States to effectively engage in this space to counter malign



Dutch-German Air and Missile Defense Task Force deploys Patriot surface-to-air missile systems near Sliač Air Base, Slovakia, to reinforce defense capabilities following Russia's invasion of Ukraine, April 19, 2022 (Courtesy Mediacentrum Defensie/Gregory Fréni)

behavior, understanding and applying international law is the starting point. Viewing international law through the lens of the triad framework offers a better foundation for developing new national security strategies to compete outside of traditional armed conflict. The framework also provides the basis for measures of self-help arming the United States with the ability to counter malicious state activities.

While this article provides guidelines for understanding and applying international law, context matters. Specific activities in specific situations require careful legal analysis. Regardless, the crux is the United States is not bound by international rules that constrain its ability to compete, fight, and win in the current global operational environment. Certainly, international law need not be thought of as a binary model only applying to peacetime or wartime. Once reframed, U.S. domestic legal authorities, strategy, and policy can be reshaped to meet the needs of persistent engagement and undermine U.S. competitor objectives. **JFQ**

Notes

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[13] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), 21–22.

[14] Ibid., 595.

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[16] General Assembly resolution 56/83, *Responsibility of States for Internationally Wrong Acts*, A/RES/56/83 (January 28, 2002), available at <https://undocs.org/en/A/RES/56/83>.

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[19] Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*, vol. 1, *Peace*, 9th ed. (London: Longman Group, 1992), 386.

[20] S.S. *Lotus*, 18.

[21] Crawford, *Brownlie's Principles*, 300–301.

[22] Gary P. Corn and Robert Taylor, "Sovereignty in the Age of Cyber," *AJIL Unbound*, vol. 111 (October 2017), 207–212; cf. Michael N. Schmitt and Liis Vihul, "Respect for Sovereignty in Cyberspace," *Texas Law Review* 95, no. 7 (June 2017), 1639–1676.

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[26] *Nicaragua v. United States of America*, para. 202.

[27] Ibid., para. 205.

[28] Jennings and Watts, *Oppenheim's International Law*, 430–431; *Nicaragua v. United States of America*, para. 205.

[29] Jennings and Watts, *Oppenheim's International Law*, 432.

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[31] Albrecht Randelzhofer and Oliver Dörr, "Article 2(4)," *The Charter of the United Nations: A Commentary*, vol. 1, 3rd ed., ed. Bruno Simma et al. (Oxford: Oxford University Press, 2012), 200–234.

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[33] Abraham D. Sofaer, "International Law and the Use of Force," *American Society of International Law Proceedings* 82 (April 1988), 422.

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[36] Thomas Geigrich, "Retorsion," in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011), § 1-3.

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