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Malcolm Jorgensen

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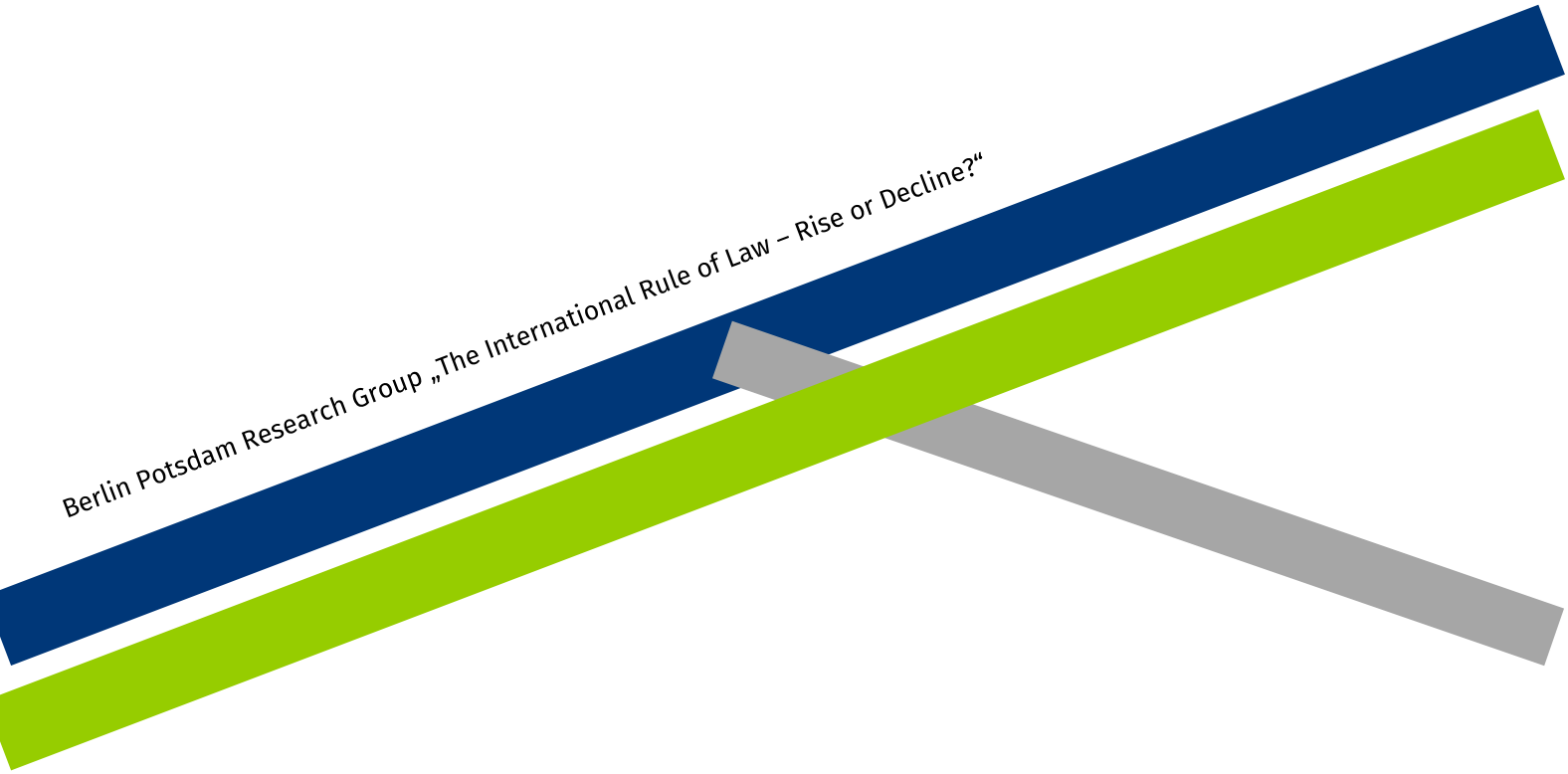

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The United States and the International Law of Global Security

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Abstract:

For the United States the 'international law of global security' is, in a unique sense, synonymous with the entire project of constructing global legal order. Uniquely preponderant power enjoyed since the end of the Second World War has allowed US preferences to manifest not merely in specific rules and regimes, but in purposive development of the entire structure of global legal order to favour American security interests. Perceptions of a recent decline in this order now find expression in advocacy for a 'liberal' or 'rules-based' international order, as the claimed foundation for global prosperity and security. This working paper seeks to map out the parameters of US contributions to the global security order by uncovering the strategic and political foundations of its engagement with the international law of global security. The paper begins by reflecting on competing US conceptions of the relationship between national security and global order as they evolved across the twentieth century. The focus then turns to three significant trends defining the contemporary field. First are US attitudes toward multilateral institutions and global security, and the ongoing contest between beliefs that they are mutually reinforcing versus beliefs that US security and global institutions sit in zero-sum opposition. Second is the impact of the generational 'War on Terror', which has yielded more permissive interpretation and development of laws governing the global use of violence. The final trend is that towards competitive geopolitical interests restructuring international law, which are evident across diverse areas ranging from global economics, to cybersecurity, to the fragmentation of global order into spheres of influence. Looking ahead, a confluence of rising geopolitical competitors with divergent legal conceptions, and conflicted domestic support for the legitimacy and desirability of US global leadership, emerge as leading forces already reshaping the global security order.

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Contents:

1. Introduction[1]

For the United States the 'international law of global security' is, in a unique sense, synonymous with the entire project of constructing global legal order. Uniquely preponderant global power enjoyed since the end of the Second World War has translated into unparalleled US influence over the design and development of international law. US preferences thus manifest not merely in specific rules and regimes, but in purposive development of the entire structure of global legal order to favour American security interests. The task of characterising this complex history is itself deeply political, but advocates have increasingly settled on appeals to variants of a US-led 'liberal' or 'rules-based' international order, as the claimed foundation for global prosperity and security.[2] These accounts gravitate toward an order fixed on key post-WWII institutions and normative principles, especially as they rose in the immediate post-Cold War era, which were largely constructed by and designed to underpin American and global security.[3] Such formulations remain forensic constructions of an idealised and predominantly Western-led legal order that, even if never fully realised, has claimed ideals of unified and non-discriminatory rules governing a single coherent legal system.[4] The urgency with which its main beneficiaries now seek to define the US-led order emerges from a set of interrelated and unprecedented challenges that include increasing geopolitical competition, most prominently from China and Russia, security threats by non-state and transnational actors, and by wavering ideological commitments of the US itself. As foundations of the order decline, the particularistic and often contradictory ways in which American national security interests are pursued through law have become ever more apparent behind the veil of the 'liberal international order'.

Whatever the structure of the global legal order, its function in US national security terms remains to protect 'the fundamental values and core interests necessary to the continued existence and vitality of the state'.[5] The anxiety of advocates for variations of the liberal or rules-based order is thus not that rules will disappear from key domains of global politics, but rather that fragmented and competing bodies of rules will emerge in which rights and obligations of States are incapable of reconciliation within the terms of US-led institutions. A core theme of this working paper is thus the recurrent tension across a range of security challenges of the US seeking to both sustain universal claims in its vision for international legal order, while simultaneously pursuing competitive security advantages through law. The working paper begins by reflecting on competing US conceptions of the relationship between national security and global order as they evolved across the twentieth century. The focus then turns to three significant trends defining the contemporary field. First are US attitudes toward multilateral institutions and global security, and the ongoing contest between beliefs that they are mutually reinforcing versus beliefs that US security and global institutions sit in zero-sum opposition. Second is the impact of the generational 'War on Terror', which has yielded more permissive interpretation and development of laws governing the global use of violence. The

[1] A version of this working paper will appear as a chapter in Robin Geiß and Nils Melzer (eds.), *The Oxford Handbook on the International Law of Global Security* (Oxford University Press, forthcoming 2020).

[2] See for example: G. John Ikenberry, *Liberal leviathan: The origins, crisis, and transformation of the American world order* (Princeton University Press 2011) 2; United States Department of Defense, *Summary of the 2018 National Defense Strategy of the United States of America* (United States Department of Defense 2018) 1-2.

[3] G. John Ikenberry, 'Why the Liberal World Order Will Survive' (2018) 32 Ethics & Int'l Aff 17, 17 & 23.

[4] On constructions of the 'international' according to Western interests see: Anthea Roberts, *Is International Law International?* (Oxford University Press 2017) 5.

[5] Amos A. Jordan et al., *American National Security* (6th edn., Johns Hopkins UP 2009) 3-4.

final trend is that towards competitive geopolitical interests restructuring international law, which are evident across diverse areas ranging from global economics, to cybersecurity, to the fragmentation of global order into spheres of influence.

2. Current Status of the Debate

Contestation of American claims to the universality of its global order are nothing new, with US-Soviet confrontation throughout the Cold War effectively yielding 'two systems of international law and two systems of world public order.'[6] These divisions were especially conspicuous in the UN system and the UN Security Council (UNSC) within, which were originally envisioned as the formal rules-based foundations for global security. US leadership oversaw the realisation of President Franklin Roosevelt's vision of the "Four Policemen"[7] into a UNSC structure that formalised the US role at the apex of global security as one of five permanent members (P5).[8] The almost immediate paralysis of the UNSC due to Cold War divisions did not constrain the US in exercising executive type global functions however, but merely normalised its use of military power without UNSC authorisation.[9] The preference for approaching international law via unilateral interpretations was exemplified in the 'Reagan corollary' to international law, which made a virtue of the marginalised role of UN institutions in 'an attempt to pressure the international legal system into changing in a manner beneficial to United States interests'.[10] This strategy seemed close to realisation in the immediate post-Cold War years, with the US promulgating the unity between its national and global security interests through law. The high-water mark was likely the 1991 Persian Gulf War in which the US reasserted a central UNSC role in forging a 'new world order – a world where the rule of law, not the law of the jungle, governs the conduct of nations'.[11] Yet appearance of consensus quickly declined, as the US met with forceful opposition to its security vision in relation to its many subsequent uses and legal justifications for force outside of UNSC authorisation, including prominently in the 1999 NATO intervention in Kosovo, in Iraq in 2003, and throughout the Syrian Civil War.[12] In Glennon's pithy retelling of history, the UNSC 'hobbled along during the Cold War, underwent a brief resurgence in the 1990s, and then flamed out with Kosovo and Iraq.'[13]

What has remained consistent across both the Cold-War and post-Cold War era is that debates over the US role in global security law have been persistently prompted by the US itself. US claims in high-profile cases have systematically sought to achieve new developments in established understanding of the international rules and institutions governing traditional and emerging security threats. American hegemony has not meant control over every legal development but, rather, that the United

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[6] W. Michael Reisman, 'International Law After the Cold War' (1990) 84 *AJIL* 859, 859.

[7] Comprised of the USA, United Kingdom, Soviet Union and China.

[8] Including France: Evan Luard, *A History of the United Nations: Volume 1: The Years of Western Domination, 1945-1955* (Springer 1982) 18-19 & 24.

[9] David L. Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (Oxford University Press 2009) 3.

[10] Stuart S. Malawer, 'Reagan's Law and Foreign Policy, 1981–1987: The "Reagan Corollary" of International Law' (1988) 29 *HarvInt'l LJ* 85, 85.

[11] George H. W. Bush, 'Address to the Nation Announcing Allied Military Action in the Persian Gulf' (16 January 1991) <www.presidency.ucsb.edu/node/265756>.

[12] See Paul R. Williams & Sophie Pearlman, 'Use of Force in Humanitarian Crises: Addressing the Limitations of UN Security Council Authorization' (2019) 51 *Case WResJInt'l L* 211.

[13] Michael J. Glennon, 'Why the Security Council Failed' (2003) *Foreign Aff* 16, 31.

States has become 'the one against whose ideas regarding the system of international law all others debate'.[14] The consequence of global power preponderance is that the US is

> 'generally averse to limiting its scope of action via treaty; avoids being constrained by those treaties to which it has adhered; and disregards, when inconvenient, customary international law, confident that its breach will be hailed as a new rule.'[15]

Under conditions of hegemony legal scholars and practitioners cannot remain silent when the US engages in such conduct, but are obliged to engage in discourse over the changes being sought in global legal order, and the legitimacy and global security implications of the US role in bringing them about.

Continuity in hegemonic incentives does not however equate to unity in US conceptions of security through law, which have been systematically contested according to the fortunes of domestic electoral politics, geopolitical pressures and ideological forces. The contestation is clearly evident in the periodic National Security Strategy (NSS), in which the president fulfils a Congressional mandate to communicate a conception of national security and the strategy for its attainment.[16] Evolution of these reports over more than 30 years demonstrates that, whereas these reports 'are predominantly convergent on national security ends,' they do in contrast display 'significant divergence' regarding the instrumental role of the law.[17] A prominent example is the marked shift between the administration of President George W. Bush (Bush 43) and its 'vision of American leadership of coalitions unconstrained by formal international institutions,' towards acceptance by President Barack Obama of the strategic value of adhering to 'international standards' prescribed by law.[18] Obama's preface to the NSS 2010 explicitly sets out the strongest version of the perceived positive relationship between upholding a global legal system and American national security:

> The rule of law – and our capacity to enforce it – advances our national security and strengthens our leadership … Around the globe, it allows us to hold actors accountable, while supporting both international security and the stability of the global economy. America's commitment to the rule of law is fundamental to our efforts to build an international order that is capable of confronting the emerging challenges of the 21st century.[19]

The Trump Administration's NSS 2017, in contrast, has referred to the value of 'rules' primarily in the context of a competition for influence within multilateral forums, and avoids any such general commitment to the 'rule of law' as a security ideal at the global level.[20] Setting aside the hitherto US consensus on some variation of the liberal international order, the NSS 2017 criticises continued assumptions that, by relying on such an order, 'American power would be unchallenged and self-sustaining.'[21] In this sense the latest NSS appears to represent a fraught transition between the

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[14] Shirley V. Scott, 'The Impact on International Law of US Non-Compliance', in Michael Byers & Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge University Press 2003) 450–51.

[15] Jose E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *AJIL* 873, 873.

[16] See 50 U.S. Code § 3043(b).

[17] Aaron Ettinger 'U.S. national security strategies: Patterns of continuity and change 1987–2015' (2017) 36 *Comparative Strategy* 115, 115.

[18] Ibid, 119. See The White House, *The National Security Strategy of the United States of America 2010* (2010), 22.

[19] NSS 2010 (n 18) 37. See also ii & 2.

[20] See The White House, *The National Security Strategy of the United States of America 2017* (2017) 17 & 40.

[21] Ibid, 2.

security orthodoxy and a 'full-throated commitment to maintaining primacy and unbinding the US from multilateral obligations.'[22]

The dynamic interplay between alternative US national security conceptions and the development of international law has elicited an array of explanatory frameworks to explain seemingly contradictory polices. Shirley Scott interprets variability in US legal policy as the product of a 'quest for legal security.' This has taken both a 'defensive' form, in the sense of seeking 'protection of its domestic political and legal systems from external influence via law', as well as an 'offensive' strategy of influencing the 'legal and policy choices of other states via law.'[23] By identifying these strategies grounded in legal security Scott reveals a 'remarkable degree of consistency' beneath apparent contradictions.[24] Rebecca Sanders focuses alternatively on the causal role of 'several distinct national security legal cultures that have operated in the United States at varying points in time: cultures of exception, cultures of secrecy, and cultures of legal rationalization.'[25] Shifts between these competing approaches to security and law have defined distinctive US practices. For Heiko Meiertöns, the pertinent sets of ideas are more explicit and purposive in the form of various 'doctrines of US security policy' that are generally named after US presidents and well known in foreign policy writings. These doctrines have in particular set out political principles that reframe and at times override laws on the use of force in ways seen necessary for US national security.[26] Reading the US government's own shifting accounts of national security from a range of scholarly perspectives confirms the crucial importance of understanding geopolitical and ideological context, which continue to structure responses to the full range of international legal challenges set out below.[27]

3. Recent Developments and Contemporary Challenges

a) Multilateralism and Global Security

Its brief revival as the centrepiece of global security architecture notwithstanding, the post-Cold War fracturing of purpose between the P5 has seen the UNSC revert to a significant constraint on US security policy.[28] Frustrations have contributed to US government default on its UN dues, and to various calls for the UN to submit to US preferences or be 'irrelevant',[29] or for a 'supermajority' of democratic states to override the positive obligations of the UNSC where it 'prevented free nations

[22] Aaron Ettinger, 'Trump's National Security Strategy: "America First" meets the establishment' (2018) 73 *International Journal* 474, 475.

[23] Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge University Press 2012) 17-18.

[24] Ibid, 29.

[25] Rebecca Sanders, *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror* (Oxford University Press 2018) 8.

[26] Heiko Meiertöns, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press 2010) 240.

[27] On the competing foreign policy ideologies structuring US international law policy see: Malcolm Jorgensen, *American Foreign Policy & The International Rule of Law: Contesting Power Through the International Criminal Court* (Cambridge University Press 2020).

[28] See Sean D. Murphy, 'The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War' (1994) 32 *ColumJTransnat'l L* 201, 207.

[29] George W. Bush, 'Address to the United Nations General Assembly in New York City' (12 September 2002) <https://www.presidency.ucsb.edu/node/213436>.

from keeping faith' with liberal principles.[30] Yet, despite these challenges to legitimacy in times of crisis, the US position remains complicated, with a parallel history in which the US prioritises UNSC mechanisms in meeting a wide range of ordinary security challenges. These range from implementing state sanctions, such as those against Iran for violating nuclear non-proliferation obligations, authorising the deployment of peacekeeping forces, renewing missions in Afghanistan and Iraq, referring matters to the International Criminal Court (ICC), to combatting terrorist organisations.[31] Such ambivalence is in no small part a factor of the US position of global dominance, whereby advantages of multilateral cooperation are tempered by a perception that policy goals have no longer 'seemed to depend so much on reaching agreement with other states and acquiescing in the inevitable compromises that reaching such agreement often requires.'[32]

The dynamics are nowhere clearer than in fraught US policy regarding the ICC, heralded by some as 'the most important institutional innovation since the founding of the United Nations'.[33] For ICC advocates a foundational rationale was always that: 'National security interests of the United States fundamentally concern the creation of a peaceful, liberal democratic, and economically integrated international system that allows America to flourish.'[34] In this view the ICC promised to 'improve security for individuals and among states' by serving as 'another tool that can be used to promote the behaviors and international system that best suit the United States.' Moreover, the ICC was fundamentally 'linked to U.S. national security in its effect on the legitimacy of U.S. leadership.'[35]

Understanding conflicted US support and ultimate opposition to joining the ICC, as well as a range of multilateral security initiatives, necessitates an understanding of US views on the causal links between global institutions and US security. The establishment of the UN system and UNSC was originally envisioned by the US in terms of a strategy for securing a global order capable of complimenting and reinforcing its internal values and institutions. Reversing this logic, US retreat from core multilateral institutions is premised on a competing view that, rather than operating as guardians of US sovereignty, the diverse foreign interests embodied in global institutions pose an existential threat to particularistic US values and institutions, being the ultimate ends of national security policy. In a 2018 speech to the UN General Assembly (UNGA), President Trump defended US withdrawal from the UN Human Rights Council and opposition to the ICC in terms that the US 'will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy.' In contrast to seeking security through global law: 'America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism.'[36] This logic now manifests as declining US commitment to multilateralism across a range of fields, including in US opposition to

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[30] Anne-Marie Slaughter & G. John Ikenberry, *Forging a World of Liberty under Law: U.S. National Security in the 21st Century* (Woodrow Wilson School of Public and International Affairs, 27 September 2006) 26.

[31] Kara C. McDonald & Stewart M. Patrick, *UN Security Council enlargement and US interests*, Council Special Report No. 59, (Council on Foreign Relations 2010) 16.

[32] William H. Taft IV, 'A View from the Top: American Perspectives on International Law after the Cold War' (2006) 31 *Yale JInt'l L* 503, 508.

[33] Robert C. Johansen (1997), cited in William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2011) x.

[34] Sarah B. Sewell, Carl Kaysen & Michael P. Scharf, 'The United States and the International Criminal Court: An Overview', in Sarah B. Sewell & Carl Kaysen (eds.), *The United States and the International Criminal Court: National Security and International Law* (Lanham: Rowman and Littlefield 2000) 4.

[35] Ibid, 4-5.

[36] Donald J. Trump, 'Remarks by President Trump to the 73rd Session of the United Nations General Assembly, New York, NY' (25 September 2018) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>.

the new Global Compact on Migration, since '[m]igration should not be governed by an international body unaccountable to our own citizens,' and to the US declaration of its intention to withdraw from the 2015 Paris Climate Agreement.[37] It has likewise underpinned US denouncement or withdrawal from various Cold War era agreements, including major arms-control treaties,[38] dispute resolution provisions under the 1961 *Vienna Convention on Diplomatic Relations*,[39] and repeated threats to withdraw from NATO.[40] Whatever the pitfalls of illiberal and nationalist perceptions, they constitute a significant explanation for persistent and vigorous opposition to globalised legal frameworks as a means for achieving security at home.

b) War on Terror

It is doubtless that the US approach to global security law underwent a transformation following the terrorist attacks of 11 September 2001, when US policy turned toward more permissive interpretations of the entire legal framework governing the 'War on Terror'.[41] One consequence of the shock and sense of vulnerability created by the attacks was a desire among some policymakers to restructure law in service of an illusory quest for 'absolute security'.[42] Even within the discipline of international law it has been observed that national security law was subsequently elevated to a privileged position, to a degree that now distinguishes the US academy from global counterparts.[43] In the most orthodox legal accounts, however, the novel dimensions of the War on Terror did not create any legal black hole or 'limbo' but, rather, invoked existing rights under 'criminal law and the law governing peaceful settlement of disputes and resort to armed force' combined with 'constraints on how those responses may be executed' as set out under international human rights and humanitarian law.[44] Yet, despite the availability of these legal frameworks, US policy has continued to diverge on the question of whether upholding universal and liberal conceptions of law are a path toward global security, or whether narrow national security imperatives should reshape the field.

aa) Use of Force Rules

The distinctive contributions of US practice to global security remain most conspicuous and consequential in the rules governing the use of military force. States are legally entitled to use force only within the framework of the UN Charter, namely in cases of self-defence under Article 51, or when collective action is authorised by the UNSC under Chapter VII.[45] As the State with the most opportunities to exercise these powers, the US has, with mixed success, remained at the forefront of

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[37] Donald J. Trump, 'Statement by President Trump on the Paris Climate Accord' (1 June 2017) <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>. Concluded under *The United Nations Framework Convention on Climate Change* (1994).

[38] See Jean Galbraith, 'United States Initiates Withdrawal from Intermediate-Range Nuclear Forces Treaty' (2019) 113 *AJIL* 631.

[39] John B. Bellinger, 'The Trump Administration's Approach to International Law and Courts: Are We Seeing a Turn for the Worse?' (2019) 51 *Case WResJInt'l L* 7, 19.

[40] Scott R. Anderson, 'Saving NATO' (*Lawfare*, 25 July 2018) <https://www.lawfareblog.com/saving-nato>.

[41] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2005) 2-3.

[42] David C. Hendrickson, 'Toward universal empire: the dangerous quest for absolute security' (2002) 19 *World Policy Journal* 1, 9.

[43] Roberts (n 4) 104-05 & 225.

[44] Duffy (n 41) 10.

[45] See James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press 2012) 746-68.

defining and developing the boundaries of relevant prohibitions. Most notoriously the US has sought expansive interpretations of the right to self-defence under Article 51, including claims to anticipatory or even pre-emptive self-defence. The so-called 'Bush Doctrine' was described by Bush 43 as a new US strategic policy to 'confront the worst threats before they emerge.'[46] The NSS 2002 argued the lawfulness of the doctrine by reference to the modern threat posed by weapons of mass destruction, which required that the US 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.'[47] By removing any of the conventional constraints on self-defence requiring 'imminence,'[48] the administration sought to develop law into an enabling framework rather than one capable of constraining US policy. That interpretation has unsurprisingly met with almost total rejection for inviting an 'unraveling of norms on the use of force'.[49] The permissive attitude towards global security law was nevertheless evident in US justifications for the 2020 airstrikes in Iraq that killed Iranian General Qassem Soleimani.[50] The circumstances failed to meet any generally recognised threshold for the lawful use of force in self-defence – whether against an imminent threat or otherwise.[51] Yet the President and other senior officials employed the rhetoric of 'imminent' attacks in their public diplomacy, in a manner that cloaked otherwise unlawful actions with the symbols of legal authority.[52]

The US has similarly sought to extend the law to permit self-defence against non-state actors, which were recast in the context of the War on Terror as the primary threat to US security. American preferences have met with moderate success in this regard, including during the 2001 US military action in Afghanistan, which likely saw a new customary rule develop that sanctioned the use of force against States harbouring terrorists even when an attack did not emanate from the State itself.[53] In practice such a legal development benefits only States with power projection capabilities, and thereby has the effect of translating preponderant US political power into '*de facto* exceptionalism' within the doctrines of international law.[54] This precedent facilitated a further prominent example of US rule development in the so-called 'unwilling or unable' doctrine, which the US articulated in 2014 to defend the legality of its airstrikes in Syrian territory in the collective defence of Iraq against a non-State actor.[55] In that case the US reasoned that the government of President Bashar al-Assad

[46] George W. Bush, 'Graduation Speech at West Point' (1 June 2002) <https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html >; The White House, *The National Security Strategy of the United States of America 2002* (2002) ii.

[47] NSS 2002 (n 46) 15.

[48] See Crawford (n 45) 750-52.

[49] Sean D. Murphy, 'Assessing the legality of invading Iraq' (2003) 92 *Geo LJ* 173, 176-77; W. Michael Reisman & Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 *AJIL* 525.

[50] See *Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (14 February 2020) <https://foreignaffairs.house.gov/cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf>.

[51] Ryan Goodman, 'White House "1264 Notice" and Novel Legal Claims for Military Action Against Iran' (*Just Security*, 14 February 2020) <https://www.justsecurity.org/68594/white-house-1264-notice-and-novel-legal-claims-for-military-action-against-iran/>.

[52] Donald J. Trump, 'Remarks by President Trump on the Killing of Qasem Soleimani' (3 January 2020) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/>.

[53] Christine Gray, *International Law and the Use of Force* (4th edn., Oxford University Press 2018) 200-202.

[54] Michael Byers, 'Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *The Journal of Political Philosophy* 171, 179 & 184.

[55] Malcolm Jorgensen, 'Ungoverned Space: US Request to Join Fight in Syria Carries Legal Risk' (*Sydney Morning Herald*, 26 August 2015) <https://www.smh.com.au/opinion/ungoverned-space-us-request-to-join-fight-in-syria-carries-legal-risk-20150826-gj7wxm.html>.

had shown itself to be unwilling or unable to prevent its territory being used by the Islamic State group to launch cross-border attacks.[56] Although not yet accepted as orthodoxy, the practice has been fortified by sophisticated jurisprudential articulations[57] and the explicit or tacit endorsement by a handful of states,[58] a fact that, at the very least, has unsettled any consensus against the doctrine.

The US has in parallel sought to reinterpret the scope of UNSC authorisations to use force under Chapter VII, which have been at the heart of the 'long war with Iraq,' lasting (at least) from 1990 to 2011.[59] The legality of airstrikes carried out throughout the 1990s under President Clinton was based in part on implied and revived authorisation of UNSC resolutions from the Persian Gulf War[60] which became the explicit justification for the 2003 invasion.[61] Then legal adviser to the Department of State William Taft IV argued that America's use of force in 2003 'was and is lawful,'[62] yet the argument gained little traction outside of the US, with the 2003 invasion seen to represent 'not simply the exceptional breaking of the rules by a big power, but the beginning of a generally more liberal, or rather permissive, attitude towards the rules regarding the use of force as an instrument of state power.'[63]

Finally, beyond the War on Terror, there have been arguments for a right to use force beyond the two legally accepted grounds in the UN Charter, through various versions of a 'humanitarian' exception as encapsulated in the policy guidance of the so called Responsibility to Protect (R2P).[64] The US resiled from fully articulating such an exception during the 1999 Kosovo intervention, which was spearheaded by the Clinton administration without UNSC authorisation to prevent a 'humanitarian catastrophe.' [65] US lawyers presciently recognised that any articulated exception could be weaponised by US adversaries in a range of cases that bore little resemblance to the Kosovo crisis.[66]

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[56] See the statement of Samantha Power, cited in Marty Lederman, 'The War Powers Resolution and Article 51 Letters Concerning Use of Force in Syria Against ISIL and the Khorasan Group' (*Just Security*, 23 September 2014) <http://justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/>.

[57] See Ashley Deeks, '"Unwilling or Unable": Toward an Normative Framework for Extra-Territorial Self-Defense' (2012) 52 *VaJInt'l L* 483; *c.f.* Kevin Jon Heller, 'Ashley Deeks' Problematic Defense of the "Unwilling or Unable" Test' (*Opinio Juris*, 15 December, 2011) <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>.

[58] For a spectrum of state views ranging from explicit endorsement to objection see: Elena Chachko & Ashley Deeks, 'Which States Support the "Unwilling and Unable" Test?' (*Lawfare*, 10 October 2016) <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>.

[59] Timothy J. Lynch, 'Obama, Liberalism, and US Foreign Policy', in Inderjeet Parmar, Linda B. Miller & Mark Ledwidge (eds.), *Obama and the World: New Directions in US Foreign Policy* (Routledge 2014) 47.

[60] Gavin A. Symes, 'Force Without Law: Seeking a Legal Justification for the September 1996 US Military Intervention in Iraq' (1997) 19 *MichJInt'l L* 581, 602-08.

[61] Through the combined operation of UNSC Resolutions 678 (1990), 687 (1991) & 1441 (2002): William H. Taft IV & Todd F. Buchwald, 'Preemption, Iraq and International Law' (2003) 97 *AJIL* 557, 559-60.

[62] Ibid, 557.

[63] Heike Krieger & Georg Nolte, 'The International Rule of Law— Rise or Decline?—Approaching Current Foundational Challenges', in Heike Krieger, Georg Nolte & Andreas Zimmermann (eds.), *The International Rule of Law Rise or Decline?* (Oxford University Press 2019) 10.

[64] See ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001).

[65] See Michael P. Scharf & Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge University Press 2010) 166-67.

[66] Anne Peters, 'Crimea: Does "The West" Now Pay the Price for Kosovo?' (*EJIL: Talk*, 22 April 2014), <https://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/>.

Such proved to be the case when Russia bolstered its legal case for the 2014 annexation of Crimea.[67] Nevertheless, leading US lawyers have continued to push for such an exception, with former State Department Legal Adviser Harold Koh arguing that refusal to do so is flawed for exhibiting an 'absolutist, formalist, textualist, originalist quality' that cannot be squared with beliefs that 'international law should serve human purposes.'[68] These claims coloured negotiations over the Crime of Aggression under the ICC Statute,[69] where the US originally sought exemption from prosecution for any actions 'undertaken in connection with an effort to prevent the commission' of the core ICC crimes.[70] Across these varied examples, it can be concluded that, although US claims and practice rarely shift global legal consensus, they have achieved a fracturing of views on the legitimacy and content of international law in each case. The consequence has been to sustain an arguable case for US actions taken in the name of national and global security and in ways that few states are capable of replicating.

bb) Laws of War

Among the areas of international law that the US has historically proven itself most committed to both complying and being seen to comply with is in the conduct of armed conflict. Yet, as with the use of force, the security imperatives of the War on Terror have led to prominent reconsiderations of the security benefits of a liberal legal regime versus the carving out of exceptions. *The Department of Defense Law of War Manual* was released in 2015, which at over 1,200 pages, 'represents the single most authoritative consolidation of US policy and legal positions regarding the lawful conduct of hostilities.'[71] In security terms, the reality of unmatched capacity to project global military power creates strong incentives for the US to increase the efficiency of military power through rules that ensure discipline in the conduct of US personnel, minimise political opposition, and ensure interoperability and reciprocity on the battlefield. Charles Dunlap noted the particular value of the Manual for building a 'counter-lawfare campaign' in cases where 'a technologically inferior opponent attempts to use allegations of violations of the law of war to undermine the public support that democracies so often need to successfully wage war.'[72]

In seeking to gain an overall understanding of US views from this sprawling document, the Manual's treatment of the role of 'specially affected states' in the development of customary international law is particularly illuminating. US lawyers had previously criticised a comprehensive study by the International Committee of the Red Cross on customary international law in armed conflicts for, among other reasons, failing 'to pay due regard to the practice of specially affected States.'[73] The

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[67] Simon Chesterman, 'Is International Law Effective: The Case of Russia and Ukraine' (2014) 108 *Proceedings of the Annual Meeting (American Society of International Law)* 37, 38-39.

[68] Harold H. Koh, *The Trump Administration and International Law* (Oxford University Press 2019) 129-130.

[69] Rome Statute of the International Criminal Court, 2187 UNTS 3.

[70] Claus Kreß, Stefan Barriga, Leena Grover & Leonie Von Holtzendorff, 'Negotiating the Understandings on the Crime of Aggression', in Stefan Barriga & Claus Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012) 95.

[71] Michael A. Newton, 'Framing Thoughts on the DoD Law of War Manual and this Commentary', in Michael A. Newton (ed.), *The United States Department of Defense Law of War Manual: Commentary and Critique* (Cambridge University Press 2019) 4; see General Counsel of the Department of Defense, *The Department of Defense Law of War Manual* (June 2015, updated December 2016).

[72] Charles J. Dunlap, 'Practitioners and the Law of War Manual', in Newton (n 71) 66 & 74.

[73] John B. Bellinger III & William J. Haynes II, cited in David Glazier et al, 'Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual' (2017) 42 *Yale JInt'l L* 215, 259; see Jean-Marie Henckaerts &

Manual responds that States which have 'had significant opportunities to develop a carefully considered military doctrine, may be expected to have contributed a greater quantity and quality of State practice relevant to the law of war than States that have not.'[74] By adopting this unusually broad interpretation, the Manual

> 'seems to be asserting that as the leading military power, and the state perhaps most frequently resorting to the use of force in the modern era, the United States should have the dominant say in establishing the content of the current law of war.'[75]

Yet, despite comprehensive aspirations for the laws of year, the years after September 11 saw a determination within the US government not to apply the Geneva Conventions to detainees who themselves were not 'living up to the laws of war.'[76] Then Secretary of State Condoleezza Rice defended the 'enhanced' interrogation of detainees, including through waterboarding, as being 'consistent with our international obligations and American law.'[77] The US Supreme Court itself reflected the deep divisions in US national security views when it held in *Hamdan v. Rumsfeld*,[78] by majority, that detainees had customary legal rights exercisable against the US government, as codified under Common Article 3 of the 1949 Geneva Conventions.[79] Rice's successor as Secretary of State Hillary Clinton declared: '[t]hat America is a nation of laws is one of our great strengths, and the Supreme Court has been clear that the fight against terrorism cannot occur in a "legal black hole."'[80] Nevertheless, the Obama administration faced its own comparable criticisms for defending the legality of targeted killing of enemy combatants using drone technology, which was facilitated by broad rereading of the laws of combat and due process obligations.[81] By so doing, the US may have addressed immediate security objectives, but contributed to the trend toward more permissive and unaccountable uses of violence at the global level.[82]

c) The Return of Geopolitics

US influence extends not only to the content of specific bodies of international law, but also in restructuring the legal order as it operates across geographical domains most critical to American security. Forms of legal fragmentation along geopolitical lines pose a particular challenge to the ideal of a rules-based order and can be expected to increase in significance, both with the rise of

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Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press 2005).

[74] General Counsel of the Department of Defense (n 71) 32.

[75] David Glazier et al., 'Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual' (2017) 42 *Yale JInt'l L* 215, 261-62.

[76] Committee on Foreign Relations, United States Senate, *Senate Committee on Foreign Relations, Nomination of Dr. Condoleezza Rice to be Secretary of State,* 1st Session 109th Congress, (2005) 117.

[77] Condoleezza Rice, *No Higher Honor: A Memoir of my Years in Washington* (Random House LLC 2011) 117, 121 & 497.

[78] (2006) 548 U.S. 557.

[79] Referring to Art. 75 of Protocol I to the *Geneva Conventions* (1949): ibid, 633 per Stevens J. *C.f.* the dissent of Thomas J, 718–19.

[80] Hillary Rodham Clinton, *Hard Choices: A Memoir* (Simon and Schuster 2014) 184.

[81] See Harold H. Koh, 'The Obama Administration and International Law' (25 March 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>. *C.f.* Nils Melzer, *Targeted killing in international law* (Oxford University Press 2008) 243.

[82] See Anthony Dworkin, 'Soleimani Strike Marks a Novel Shift in Targeted Killing, Dangerous to the Global Order' (*Just Security*, 7 January 2020) <https://www.justsecurity.org/67937/soleimani-strike-marks-a-novel-shift-in-targeted-killing-dangerous-to-the-global-order/>.

regional competitors, and with the decline in US recognition of the security dividends from investing in such order. The countervailing forces pulling US security policy between an open rules-based order and one defined by competitive geography are increasingly evident in the transformation of global economics, in emerging challenges of cybersecurity, and in fragmentation of the international legal order into spheres of influence.

aa) Geoeconomics

However the 'rules-based order' is defined, the global system of economic law with the World Trade Organisation (WTO) and its dispute settlement mechanism at its centre are widely recognised as among its greatest achievements.[83] They (and the Bretton Woods institutions) represent both the fruits of US leadership, and the divergent implications of its competing security interests. The rise in competitive security interests has led to the renewed significance of geoeconomics where, as 'territorial entities, spatially rather than functionally defined, states cannot follow a commercial logic that would ignore their own boundaries'.[84] The NSS 2017 declared that 'economic security is national security' and observed that the 'post-war order' of global institutions has been eroded by a complacency in which the US has 'stood by while countries exploited the international institutions we helped to build.'[85] Naming specifically China and Russia, the NSS continues that:

> 'These competitions require the United States to rethink the policies of the past two decades—policies based on the assumption that engagement with rivals and their inclusion in international institutions and global commerce would turn them into benign actors and trustworthy partners. For the most part, this premise turned out to be false.'[86]

The associated policy responses have included blocking the filling of Appellate Body vacancies in the WTO to end the effective operation of the dispute settlement system. This obstruction constitutes a direct challenge to the rules-based order and is driven by broader recognition that WTO law increasingly replicates rather than impedes the decline of US dominance relative to competitors.[87]

The US now leads a global trend towards preferential trade agreements (PTAs), which ostensibly bypass the WTO system, and have been unmistakably pursued to shore up US security relationships. 'Securitization' of US foreign economic policy became especially pronounced during the Bush 43 administration, when strategic interests drove the negotiation of PTAs with a range of allies 'as a way of bolstering or rewarding good partners in the fight against terrorism.'[88] The importance of securitised interests highlights the particular strategic incoherence of US rejection of the Trans-Pacific Partnership (TPP), which was touted as a 'mega-regional trade agreement' with the potential to realign global economic law in the United States' favour.[89] The TPP was always constructed upon

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[83] See Stewart Patrick, *World Order: What, Exactly, are the Rules?* (2016) 39 *The Washington Quarterly* 7, 14.

[84] Edward N. Luttwak, 'From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce' (1990) 20 *The National Interest* 17, 18.

[85] NSS 2017 (n 21) 2 & 17.

[86] Ibid, at 3.

[87] See Gregory Shaffer & Henry Gao, 'China's Rise: How It Took on the US at the WTO' (2018) 1 *UIllLRev* 115.

[88] Richard Higgott, 'US foreign policy and the 'securitization'of economic globalization' (2004) 41 *International Politics* 147, 165.

[89] Arlo Poletti, 'Containment through Trade? Explaining the US Support for the Trans-Pacific Partnership', in Matteo Dian, Barbara Pisciotta & Marco Clementi (eds.), *US Foreign Policy in a Challenging World*, (Springer 2018) 46.

securitised foundations, with former US Defense Secretary Ashton Carter arguing that 'passing TPP is as important to me as another aircraft carrier'.[90] President Obama never defended the deal simply in terms of economic benefits, but reminded that:

> 'TPP is more than just a trade pact; it also has important strategic and geopolitical benefits. TPP is a long-term investment in our shared security and in universal human rights.'[91]

US withdrawal has assisted in vacating the field for China's alternative Regional Comprehensive Economic Partnership (RCEP) trade agreement, and thereby contributed to the trend toward geographically fragmented rules-based orders.[92]

bb) Cyber Security

Many of the assumptions and principles guiding conduct in traditional security domains are now replicated in the new frontiers of global security, including crucially in cyberspace. In 2012 Harold Koh posed the fundamental question: 'how do we apply old laws of war to new cyber-circumstances, staying faithful to enduring principles, while accounting for changing times and technologies?'[93] Koh reaffirmed his well-established position that international law is a complete system, and that existing rules and principles, including those governing the use of force, extended by analogy to cover the new terrain.[94] In this approach the US confirmed recognition of the security benefits of being enmeshed within and bolstering a global system of laws that 'constrain the activity of all countries, including the United States.'[95] Nevertheless, the more recent *National Cyber Strategy* has adapted the pillars of the NSS 2017, turning to more direct recognition of geostrategic challenges and an associated desire to reassert US advantage in a domain hitherto defined by the absence of geographical borders.[96]

Cybersecurity is no hypothetical exercise in circumstances where Russian interference with the US electoral system and domestic politics has long been identified by the US' own intelligence community as a serious and ongoing threat.[97] The risk of geopolitical fragmentation became increasingly evident in 2018 however, when the UNGA adopted parallel resolutions on cyber security, with one sponsored by Russia and a competing one sponsored by the US and 26 other States.[98] The later resolution confirmed its recognition that the 'international rules-based order' extended into cyberspace, and replicated language already familiar in the maritime domain of safeguarding a 'free'

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[90] Ashton Carter, 'Remarks on the Next Phase of the U.S. Rebalance to the Asia-Pacific', McCain Institute, Arizona State University (6 April 2015) <https://www.defense.gov/News/Speeches/Speech-View/Article/606660/remarks-on-the-next-phase-of-the-us-rebalance-to-the-asia-pacific-mccain-instit/>.

[91] Barack H. Obama, 'Remarks by President Obama at ASEAN Business and Investment Summit', Kuala Lumpur, Malaysia (20 November, 2015) <https://obamawhitehouse.archives.gov/the-press-office/2015/11/20/remarks-president-obama-asean-business-and-investment-summit>.

[92] Shaffer & Gao (n 87) 181-82.

[93] Harold Hongju Koh, 'International Law in Cyberspace' (2012) 54 *HarvInt'l LJ Online* 1, 2, emphasis ommitted.

[94] Ibid, 3-4.

[95] Brian J. Egan, 'Cybersecurity, International Law, and the First Year of the Trump Administration' (2018) 32 *TempInt'l & CompLJ* 135, 139.

[96] The White House, *National Cyber Strategy of the United States of America* (September 2002) 3 & 20.

[97] See David P. Fidler, 'The US Election Hacks, Cybersecurity, and International Law' (2016) 110 *AJIL Unbound*, 337-342.

[98] UN General Assembly, 'Advancing Responsible State Behaviour in Byberspace in the Context of International Security', A/RES/73/266, 2 January 2019.

and 'open' order.[99] Russian backed proposals for a new international cyber convention have been rejected by the US, which has preferred to develop existing norms and rules without ceding its more advanced cyber capabilities.[100] In substance, US proposals for 'defending the rule of law in cyberspace' remain deeply mindful of prevailing in competition with China, Russia, Iran, and North Korea, who 'actively work to destabilize the U.S.-led international order, thereby promoting and advancing their own geopolitical interests.'[101]

cc) Spheres of Influence

The structural legal ideal embedded in notions of the liberal international order is that legal rules remain unified and capable of determination within the constraints of a single coherent system. On this point US policy has been historically contradictory, with the 'Monroe Doctrine' long subjecting legal rules to a buffer zone of exceptional rights in the Western hemisphere.[102] Although not a legal rule or regime, the claimed right to expel foreign powers from its own hemisphere provided a framework throughout the Cold War for engaging in the kinds of use of force that were ruled illegal in the 1986 Nicaragua Case.[103] The historical reality of imperialistic US policies led the Obama administration to finally declare in 2013 that the 'era of the Monroe Doctrine is over.'[104] Yet, in recent years the US has explicitly revived the doctrine to recalibrate the interpretation and role of international law in its foreign policy. In 2019, then National Security Advisor John Bolton defended the legitimacy of possible US intervention in Venezuela by stating: 'In this administration, we're not afraid to use the phrase "Monroe Doctrine" … it's been the objective of presidents going back to Ronald Reagan to have a completely democratic hemisphere.'[105]

The strategy of fragmenting rules of global order into exclusionary zones of security and geopolitical power now extends beyond the United States' own backyard into other pivotal regions. These include recent US decisions to recognize the Golan Heights, acquired from Syria by Israeli military force in 1967, as 'part of the State of Israel,'[106] and to declare that the United States will 'no longer recognize Israeli settlements [in the West Bank] as per se inconsistent with international law.'[107] Yet the security logic underpinning US policy has proven a double edged sword, as China now replicates the logic of

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[99] US Department of State, 'Joint Statement on Advancing Responsible State Behavior in Cyberspace' (23 September 2019) <https://www.state.gov/joint-statement-on-advancing-responsible-state-behavior-in-cyberspace/>.

[100] Roberts (n 4) 307.

[101] Sujit Raman, 'The Rule of Law in the Age of Great Power Competition in Cyberspace', ABA Rule of Law Initiative Annual Issues Conference, Washington, DC (21 May 2019) <https://www.justice.gov/opa/speech/associate-deputy-attorney-general-sujit-raman-delivers-remarks-aba-rule-law-initiative>.

[102] James Monroe, 'Monroe Doctrine' (2 December 1823) <https://avalon.law.yale.edu/19th_century/monroe.asp>.

[103] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. ICJ Reports 1986,* 14.

[104] John Kerry, 'Remarks on U.S. Policy in the Western Hemisphere' (18 November, 2013) <https://2009-2017.state.gov/secretary/remarks/2013/11/217680.htm>.

[105] See Pablo Arrocha Olabuenaga, 'The Specter of Interventionism is Haunting Latin America' (*Just Security*, 10 December 2019) <https://www.justsecurity.org/67644/the-specter-of-interventionism-is-haunting-latin-america>.

[106] Michael R. Pompeo & David Friedman, 'International Law Backs The Trump Golan Policy' (*Wall Street Journal*, 14 May 2019) <https://www.wsj.com/articles/international-law-backs-the-trump-golan-policy-11557875474>.

[107] Michael R. Pompeo, 'Secretary Michael R. Pompeo Remarks to the Press', Press Briefing Room, Washington, D.C. (18 November 2019) <https://www.state.gov/secretary-michael-r-pompeo-remarks-to-the-press/>.

the Monroe doctrine in its own backyard of the South China Sea,[108] and Russia in border states with Western Europe,[109] each enforcing idiosyncratic interpretations of international law to fortify regional security zones. The US response to China has been to revert to appeals to versions of the liberal international order in terms of upholding 'a peaceful, prosperous and freer Asia with a free and open regional order defined by the rule of law'.[110] Pursuant to its defence of the regional security order the US has engaged in 'Freedom of Navigation Operations' in which it sails military vessels within 12 nautical miles of constructed islands and other maritime features over which China makes excessive claims to a territorial sea.[111] Yet what these various US, Chinese and Russian cases have in common are self-judging legal claims that remain incomprehensible in terms of any recognized methods and sources of international law, yet express the effective rules operating within a sphere of geopolitical influence. In 2016, China and Russia released a joint declaration on the 'Promotion of International Law,' which sought to articulate foundational political understandings to directly challenge hegemonic American conceptions.[112] The 2018 US National Defense Strategy responded to the words and actions of China and Russia by singling them out for 'undermining the international order from within the system by exploiting its benefits while simultaneously undercutting its principles and "rules of the road."'[113] In this response a crucial point of agreement emerges: that the international legal domain has become one in which great powers explicitly pursue competitive security advantages through law. Together these examples demonstrate the logic of security imperatives fragmenting the international legal order which, mirroring the logic of geoeconomics, is being restructured to resemble 'geolegal' orders in place of the liberal international order.[114]

4. Conclusions and Outlook

The return of great power competition as a primary security threat to the US, and associated trend towards geopolitical fragmentation in the international legal order, emerges as among the most consequential trends reshaping the international law of global security. The 2020 coronavirus (COVID-19) pandemic has, for some, reinforced the indispensability of internationalised legal frameworks when addressing a security threat that takes no heed of national boundaries.[115] Yet the US president's initial response was to ban travel from much of Europe, while conspicuously exempting the United Kingdom, on the basis that 'the free flow of people between the Schengen Area

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[108] Steven F. Jackson, 'Does China Have a Monroe Doctrine? Evidence for Regional Exclusion' (2016) 10 *Strategic Studies Quarterly* 64, 64.

[109] James R. Holmes, 'Goodbye Grotius, Hello Putin' (*Foreign Policy*, 29 November 2018) <https://foreignpolicy.com/2018/11/29/goodbye-grotius-hello-putin-russia-ukraine-sea-of-azov-kerch-strait-south-china-sea-unclos-law-of-sea-crimea/>.

[110] James N. Mattis, 'Press Gaggle by Secretary Mattis En Route to Indonesia' (22 January 2018) <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1420752/press-gaggle-by-secretary-mattis-en-route-to-indonesia/>.

[111] Under UNCLOS, Art. 57. See Adam Klein & Mira Rapp-Hooper, 'Freedom of Navigation Operations in the South China Sea: What to Watch For' (*Lawfare*, 23 October 2015) <https://www.lawfareblog.com/freedom-navigation-operations-south-china-sea-what-watch>.

[112] Ministry of Foreign Affairs of the Russian Federation, *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law* (25 June 2016) <http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698>.

[113] United States Department of Defense (n 2) 2.

[114] See Malcolm Jorgensen, 'Equilibrium & Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order' (*No. 21 KFG Working Paper Series*, November 2018) <https://ssrn.com/abstract=3283626>.

[115] See Gian Luca Burci, 'The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations fit for Purpose?' (*EJIL: Talk*, 27 February 2020) <https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose/>.

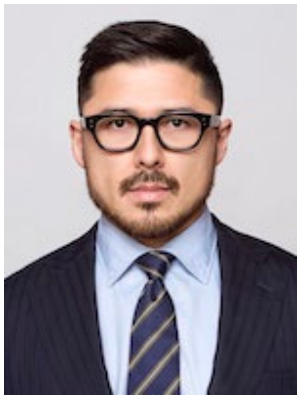
countries makes the task of managing the spread of the virus difficult.'[116] The weight given to this tenuous distinction, although quickly abandoned, provided an insight into US perceptions that the increasingly integrated international legal order constituted a more fundamental security threat then the pandemic itself. Rather than opposing forms of fragmentation, US policy has retreated from defining security in terms of a unified rules-based order and instead reinforces the restructuring of globalised law toward differentiated orders of regional and hemispheric security.

As both global power and conceptions of law fragment, the hitherto US practice of exercising claimed rights and expecting international doctrine to follow will have decreasing power in defining the parameters of global order. Strategy under the Trump administration has expressly disconnected the US role in underwriting global security from the preservation of core national security interests. The 'trump' card for the US-led rules-based order was always assumed by its advocates to be the uniquely universal attraction of its values and interests, and their normative superiority and pull for States and citizens alike. That assumption has collapsed with the rotation of the former division between the US and its allies against the rest, to a division between advocates for a unified system of law and the rest – which now cuts through as well as between States. There is not yet confirmation that the turn from commitment to American leadership of the 'liberal international order' will crystallise as the new orthodoxy of US global security policy. Polarised domestic responses to the President's unprecedented pardoning of US soldiers, convicted of war crimes, is only one salient reminder that the nexus between law and security remains deeply contested.[117] Nevertheless, the confluence of rising geopolitical competitors with divergent legal conceptions, and conflicted domestic support for the legitimacy and desirability of US global leadership, are confirmed forces already reshaping the global security order.

[116] Donald. J. Trump, 'Proclamation—Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus' (11 March 2020) <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>.

[117] Dan Maurer, 'Should There Be a War Crime Pardon Exception?' (*Lawfare*, 3 December 2019) <https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception>.

The Author



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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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