

HCSS PAPER SERIES – CASE STUDY 5

From Blurred Lines to Red Lines

How Countermeasures and Norms Shape Hybrid Conflict

**Case Study 5: Upholding Freedom of Navigation
in the South China Sea**



HCSS helps governments, non-governmental organizations and the private sector to understand the fast-changing environment and seeks to anticipate the challenges of the future with practical policy solutions and advice.

From Blurred Lines to Red Lines

How Countermeasures and Norms Shape Hybrid Conflict

HCSS Progress

The Hague Centre for Strategic Studies

This case study is part of a five-part paper series, which is compiled into the full report “From Blurred Lines to Red Lines - How Countermeasures and Norms Shape Hybrid Conflict”.

Full Report Authors: Louk Faesen, Tim Sweijs, Alexander Klimburg, Conor MacNamara and Michael Mazarr

Reviewers: Pieter Bindt, Frank Bekkers and Richard Ghiasy

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Design: Mihai Eduard Coliban (layout) and Constantin Nimigean (typesetting).

The Hague Centre for Strategic Studies

info@hcss.nl

hcss.nl

Lange Voorhout 1

2514EA

The Hague

The Netherlands

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About the Paper Series

This paper is part of the paper series “From Blurred Lines to Red Lines: How Countermeasures and Norms Shape Hybrid Conflict”. The series analyzes effective responses against hybrid threats by evaluating the ways in which countermeasures and norms can help shape appropriate state behavior in the hybrid realm. The series unpacks the logic driving norm development across five different cases, yielding a better understanding of the norm strategies, tools of influence, dilemmas and trade-offs by European states and the US in their response to adversarial hybrid operations, including **cyber operations (Russia)**; **disinformation (Russia)**; **propaganda (ISIS)**; **economic espionage (China)**; **maritime claims (China)** (see Table 1). The starting point of each case is the hybrid offensive campaign, followed by a description of the western countermeasures and their underlying legal or doctrinal mandate. The normative dimension of each case assesses whether and how the countermeasures reaffirm or establish new norms, and finally identifies their second-order normative effects that are too often ignored and risk undermining the initiator’s long-term strategic goals. The case studies are published individually as a paper series and compiled in a **full report** with complete overview of the theoretical underpinnings of norm development and the key insights that emerge from the analysis, as well as the concluding remarks and policy recommendations.

Paper Series | From Blurred Lines to Red Lines

How Countermeasures and Norms Shape Hybrid Conflict



Case Study 1

Protecting Electoral Infrastructure from Russian cyberoperations



Case Study 2

Responding to Russian disinformation in peacetime



Case Study 3

Countering ISIS propaganda in conflict theatres



Case Study 4

Responding to Chinese economic espionage



Case Study 5

Upholding Freedom of Navigation in the South China Sea

[Read the full report here.](#)

Case		Countermeasures	Second-Order Normative Effects	Norms
1	Protecting Electoral Infrastructure from Russian cyberoperations	Detailed public attribution	Higher burden of proof	<i>Norm emergence</i> prohibiting cyberoperations against electoral infrastructure
		Indictments	Lawfare escalation	
		Sanctions	n/a	
		Diplomatic expulsion	n/a	
2	Responding to Russian disinformation in peacetime	Resilience	n/a	<i>Norm proposal</i> against disinformation as covert election interference based on noninterference
		Discrediting media as propaganda	Politicians labelling media as propaganda	
		Overt offensive cyber operation	Weaponization of information	
		Cyber pre-deployment in critical infrastructure	Norm of mutual hostage-taking	
3	Countering ISIS propaganda in conflict theatres	Strategic communication	Success of wartime offensive cyber operations over STRATCOM informed U.S. response to similar threats in peacetime.	<i>Norm proposal</i> truthfulness as a benchmark for information operations
		Psychologic operations		
		Covert offensive cyber operation		
4	Responding to Chinese economic espionage	Sanctions	Tariff war reduces Chinese incentives for norm adherence and isolates norm violation as bilateral issue	<i>Norm emergence</i> prohibiting cyber-enabled IP theft for economic benefits
		Indictments	Lawfare escalation	
		Bilateral agreement predicated upon improved relations	Souring of bilateral relations reduced Chinese incentives for adherence	
5	Upholding Freedom of Navigation in the South China Sea	Arbitration / legal challenge	Political unwillingness to enforce legal ruling	<i>Norm contestation or revision</i> of previously internalized UNCLOS norm of freedom of navigation
		Freedom of Navigation Operations (FONOPs)	Potential of unintended escalation	
		Diplomatic Engagement	n/a	

Table 1: Five case studies of hybrid campaigns, countermeasures and norms promotion

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Upholding Freedom of Navigation in the South China Sea

China claims large swathes of the South China Sea, primarily on the basis of 'historic rights' and its 'nine-dash line'. It tries to reinforce these claims by assertive Chinese law enforcement and island-building in the region. In doing so, it challenges the UN Convention on the Law of the Sea, particularly freedom of navigation and the right of innocent passage.

COUNTERMEASURES



Freedom of Navigation Operations (FONOPs): In cooperation with regional allies, the U.S. navy regularly sails through the Chinese nine-dash line, indicating that it rejects China's proclaimed revisions to UNCLOS and the right of innocent passage.



Arbitration: Between 2013-2016, the Philippines appealed to international law over the legality of China's claims. Despite a tribunal ruling in the Philippine's favor, it has made little impact on the ground.



Diplomatic Negotiations include U.S.-Japan-Australia-India quadrilateral dialogue and joint efforts to a joint Indo-Pacific strategic space, amongst others. Beijing's talk and take strategy has been largely successful in holding off meaningful diplomatic progress, including a code of conduct or resource-pooling within the ASEAN context.

SECOND-ORDER NORMATIVE EFFECTS

The FONOPs may incite escalation between Beijing and Washington and legitimize Chinese behavior. Conversely, such overt confrontations increase domestic pressure on Beijing toward a more hardline position not to accede to U.S. demands.

The precedent set by China in successfully ignoring the 2016 legal ruling may be utilized by other actors in similarly contested regions.

The second order-normative effects of diplomatic negotiations were not considered in this case.

NORM CONTESTATION

China challenges and revises previously internalized UNCLOS norms on freedom of navigation

China attempts to socialize its revisionist norm by linking it to the prevalence of historic rights and sovereignty, and by framing it to its national identity and regional self-determination. It has persuaded other states to support its claims, as shown in varying degrees of support voiced by 70 countries towards the 2016 ruling and opposition to UNCLOS. Finally, Beijing has used coercion towards its neighbors both in terms of economic entanglement and in terms of its assertive maritime law enforcement agencies and growing military power.



1. Introduction

Conflicts between states are taking on new forms. Russian and Chinese hybrid activities are intended to circumvent detection, existing norms and laws, and response thresholds. They minimize the basis for decisive responses and have introduced a new model of conflict fought by proxy, across domains, and below the conventional war threshold to advance a country's foreign policy goals. A particular challenge associated with this form of conflict is that in some cases there is a lack of explicit norms or rules, while in others it is unclear when and, more specifically, *how* existing international law and norms are to be interpreted and applied in such a context. Against this backdrop, there is significant concern that the ability of Western governments to successfully manage the threat of a major hybrid conflict is hampered by difficulties in attribution, timely response, and escalation control. Yet there are instruments of statecraft available to the defender to level the playing field and shape adversarial conflict behavior. One such tool, in many ways the foundation for all others, is the active cultivation of international norms to shape adversarial hybrid conflict behavior. **This paper series** evaluates the strategic utility of such norms and considers how countermeasures can be instrumental in establishing and upholding such norms.

This paper begins by addressing the normative dimensions of China's actions and claims of exclusive territorial authority over contested areas of the South China Sea. More specifically, it looks at how China is challenging the well-established norms of innocent passage and freedom of navigation that have their propriety in the UN Convention on the Law of the Sea (UNCLOS) – the most comprehensive and widely ratified framework maritime security framework. This paper then analyzes the underlying mandate of the U.S. and allied countermeasures and the second-order normative effects of these actions, and how seemingly internalized norms are contested by Beijing.

The Chinese reinterpretation of the innocent passage and freedom of navigation norm embedded in customary international law such as UNCLOS shows that the formation of a fully internalized norm does not imply that the end product will remain fixed or unchallenged. Instead, norms evolve as the interests, context, identity, and propriety change around them. Chinese assertiveness in the South China Sea based on inchoate territorial and maritime claims have, in turn, shaped the contours and content of these norms. Beijing not only challenges how states lay claim to maritime zones, but also campaigns for a revisionist norm that challenges the right of innocent passage of

foreign navies by barring them or by requiring previous authorization. This emerging norm is in conflict with the pre-existing norm that is enshrined in UNCLOS and customary international law and internalized by the majority of states around the world. In doing so, it undermines the only global maritime security framework and the existing balance of coastal state rights and international rights of freedom of navigation through its use of various tools of influence. States that violate widely established or internalized norms are likely to be met with punitive action and stigma from the international community. Yet punitive action has been ineffective in manipulating Chinese behavior towards conformation of the pre-established norm. Similarly, China's ability to dismiss international legal rulings against it present a direct normative challenge that, if ignored, begins to routinize norm-breaking behavior. Regionally, this ineffectiveness can be explained by the power considerations, both in economic and (para)military terms, of China vis-à-vis its neighbors. Globally, the power asymmetries of the liberal international order, of which UNCLOS is a part of, is diffusing away from the West towards the East. China especially, endowed with its economic and military successes, is leading this move by attempting to contest and reevaluate norms they were previously held to in a primarily Western system.

The paper is structured as follows: Chapter 2 offers a summary of the theory around norms, including the norm lifecycle and tools of influence to push for norm cascade and internalization. Chapter 3 applies the theoretical framework to the case study and identifies key findings concerning the promotion of international norms that emerged from the analysis. Chapter 4 offers the recommendations from the *entire paper series* on how to promote international norms in the hybrid realm.

2. Norms Primer

The utility of norms and their processes in the hybrid context derives from their dynamic character, making them a more flexible and faster alternative than binding law to manage emerging threats, even as they remain difficult to enforce due to their voluntary nature. Despite deviations in adherence by some actors, norms remain an important tool to establish predictability and signal interstate consensus on what constitutes bad behavior – a yardstick which the international community can leverage when calling out unscrupulous states.¹ The propagation of norms in the realm of hybrid conflict is therefore an important instrument in shaping hybrid threat actors. By identifying the levers of influence and strategic choices that norm entrepreneurs need to take into context, norm ingredients, the tools of influence and their potential trade-offs, they become more aware of their strategies for norm development. Ultimately, the success of a norm rests not just in its content, but in its process: who pushes it, accepts it, and where, when, and how they do so.² This section summarizes these components as part of the norm lifecycle to allow for a structured and enhanced understanding of norm development in the hybrid realm. A detailed description of the theory behind norm development is provided in the [full report](#). The lifecycle will function as the theoretical underpinning that informs how norms emerge and eventually are accepted and internalized in the hybrid realm, thereby guiding our own assessment of malicious state activity, but also the normative nature and range of our own response to hybrid threats.

2.1 What is a Norm?

A norm is broadly defined as “a collective expectation for the proper behavior of actors with a given identity”, consisting of the four core elements: identity, propriety, behavior and collective expectation (see Table 2).³ That is, they are voluntary standards for agreeing what constitutes responsible behavior. Because of their voluntary

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- 1 Chertoff, Michael; Reddy, Latha; Klimburg, Alexander, “Facing the Cyber Pandemic”, Project Syndicate (11 June, 2020): <https://www.project-syndicate.org/commentary/pandemic-cybercrime-demands-new-public-core-norm-by-michael-chertoff-et-al-2020-06>.
 - 2 Finnemore, Martha; Sikkink, Kathryn: “International Norm Dynamics and Political Change”, *International Organizations* 52, no. 4 (1998): <https://www.jstor.org/stable/2601361?seq=1>.
 - 3 Katzenstein, Peter J., “The Culture of National Security: Norms and Identity in World Politics”, Columbia University Press (1996).

nature, reaching agreement on more broadly defined norms circumvents lengthy and contentious legal issues while keeping interstate channels of communication open.

<p>Identity (the <i>who</i>) refers to the entrepreneur and the target audience. The group targeted by the norm will be affected depending on the norm’s framing and linking to a context - military, law-enforcement, economic. The entrepreneur may decide to push the norm bilaterally, multilaterally, or globally, each with its own set of advantages and disadvantages. Overall, the smaller and more identical the pairing, the lower the transaction costs are to obtain information about each side’s interests and values.</p>	<p>Propriety (the <i>how</i>) is the ideational basis upon which norms make their claim. Norm entrepreneurs should be aware of the trade-offs in pursuing norms with law/treaties (binding) and politics (non-binding) as a proprietary basis. Treaties are state-led, offer harder assurances for internalization through ratification, require significant resources, and are harder to change. Political commitments are an agile and faster alternative that comes with fewer terminological disagreements and is not limited to states.</p>
<p>Behavior (the <i>what</i> and <i>where</i>) denotes the actions required by the norm of the community. Entrepreneurs establish norms anchored within their social construction of reality to advance their own interests and values. Behavior therefore not only asks what the norm says but also where it resides. Grafting a norm to an organizational platform means grafting it to the culture of an institution, thereby shaping its content.</p>	<p>Collective expectations (the <i>why</i>) underpin the social and intersubjective character of the social construction of norms. Entrepreneurs should be aware that others may agree to the norm for different reasons and use this to their advantage. Incompletely theorized norms – where actors disagree as to why the norm exists – and insincere commitments can eventually lead to norm internalization.</p>

Table 2: Four core ingredients of a norm: identity, propriety, behavior, and collective expectations.

The pluralistic nature of norms indicates that a norm entrepreneur has multiple identities and is part of multiple organizational platforms or institutions that may work in tandem coherently and harmoniously but may also conflict in certain contexts.⁴ The entrepreneur may then need to prioritize one of them. Norm processes are thus complicated by the uncertainty of which identity, and which underlying norms, the entrepreneur is perceived to prioritize in a particular situation.

Norms and interests are closely related to each other: the former should be seen as generative of, and complementary to, interests pursued by agents rather than as opposed to them.⁵ Part of a norm’s utility in the hybrid realm, and conversely part of its limitation, is its dynamic nature. There is no set process for norm adaptation

4 Finnemore, Martha; Hollis, Duncan, “Beyond Naming and Shaming: Accusations and International Law in Cybersecurity”, *European Journal of International Law* (2020), p. 455: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347958.

5 Keohane, Robert, “Social Norms and Agency in World Politics”, NYU School of Law (2010): <http://www.law.nyu.edu/sites/default/files/sivp/Keohane.pdf>.

and internalization, even if the macro processes for how they operate are generally understood. Norms are not fixed products of agreements, nor are they static nodes of international relations. The accumulation of shared understanding gives norms depth and makes them more robust.

2.2 The Norm Lifecycle

How do norms emerge? Finnemore and Sikkink’s model of the norm lifecycle allows for a structured and enhanced understanding of norm development and propagation.⁶ The norm lifecycle catalogs the development and propagation of norms across three stages: norm emergence, norm cascade and norm internalization (see Table 3):

Stage 1: Norm Emergence	Stage 2: Norm Cascade	Stage 3: Norm Internalization
<p>Habit and repetition alone – particularly when they go unchallenged – create norms. Alternatively, it can be a dedicated effort by a norm entrepreneur, who has the first-mover advantage of <i>framing</i> a norm within a preferential context and <i>linking</i> it to other pre-existing norms, which not only increases its credibility and urgency but also anchors the norm within the values and interests of the entrepreneur.</p>	<p>Once a sufficient number of actors have been persuaded by the entrepreneur or even coerced into acceptance, it can trigger socialization effects, like bandwagoning or mimicry, on the remaining hold-outs, accelerating the norm towards widespread acceptance. This process is accelerated when the norm is grafted to organizational platforms.</p>	<p>When a norm is internalized it is ‘taken for granted’ and no longer considered ‘good behavior’; rather it becomes a foundational expectation of acceptable behavior by the international community. Once internalized, a norm shapes the interests of states rather than vice versa. Internalized norms however continue to evolve as the interests, context, identity, and propriety change around them.</p>

Table 3: The three stages of the norm lifecycle: Norm emergence, norm cascade, norm internalization

Habit and repetition alone – particularly when they go unchallenged – create norms.⁷ This does not only apply to the hybrid threat actor – for example China normalizing IP theft – but also to the victim undertaking countermeasures that denounce and break a pattern of behavior to keep the hybrid actor from establishing new norms. The victim’s countermeasures may itself establish new norms or have second-order normative effects. Regulatory norms known to reside in the diplomatic processes as an alternative to

6 Finnemore, Martha; Sikkink, Kathryn: “International Norm Dynamics and Political Change”, *International Organizations* 52, no. 4 (1998): <https://www.jstor.org/stable/2601361?seq=1>.

7 Sugden, Robert, “Spontaneous Order”, *Journal of Economic Perspectives* 85, no. 4, (1989), pp.87-97: <http://www.jstor.org/stable/1942911>.

international law, however, do not emerge spontaneously out of habit. They are the result of dedicated work by actors to promote a new standard of behavior for reasons ranging from self-interest and values to ideational commitment. These actors are the norm entrepreneurs that may be any group of actors. Given our focus on interstate hybrid conflict, we primarily focus on states as norm entrepreneurs. Their efforts are shaped and constrained by existing context and understandings, in that the norm they propose operates alongside pre-existing norms within or outside of their regime complex, without clear hierarchies or processes for resolving overlap, conflict, or coherence.⁸

2.3 Tools of Influence

Once a norm has emerged and gathered a base level of support, two processes that take place simultaneously can contribute to the development of the norm: the norm cascades into widespread adoption (broad acceptance) and reaches internalization (deep acceptance). In promoting norms, norm entrepreneurs can make use of three tools of influence: socialization, persuasion and coercion (see Table 4).⁹ The tools of influence that contribute to cascade and internalization come with their own set of costs and benefits on the basis of which entrepreneurs must continuously (re)evaluate their choice based on their interests and the changing context.

<p>Socialization leverages the shared relations and identities between actors and institutions, in order to push a norm towards conformity. It includes forms of mimicry or conformity based on national interests, such as rationally expressive action, social camouflage, bandwagoning, insincere commitments to avoid stigmatization, or improved relations.</p>	<p>Persuasion can occur through cognitive means (through <i>linking</i> or <i>framing</i>) or material incentives. Persuading actors with very different values and interest systems is difficult unless the norm is incompletely theorized. Persuading actors through incentives, such as trade agreements, is mostly a tool available to strong states as they require a vast amount of resources over a longer period of time.</p>	<p>Coercion refers to the use of negative inducements, such as sanctions, threats, and indictments to promote the norms of the strong. It mostly remains a tool for strong states who have attribution capabilities and political will. When entrepreneurs face opposition from other actors, incentives and coercion can play a large role at the contentious stages of the norm lifecycle – where contestation is high.</p>
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Table 4 Three strategies for norm promotion: socialization, persuasion, coercion.

8 Klimburg, Alexander, and Louk Faesen. "A Balance of Power in Cyberspace." In "Governing Cyberspace - Behavior, Power, and Diplomacy", Rowman & Littlefield, pp. 145-73. (2020): https://rowman.com/WebDocs/Open_Access_Governing_Cyberspace_Broeders_and_van_den_Berg.pdf.

9 Finnemore, Martha; Hollis, Duncan, "Constructing Norms for Global Cybersecurity." *The American Journal of International Law* 110: (2016), pp. 425-479.

While states may initially adhere to norms not because of their content but as part of tactical bargains that serve their interests, in response to incentives or coercion, norm internalization or compliance may still become routinized as habits take hold, such that norm-conforming behavior continues even after the incentives.¹⁰ Over time, tactical concessions, perceived as insincere, may therefore still lead to norm internalization. An entrepreneur should take advantage of the wider spectrum of tools and realize where they enforce their strategy or potentially crowd out other tools.

¹⁰ Finnemore and Hollis, "Constructing Norms for Global Cybersecurity.", 425–479.

3. Case Study: Upholding Freedom of Navigation in the South China Sea

The norm lifecycle provides the theoretical basis through which we can now analyze norm development in a case study to better understand the real-life strategies, tools of influence, dilemmas, and trade-offs that empower state-led norm processes. These dynamics between countermeasures and norms are analyzed as part of the strategies adopted by the U.S. and European countries toward Chinese assertiveness in the South China Sea. The normative dimension of this case is analyzed at different levels. First, as previously described, states are aware that habit and repetition alone – especially when they go unchallenged – create norms. The Western countermeasures were aimed at derailing or delegitimizing unwanted Chinese behavior from establishing new norms. Second, we assess whether the countermeasures reaffirm existing norms or whether they lead to the emergence of a new norm that shapes the behavior of the opponent. Third, if a new norm emerges, we assess its position within the norm lifecycle and identify the tools of influence used for cultivation. Finally, as states pursue what they may perceive as norm-enforcing behavior, their countermeasures may trigger second-order effects. These effects are often underestimated or even ignored when states consider their countermeasures, even though they may produce unintended negative outcomes that risk undermining the initiator’s long-term strategic goals. It is important to view these consequences in the context of their impact upon the long-term stability of established norms, focusing on how they set new precedents or affects the socialization that keeps otherwise non-abiding actors in adherence to the overall normative status quo.

Prior to the normative analysis, a description is given of the Chinese hybrid operation, followed by the Western countermeasures and their underlying mandate. Herein, we use a broader interpretation of countermeasures than the strictly legal definition. Countermeasures encompass the broad range of State responses taken both horizontally across the Diplomatic, Information, Military, Economic, and Legal (DIMEL) spectrum and vertically in the context of an escalation ladder through which the victim tries to shape the behavior of the opponent, deny benefits, and impose costs. These responses can be cataloged along a spectrum of preventive action to thwart an anticipated threat to reactive responses, which denote pre-and post-attack defensive

actions.¹¹ Throughout the case studies, we predominantly focus on reactive measures and give a cursory glance at the preventive measures when considering how the reactive measures fit into the broader response posture of the state. To this end, this case study deals with diplomatic, economic, and military countermeasures in response to Chinese hybrid operations.

Structure of the case study:

- a) **Incident:** a description of the hybrid offense.
- b) **Countermeasures:** a description of the countermeasures taken by the victim, and their underlying legal or doctrinal mandates.
- c) **Normative Dimension:** an analysis of the norm that emerges from the countermeasure.
 - i. Norms: do the countermeasures reaffirm existing norms, or do they establish a new norm?
 - ii. Application of the norm lifecycle to the norm: what tools of influence are used to cultivate the norm?
 - iii. Second-order normative effects: countermeasures which may also (unintentionally) establish norms that have second-order normative effects that may clash with the long-term interests of the entrepreneur.
- d) **Key Take-away:** a summary of the main findings concerning the norm development through countermeasures. This includes an assessment of the norm's position in the lifecycle, the tools of influence used to advance the norm, and the risks associated with second-order normative effects stemming from countermeasures.

3.1 Incident

This case study addresses the normative dimensions of China's actions and claims of exclusive territorial authority over contested areas of the South China Sea. They are challenging the well-established norms of innocent passage and freedom of navigation that have their propriety in the UN Convention on the Law of the Sea (UNCLOS) – the most comprehensive and widely ratified framework maritime security framework. While China ratified the convention, which should increase the likelihood of norm internalization, it is now walking back on its commitment stating that in retrospect it was not knowledgeable and well-prepared enough to ratify it at the time. It is important to stress that the U.S. has not ratified the UNCLOS, but is still bound to its components that have reached the status of customary international law. The emergent norms introduced by China, and the reciprocal norms introduced or reasserted by actors like the U.S. in their countermeasures, are subsequently addressed in line with their first and second-order implications.

¹¹ Jong, de Sijbren; Sweijs, Tim; Kertysova, Katarina; Bos, Roel, "Inside the Kremlin House of Mirrors", The Hague Centre for Strategic Studies, (17 December, 2017), p. 9: <https://hcss.nl/sites/default/files/files/reports/Inside%20the%20Kremlin%20House%20of%20Mirrors.pdf>.

In order to strengthen its claims to the South China Sea, China relies on a twin pillar strategy: its purported **historical right** to its territorial claims and its mandate under the purported ‘**nine-dash line**’.¹² China has maintained a political strategy of cultivated ambiguity, avoiding detailed justification for the legitimacy its claims whilst touting alleged historic rights to the disputed territories.¹³ China regularly employs vague terminology which conflates the distinction between maritime claims and territorial claims, especially in its construction of artificial islands as a means to establish effective control over the islands and its adjacent maritime zones. The “Nine-Dash Line” demarcates the current contested area spanning much of the South China Sea, from Hainan Island down to the top of Indonesia.¹⁴ Beijing has provided no specific coordinates or clarifying details to the document, instead opting to leverage its cultivated ambiguity as a bargaining chip in its political strategy.¹⁵ Both claims are loosely defined and have been regularly contested both within international law and by the other claimant states.¹⁶

In practice, Beijing has employed a spectrum of measures ranging from paramilitary and law enforcement agencies, assertive fishing activity, and the construction of artificial islands and military bases to enforce Chinese law, expand its presence, and bolster what it perceives as its rightful claim. From 2009 onward, it has built-up of its military facilities within the contested area, in tandem with assertive patrols and exercises. According to the 2019 U.S. Department of Defense Report, many occupied islands – notably the Spratly Islands - have been fitted with anti-air and anti-sea capabilities, in violation of a 2015 pledge by Xi Jinping that “China does not intend to pursue militarization” of

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- 12 While the 9-dash line dates back to the 1940s, it took until May 2009 before it received international attention when China used it in its objection to the Malaysian-Vietnamese joint submission and Vietnamese individual submission to the Commission on the Limits of the Continental Shelf. The use of the nine-dash line has been inconsistent at best – it went from eleven to nine, and then back to ten, dashes to include Taiwan. Benatar, Marco; Franckx, Erik. “Dots and Lines in the South China Sea: Insights From the Law of Map Evidence”, *Asian Journal of International Law* 2, no. 1, (January 2012), pp. 89-118: <https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/dots-and-lines-in-the-south-china-sea-insights-from-the-law-of-map-evidence/328F9E4996170DF296D42A287B1E479A>. Berkovsky, Axel, “US Freedom of Navigation Operations (FONOPs) in the South China Sea—Able to Keep Chinese Territorial Expansionism in Check?”, in “US Foreign Policy in a Challenging World: Building Order on Shifting Foundations”, ed. Marco Clementi, Matteo Dian, and Barbara Pisciotta (Cham: Springer, 2018), pp.343-344.
- 13 Since its first official reference to historical rights in 1998, China has reiterated its exclusive maritime rights without defining their legal basis, stating its sovereignty over the disputed islands as a matter of fact. The islands include the Paracel and Spratly islands, as well as a collection of reefs and shoals, such as Mischief Reef and the Scarborough Shoal. The historic appeal to territorial rights over the concerned islands refers to the times in which the islands were under the integral rule of Imperial China, with recent studies indicating that the claim as such originated at the beginning of the 20th century. See Hayton, Bill, “The Modern Origins of China’s South China Sea Claims: Maps, Misunderstandings, and the Maritime Geobody”, *Modern China* (4 May, 2018): <https://journals.sagepub.com/doi/abs/10.1177/0097700418771678?journalCode=mcxa>.
- 14 Beech, Hannah, “Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?”, *TIME* (19 July, 2016): <https://time.com/4412191/nine-dash-line-9-south-china-sea/>.
- 15 Wong Chun Han, “Nine-Dash Line’s Ambiguity a Good Thing, Argues Chinese Military Academic”, *Wall Street Journal* (5 June, 2016): <https://blogs.wsj.com/chinarealtime/2016/06/05/nine-dash-lines-ambiguity-a-good-thing-argues-chinese-military-academic/>.
- 16 United States Office of Ocean and Polar Affairs, “Limits in the Sea”, U.S. State Department (5 December, 2014): <https://news.usni.org/2014/12/09/document-u-s-state-department-report-chinas-claims-south-china-sea>; Regencia, Ted, “Malaysia FM: China’s ‘Nine-Dash Line’ Claim ‘Ridiculous’”, *Aljazeera* (21 December, 2019): <https://www.aljazeera.com/news/2019/12/malaysian-top-envoy-china-dash-line-claim-ridiculous-191221034730108.html>.

the islands.¹⁷ From 2014, it aggressively pursued land reclamation efforts, producing thousands of acres of new landmass for civilian and military purposes.¹⁸

China has significantly upgraded its overall naval capabilities across different services, which have exercised maritime control in the area.¹⁹ That control has been exercised partly by military coast guards but more prominently by patrolling paramilitary law enforcement agencies.²⁰ China has also sought to tighten its hold over the region in symbolic ways. The nine-dash line is portrayed on Chinese passports and in April 2020, it created two new administrative districts covering the Spratly and Paracel islands under the notional Sansha city; it has also named 80 geographical features in the South China Sea. By taking these efforts, it seeks to reinforce its legally inchoate claims as a matter of undisputed fact rather than a disputed legal contest.²¹

The underlying reasons for China's maritime and territorial claims in the South China Sea are manifold and partly overlap. Control over the area offers strategic and security gains through an expanded Southern sphere of control that secures its supply lines, strengthens its military position vis-à-vis Taiwan, controls subsea natural resources, such as gas and oil fields, while pushing the U.S. (and other Western) navy out. Beijing seeks to exercise control and assert sovereignty in the region through a careful balance between "safeguarding rights and maintaining stability".²² The term coined to describe these actions – known as 'talk and take' – denotes China's dual-use of expansion and entrenchment, coupled with the proclaimed facade that it is willing to engage in peaceful talks with other litigant states to resolve their issues.²³ This ostensible accommodating diplomatic outlook rarely materializes beyond rhetoric and is generally viewed as a means by which China can deescalate and prolong international discussions whilst it entrenches and normalizes its territorial presence and pursues its ambition of the nine-dash line.²⁴ The following section will outline the countermeasures employed by the U.S. and their regional allies in response to this behavior, and their role in bolstering UNCLOS.

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- 17 United States Office of the Secretary of Defense, "Annual Report to Congress – Military and Security Developments Involving the People's Republic of China 2019", Department of Defense, (2 May, 2019): https://media.defense.gov/2019/May/02/2002127082/-1/-1/1/2019_CHINA_MILITARY_POWER_REPORT.pdf.
 - 18 Grossman, Derek, "Military Build-Up in the South China Sea", in *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition*, ed. Leszek Buszynski and Do Thanh Hai (2020).
 - 19 Erickson, Andrew S.; Hickey, Joshua; Holst, Henry, "Surging Second Sea Force: China's Maritime Law Enforcement Forces, Capabilities, and Future in the Gray Zone and Beyond", *Naval War College Review* 72, no. 2 (2019), pp. 11–34.
 - 20 Morris, Lyle, "Gray Zone Challenges in the East and South China Sea", *Maritime Issues*, (7 January 2019): <http://www.maritimeissues.com/politics/gray-zone-tactics-and-their-challenge-to-maritime-security-in-the-east-and-south-china-sea.html>.
 - 21 Economist, "China's Next Move in the South China Sea", (18 June, 2020): <https://www.economist.com/china/2020/06/17/chinas-next-move-in-the-south-china-sea>.
 - 22 Zhang, Cheng, "China's Long March at Sea: Explaining Beijing's South China Sea Strategy, 2009–2016", *The Pacific Review*, (2020): <https://doi.org/10.1080/09512748.2019.1587497>.
 - 23 Beukel, Erik, "China and the South China Sea: Two Faces of Power in the Rising China's Neighborhood Policy", Danish Institute for International Studies, Copenhagen (2010): <https://www.econstor.eu/handle/10419/44627>.
 - 24 Corr, Andrew, "China's Take-and-Talk in the South China Sea", *Forbes* (29 March, 2017): <https://www.forbes.com/sites/anderscorr/2017/03/29/chinas-take-and-talk-strategy-in-the-south-china-sea/#69887aa33216>.

3.2 Countermeasures

The countermeasures employed against Chinese conduct have ranged from legal (arbitration), military (Freedom of Navigation Operations), to diplomacy.

Arbitration: The most well-known legal countermeasure was the case brought against China by the Philippines, triggering a legal process that lasted from 2013 to 2016.²⁵ The Tribunal in The Hague ultimately ruled in favor of the Philippines' claim that China violated its sovereign rights, with the rule being appraised as "a major victory for [the] Philippines".²⁶ Nevertheless, this ruling had little impact on the realities on the ground, principally due to a lack of political commitment from Manila brought upon by a change in leadership.²⁷ Specifically, the tribunal ruled that China's claims of 'historic rights' encompassed by the nine-dash line are superseded by its maritime rights and obligations under the Law of the Sea Convention.²⁸

Chinese officials claimed this ruling was "null and void", and refused to abide by it.²⁹ It has since reinforced its presence along its artificial islands with increased anti-air and anti-sea capabilities, and voiced tentative claims to establishing an air defense identification zone (ADIZ) over the Pratas, Paracel and Spratly island groups.³⁰ Legal countermeasures, therefore, have not produced a real resolution to the dispute, nor have they prevented China from pursuing its objectives in the South China Sea.

FONOPs: As the principal enactor of countermeasures, the U.S. has pursued an approach rooted in the objectives of its domestic and foreign security, economic prosperity, and the upholding of international law.³¹ Its attempts to uphold the principle of Freedom of Navigation have primarily been conducted through the framework of **freedom of navigation operations (FONOPs)**.³² In recent years, the U.S. has repeatedly and ever-more frequently instructed its warships to sail within the 12 nautical miles

25 Permanent Court of Arbitration, "Press Release – The South China Sea Arbitration", The Hague (12 July, 2016): <https://www.pcacases.com/web/sendAttach/1503>; New York Times, "Hague Announces Decision on South China Sea", (12 July, 2016): <https://www.nytimes.com/interactive/2016/07/12/world/asia/hague-south-china-sea.html>.

26 Kuok, Lynn, "How China's Actions in the South China Sea Undermine the Rule of Law", Brookings (November 2019), p.2: <https://www.brookings.edu/research/how-chinas-actions-in-the-south-china-sea-undermine-the-rule-of-law/>

27 *Ibid.*

28 Perlez, Jane, "Tribunal Rejects Beijing's Claims in South China Sea", New York Times, (12 July, 2016): <https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html>.

29 Tiezzi, Shannon, "China: Tribunal Ruling 'Null and Void', Will Not Affect South China Sea Claims", The Diplomat (12 July, 2016): <https://thediplomat.com/2016/07/china-tribunal-ruling-null-and-void-will-not-affect-south-china-sea-claims/>.

30 U.S.-China Economic and Security Review Commission, "ADIZ Update: Enforcement in the East China Sea, Prospects for the South China Sea, and Implications for the United States", (2 March, 2016): <https://www.uscc.gov/research/adiz-update-enforcement-east-china-sea-prospects-south-china-sea-and-implications-united>.

31 Green et al., "Countering Coercion in Maritime Asia", Asia Maritime Transparency Initiative, (9 May, 2017): <https://amti.csis.org/countering-coercion-hub/>.

32 McDevitt, Michael, "The South China Sea: Assessing U.S. Policy and Options for the Future", CNA (November, 2014), p.6: <https://theasiadialogue.com/wp-content/uploads/2017/08/IOP-2014-U-009109.pdf>.

distance from China's claimed territories, signaling their nonacceptance of Chinese claims of sovereignty over the islands.³³ The U.S. Navy frames these FONOPs as challenging excessive Chinese territorial claims - their notional intent of missions being to reassert the internationally established UNCLOS, especially the right of innocent passage. In this respect, U.S.' operations challenge the notion that innocent passage through claimed territorial waters requires previous notification or approval, of which Beijing regularly contests as a prerequisite for FONOPs.³⁴

Whilst earlier FONOPs were sporadic and only numbered few per year, they have become more frequent, with the record achieved in 2019 in which nine FONOPs were conducted altogether.⁴¹ So far, in 2020 the U.S. conducted one operation in January near the Spratly islands (by the combat littoral ship *Montgomery*)⁴² and two operations in April both near the Spratly and Paracel islands (by the *USS Bunker Hill* and the *USS Barry*, respectively).⁴³ When conducting operations, the U.S. does not ask for permission to enter contested zones.⁴⁴ In recent

Mandate UNCLOS - Right of Innocent Passage: Article 17 of the UNCLOS stipulates “ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.” Article 19 defines innocent passage as any action “not prejudicial to the peace, good order or security of the coastal State.” Actions considered prejudicial encompass the “threat or use of force”, “the launching, landing or taking on board of any aircraft”, “collecting information”, “carrying out research or survey activities”³⁵ Some states, including China, have claimed the right of prior authorization, or at least prior notification, of vessels transiting under the right of innocent passage.³⁶ This demand is contested by Article 24 (1) UNCLOS, which forbids coastal states from imposing “requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage”.³⁷

Mandate FONOPS: The legal justification for the conduct of FONOPs relies on “freedom of navigation”, one of the most salient and well-established maritime rules that are a part and parcel of international customary law.³⁸ The U.S. doctrinal basis for FONOPs was established by the joint effort of the U.S. Department of Defense and Department of State in 1979 when it conveyed a broad range of measures, including diplomatic consultations and military operations.³⁹ Since its inception, the U.S. has relied on the international mandate and its national doctrine to conduct FONOPS in various regions.⁴⁰

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- 33 Larter, David, “In Challenging China’s Claims in the South China Sea, the US Navy is Getting More Assertive”, *DefenseNews* (February 5, 2020): <https://www.defensenews.com/naval/2020/02/05/in-challenging-chinas-claims-in-the-south-china-sea-the-us-navy-is-getting-more-assertive/>.
- 34 *Ibid.*
- 35 United Nations, “Article 19 – Innocent Passage”, Part II Territorial Sea and Contiguous Zone, (2020): https://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm.
- 36 Starting, Rebecca, “Defending the Maritime Rules-Based Order: Regional Responses to the South China Sea Disputes”, *Policy Studies* (80), East-West Center, (2020): https://www.eastwestcenter.org/system/tdf/private/ewc_policy_studies_80_-_defending_the_maritime_rules-based_order_-_regional_responses_to_the_south_china_sea_disputes.pdf?file=1&type=node&id=37485.
- 37 United Nations, “Article 24 – Innocent Passage”, Part II Territorial Sea and Contiguous Zone, (2020): https://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm; Hakapää, Kari, “Innocent Passage”, *Oxford Public International Law*, (2013): https://www.ilsa.org/Jessup/Jessup18/Second%20Batch/OPIL_Innocent_Passage.pdf.
- 38 Wolfrum, Rudiger, “International Tribunal for the Law of the Sea”, *Freedom of Navigation* (2010): https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/freedom_navigation_080108_eng.pdf.
- 39 Mandsager, Dennis, “The U.S. Freedom of Navigation Program: Policy, Procedure, and Future”, *International Law Studies* (72), (1998): <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1465&context=ils>.
- 40 United States Office of the Under Secretary of Defense, “DoD Annual Freedom of Navigation (FON) Reports”, OUSDP Office (2020): <https://policy.defense.gov/OUSDP-Offices/FON/>.
- 41 Power, Josh, “US Freedom of Navigation Patrols in South China Sea Hit Record High in 2019”, *South China Morning Post* (5 February, 2020): <https://www.scmp.com/week-asia/politics/article/3048967/us-freedom-navigation-patrols-south-china-sea-hit-record-high>.
- 42 Ziezulewicz, Geoff; Snow, Shawn, “Navy Conducts Year’s First FONOP in South China Sea”, *Navy Times* (28 January, 2020): <https://www.navytimes.com/news/your-navy/2020/01/28/navy-conducts-years-first-fonop-in-south-china-sea/>.
- 43 Maritime Executive, “U.S. Navy Conducts Two South China Sea FONOPS in Two Days”, (30 June, 2020): <https://maritime-executive.com/article/u-s-navy-conducts-two-south-china-sea-fonops-in-two-days>.
- 44 Paul Michael, “The United States, China and the Freedom of the Seas: Washington’s FONOPs Conflict with Beijing” *Stiftung Wissenschaft und Politik*, (2016), p. 2: <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-46539-4>.

years, similar operations have also been conducted by the U.K.⁴⁵ and France⁴⁶, though these countries have been less explicit about the purpose of the operations and labeled them ‘patrolling actions’ instead. Australia has conducted flights in the area for the same purpose.⁴⁷ Japan, India and the Philippines have recently joined the U.S. resulting in multinational FONOPs that send a powerful symbolic signal to China.⁴⁸ This is particularly relevant as Beijing believes FONOPs by extra-regional powers destabilize peace and order in the South China Sea. However, as some observers have pointed out, despite the increase in frequency, these countermeasures have failed to stop Chinese efforts to assert control in the area. Beijing displays typical great power behavior to this end: it aims to minimize all possible threats close to its borders and will simply not budge to foreign pressure.

Diplomatic countermeasures have included a wide range of multilateral and bilateral initiatives. These include the U.S.-Japan-Australia-India quadrilateral dialogue and joint efforts to a joint Indo-Pacific strategic space that has garnered support and interwoven the geopolitics of both bodies of water, including the South China Sea. Amongst other things, the strategy emphasizes respect for international rules, including freedom of navigation and overflight: “The US has offered support for these principles on various fronts, including expanding U.S. Freedom of Navigation operations in contested areas of the South China Sea, increasing maritime capacity building support for Southeast Asian and Pacific Island nations, working alongside G-20 leaders to promote new Principles for Quality Infrastructure Investment, and announcing a new \$400 million Indo-Pacific Transparency Initiative.”⁴⁹ The EU – with the longest maritime border in the world – has also become more involved as it has the ambition to become a net maritime security provider.

Chinese diplomatic engagement is set at barring extra-regional actors from meddling, unless deemed constructive by China, meaning that those actors would have to support Chinese claims or shelve their disputes with Beijing. China’s approach is more focused on gaining wins through bilateral engagements than sincere multilateral cooperation within ASEAN. The most notable example of the latter is the effort to reach a Code of Conduct within the ASEAN framework, which can be traced back to the 1990s, with milestones reached being the Declaration on the Conduct of Parties in the South China Sea (2002), and in 2016 when the two sides formally and jointly worked toward the

45 Hemmings, John, “Charting Britain’s Moves in the South China Sea”, RUSI (6 February, 2019): <https://rusi.org/commentary/charting-britain%E2%80%99s-moves-south-china-sea>.

46 Navy Recognition, “French Navy Frigate Conducts FONOP in South China Sea”, (23 March, 2018): <https://www.navyrecognition.com/index.php/news/defence-news/2018/march-2018-navy-naval-defense-news/6081-french-navy-frigate-conducts-fo-nop-in-south-china-sea.html>.

47 BBC, “Australia Conducting ‘Freedom of Navigation’ Flights in South China Sea”, (15 December, 2015): <https://www.bbc.com/news/world-australia-35099445>.

48 DeAeth, Duncan, “US, Japan, India, Philippines Conduct Joint Naval Patrol Through South China Sea”, Taiwan News (9 May, 2019): <https://www.taiwannews.com.tw/en/news/3698009>.

49 Ford, Lindsey, “The Trump Administration and the ‘Free and Open Indo-Pacific’”, Brookings Institute (May, 2020): https://www.brookings.edu/wp-content/uploads/2020/05/fp_20200505_free_open_indo_pacific.pdf.

adoption of a Code of Conduct rooted in mutual consensus.⁵⁰ Nonetheless, diplomatic engagement with China seems to have made little impact so far – a reflection of the ‘talk and take’ stigma they have garnered.⁵¹ China continuously stresses its peaceful intentions and willingness to cooperate on the management of maritime resources, whilst simultaneously perpetuating dialogue as a smokescreen for consolidating its claims.⁵² Beijing has reportedly proposed that the code of conduct requires unanimous approval by all ASEAN members – who are notoriously split by and over China – for military exercises involving countries outside of China or ASEAN in the South China Sea, a move likely intended to impede US-allied FONOPS.⁵³

China’s policy of ‘talk and take’, in which it reassures regional neighbors of its peaceful intentions and willingness to jointly manage maritime resources without showing any meaningful commitment, has been largely successful.⁵⁴ The more time passes, the more economic and military power China gains, and the more able it will be to outlive its competitors and reach its long-term objectives in the South China Sea simply because other stakeholders cannot or will not hold their ground anymore. Their success is due to a number of factors, including: power asymmetries with and between its neighbors, economic entanglement propelled by the Belt and Road Initiative, the absence of a regional security architecture, and, most recently, hardening positions by the major players.⁵⁵ In these circumstances, the ambiguity surrounding China’s maritime claims – especially concerning the lack of clarity on the nine-dash line – contributes to the perpetuation of discussions. As long as Beijing does not clarify its position, joint cooperation would seem unlikely. Military countermeasures from China’s neighbors are limited to the buildup of their national defenses, improvement of their anti-access and area denial capabilities, the expansion of their coast guard’s presence, and the pursuit of their own land reclamation efforts.⁵⁶ All efforts are, however, dwarfed by the parallel Chinese developments.

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- 50 ASEAN, “Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea”, (25 July, 2016): <https://asean.org/storage/2016/07/Joint-Statement-on-the-full-and-effective-implementation-of-the-DOC-FINAL.pdf>, p.1.
- 51 Guzman, Luchi de, “ASEAN Targets Completion of Code of Conduct Within Three Years”, CNN (4 November, 2019): <https://www.cnnphilippines.com/news/2019/11/41/asean-china-code-of-conduct-south-china-sea.html>.
- 52 Reuters, “Xi Jinping Says China Wants South China Sea Issues Resolved Peacefully”, The Guardian (7 November, 2015): <https://www.theguardian.com/world/2015/nov/07/xi-jinping-says-china-wants-south-china-sea-issue-resolved-peacefully>; Fravel, Taylor, “China’s Strategy in the South China Sea”, *Contemporary Southeast Asia* 33(3), (2011) pp. 292-319: <https://taylorfravel.com/documents/research/fravel.2011.CSA.china.strategy.scs.pdf>.
- 53 United States Office of the Secretary of Defense: “Annual Report to Congress – Military and Security Developments Involving the People’s Republic of China 2019”, Department of Defense, (2 May, 2019) p.86: https://media.defense.gov/2019/May/02/2002127082/-1/-1/1/2019_CHINA_MILITARY_POWER_REPORT.pdf.
- 54 Corr, Andrew, “China’s Take-and-Talk in the South China Sea”, *Forbes* (29 March, 2017): <https://www.forbes.com/sites/anderscorr/2017/03/29/chinas-take-and-talk-strategy-in-the-south-china-sea/#69887aa33216>.
- 55 Storey, Ian, “China Pushes on the South China Sea, ASEAN Unity Collapses”, *China Brief* 12, no. 15 (2012): p.59
- 56 Most notably Vietnam, and to a lesser extent Indonesia, Malaysia and the Philippines; see Kuok, Lynn, “How China’s Actions in the South China Sea Undermine the Rule of Law”, *Brookings* (November 2019): <https://www.brookings.edu/research/how-chinas-actions-in-the-south-china-sea-undermine-the-rule-of-law/>. Grossman, Derek, “Military Build-Up in the South China Sea”, in *The South China Sea: From a Regional Maritime Dispute to Geo-Strategic Competition*, ed. Leszek Buszynski and Do Thanh Hai, Routledge, (2020), pp. 7-8.

In summary, the countermeasures employed in curtailing Chinese behavior have thus far failed to produce tangible results and deter China's expansive presence over the region. The next section situates these realities within the normative context, juxtaposing the conflict between existing and emerging norms presented by the opposing sides.

3.3 The Normative Dimension: What Norms are Promoted?

This section examines norm emergence on the part of China's role as a norm entrepreneur, and how it conflicts with existing norms and rules, most notably the UNCLOS, as well as explain how tools of influence are used to bolster both norm developments. As a normative incidence, Chinese actions in the pursuit of its claims erode the United Nations Convention on the Law of the Sea (UNCLOS).⁵⁷ Crucially, Chinese actions seek to revise the "rule of innocent passage" by barring foreign navies access to its territorial sea⁵⁸ and Exclusive Economic Zones (EEZ)⁵⁹ without prior consent. China reserves exceptions of this principle to its own actions while observers believe it does not abide by this rule itself.⁶⁰ Moreover, the case shows that the seemingly internalized norms of innocent passage that are enshrined in customary international law do not remain fixed or unchallenged. As the international context changes, the norm changes with it.

While FONOPs are unlikely to be sufficient by themselves, the U.S. and its allies are arguably establishing it as an acceptable enforcement mechanism tool for freedom of navigation and of the right of innocent passage – both cornerstone norms of Hugo Grotius' *mare liberum* and enshrined in the UNCLOS and customary international law.⁶¹ These norms, and by extension UNCLOS, are not only essential to upholding maritime security in the South China Sea, its Sea Lines of Communication (SLOCs),

57 Xue, Guifang, "China and the Law of the Sea: An Update", *International Law Studies* 84, (8 January, 2008), pp. 97-98: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1143&context=ils>.

58 The Territorial Sea is described in Part II of the UNCLOS. It extends the territorial sovereignty of a coastal states up to 12 nautical miles from the baseline and includes the air space as well. Ships of all states still enjoy the right of innocent passage through the territorial sea. United Nations "Part II Territorial Sea and Contiguous Zone." *Law of the Sea*, (2020): https://www.un.org/depts/los/convention_agreements/texts/unclos/part2.htm.

59 The Exclusive Economic Zone (EEZ) is described in Part V of the UNCLOS. It extends up to 200 nautical miles from the baseline from which the territorial sea is measured and offers the coastal states with *sovereign rights* "for the purpose of exploring and exploiting, conserving and managing the natural resources". The state has jurisdiction over the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment. United Nations, "Part V of the UNCLOS" *Law of the Sea*, (2020): https://www.un.org/depts/los/convention_agreements/texts/unclos/part5.htm.

60 Michael, Paul, "The United States, China and the Freedom of the Seas: Washington's FONOPs Conflict with Beijing", *Stiftung Wissenschaft und Politik*, (2016), p.3: <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-46539-4>; Fletcher School, "Freedom of Navigation", *Law of the Sea – A Policy Primer*, TUFTS (24 May, 2016): <https://sites.tufts.edu/lawofthesea/#:~:text=The%20law%20of%20the%20sea%2C%20as%20embodied%20in%20the%20Law,international%20framework%20for%20the%20conservation%2C>.

61 *Ibid.*; United Nations, "United Nations Convention on the Law of the Sea – Agreement Relating to the Implementation of Part XI of the Convention", *UN Law of the Sea*: https://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

but also for protecting the existing balance of coastal state rights and international rights of freedom of navigation from Chinese encroachments.⁶²

3.3.1 A New Norm Emerges?

China has propagated a new norm of behavior by challenging the UNCLOS principle of Freedom of Navigation to what is described by some observers as dovetailing with its interest to localize law and push for specific regional maritime governance, due to what Beijing describes as a different or even unique historical context.⁶³ First, it is challenging UNCLOS norms that determine how states lay claim to maritime zones, such as the Exclusive Economic Zones (EEZs), by reverting to historical rights, the nine-dash line, and the construction of artificial islands. By claiming exclusive authority over the South China Sea in ways not supported by international law (UNCLOS), China challenges the only global maritime security framework, and campaigns for a revisionist norm.⁶⁴ Second, it is challenging the right of innocent passage of foreign navies by barring them or by requiring previous authorization.⁶⁵ This emerging norm is in conflict with the pre-existing norm internalized by the majority of states around the world which many, most explicitly the U.S., seek to enforce.⁶⁶

These normative revisions seek to challenge the existing balance of coastal state rights and international rights of freedom of navigation through China's use of various tools of influence.⁶⁷ This not only affects the other regional actors in the South China Sea, but risks potentially destabilizing first and second order effects for countries with Sea Lines of Communication (SLOCS) or vessels transiting through the South China Sea.⁶⁸ The following section outlines how the two sides have used a combination of tools of influence – socialization, persuasion and coercion – to propagate and cultivate their respective norms.

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- 62 Holmes, James, "Are Freedom of Navigation Operations in East Asia Enough?", *The National Interest* (23 February, 2019): <https://nationalinterest.org/feature/are-freedom-navigation-operations-east-asia-enough-45257>; Ben, Cardin, "The South China Sea is the Reason the United States Must Ratify UNCLOS", *Foreign Policy* (13 July, 2016): <https://foreignpolicy.com/2016/07/13/the-south-china-sea-is-the-reason-the-united-states-must-ratify-unclos/>.
- 63 Franki, Julie, "Seize the Sea: the Territorial Conflict Between the United States and China Over Military Operations in the South China", *Emory* (31), pp. 1026-1027: https://law.emory.edu/eilr/_documents/volumes/31/recent%20developments/franki.pdf.
- 64 Permanent Court of Arbitration, "In the Matter of the South China Sea Arbitration", (12 July, 2016): <https://pcacases.com/web/sendAttach/2086>.
- 65 Thu, Huong Le, "China's Incursion into Vietnam's EEZ and Lessons From the Past", *Asia Maritime Transparency Initiative* (8 August, 2019): <https://amti.csis.org/chinas-incursion-into-vietnams-eez-and-lessons-from-the-past/>.
- 66 Although it is necessary to point out that there is a substantial number of states that, though independently of each other, agree with China on posing restrictions on navigation, both in formal expressions and in terms of behavior. See the table in Pham, Trand; Truong-Minh Vu, "From Clash of Vision to Power Struggle: The US, China, and Freedom of Navigation", *E-International Relations* (31 October, 2014): <https://www.e-ir.info/2014/10/31/from-clash-of-vision-to-power-struggle-the-us-china-and-freedom-of-navigation/>.
- 67 Kuok, Lynn: "How China's Actions in the South China Sea Undermine the Rule of Law", *Brookings* (November 2019): https://www.brookings.edu/wp-content/uploads/2019/11/FP_20191118_china_scs_law_kuok.pdf.
- 68 Glaser, Bonnie, "Conflict in the South China Sea", *Council on Foreign Relations* (2015): <https://www.cfr.org/report/conflict-south-china-sea>.

Socialization

China has attempted to socialize other countries into accepting the norm supporting its claims to the area. One form of socialization is the periodic uptick of supportive publications *linking* the issue in terms of Chinese *historic rights* to the contested area.⁶⁹ The mainstay publication platform for this effort has been Chinese academic journals, which contain a plethora of articles advocating the Chinese perspective on the issue.⁷⁰ Moreover, these publications tend to link Chinese claims to the irrelevance of international law, which supposedly cannot overwrite historic claims, and advocate Chinese behavior by pointing at “China’s responsible attitude” as the salient reason for stability in the region.⁷¹ Others have questioned the 2016 tribunal ruling on the basis of its supposedly incorrect interpretation of international law and inconsistent terminology.⁷² These publications have been accompanied by similar *framing* devices explicitly spelled out by Chinese officials.⁷³ China has compounded its historical argument through analogy, drawing parallels to the perceived ‘century of humiliation’ of 1839-1949 in which China suffered intervention by Western, Russian and Japanese powers.⁷⁴ This cultural touchstone is regularly leveraged by the Chinese Communist Party to mobilize support domestically and abroad amongst anti-colonial audiences, portraying its actions not as expansionist but as a justified restoration of China’s sovereign rights and geopolitical status.⁷⁵

Beijing has also established official names for the recently created pieces of land, framing their identity and signaling their permanent legal status under Chinese sovereignty.⁷⁶ Furthermore, Chinese passports depict the contested territories and the nine-dash line forming part of China, a move that has provoked angry reactions from the Philippines

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- 69 For a complex overview of this literature, see Zheng Wang, Chinese Discourse on the “Nine-Dashed Line: Rights, Interests, and Nationalism”, *Asian Survey*, Vol. 55, No. 3 (May/June 2015), pp. 502-524.
- 70 YEE, Sienho, “Chinese Journal of International Law”, (2020): <https://academic.oup.com/chinesejil>.
- 71 Hao, Su, “China’s Positions and Interests in the South China Sea: A Rational Choices in its Cooperative Policies”, CSIS (12 September, 2011): <https://www.csis.org/analysis/china%E2%80%99s-positions-and-interests-south-china-sea-rational-choices-its-cooperative-policies>.
- 72 Gau, Michael Sheng-ti. “The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique.” *Ocean Development & International Law* 50, no. 1 (January 2, 2019), pp. 49–69: <https://doi.org/10.1080/00908320.2018.1511083>.
- 73 Vincenti, Daniela, “South China Sea Arbitration: Illegal, Illegitimate and Invalid”, EURACTIV (12 July, 2016): <https://www.euractiv.com/section/global-europe/opinion/south-china-sea-arbitration-illegal-illegitimate-and-invalid/>.
- 74 Raunig, Colin: “A Sense of Sovereignty: How China’s ‘Century of Humiliation’ Affects U.S. Policy in the South China Sea”, *Naval History and Heritage Command*, (2017): <https://www.history.navy.mil/content/history/nhhc/get-involved/essay-contest/2017-winners/additional-essay-contest-submissions/a-sense-of-sovereignty---how-chinas-century-of-humiliation-afec1.html>; Heller, Christian: “South China Sea: China Breaks From a Century of Humiliation”, *RealClearDefense*, (4 February, 2019): https://www.realcleardefense.com/articles/2019/02/04/south_china_sea_china_breaks_from_a_century_of_humiliation_114158.html.
- 75 Callahan, William, “National Insecurities: Humiliation, Salvation, and Chinese Nationalism”, *Alternatives: Global, Legal, Political* 29 (2), (May 2004), pp. 199-218: <https://www.jstor.org/stable/40645112?seq=1>
- 76 Lei, Zhao, “Ministries Release Official Names for South China Sea Entities”, *China Daily* (20 April, 2020): <https://www.chinadaily.com.cn/a/202004/20/WS5e9d3404a3105d50a3d176e8.html>; Odom, Jonathan, ‘Protecting the Rules-Based Order at the International Tribunal for the Law of Sea’, *Lawfare* (8 May, 2020): <https://www.lawfareblog.com/protecting-rules-based-order-international-tribunal-law-sea>.

and Vietnam.⁷⁷ Moreover, it has established two new city districts on Woody island and more broadly over 280 island shoals, reefs and features, developing their administrative control over the territories.⁷⁸ These newly created districts entrench and normalize China's perceived sovereignty, and the influx of Chinese tourism to the area brings increased ship traffic that may compound complications for Western and allied FONOPs.⁷⁹ At times, China has also utilized the Shanghai Cooperation Organisation as an organizational platform to gain support for its position, with officials from the organization explicitly proclaiming support for Chinese behavior.⁸⁰ Although several of these socialization tools have been perceived as provocative by affected actors, some have contributed to the socialization of the emerging norm's desired revisions to the principles of UNCLOS.

China's interpretation of the right of innocent passage – either as a full refutation or with the addendum that ships must receive permission – is not without precedent. Indeed, the Cold War dispute between the U.S. and the Soviet Union with regard to prior notification for ships operating in Arctic Waters may have been a key contributor to the eventual cascade of the norm underpinning the right of innocent passage.⁸¹ Opposing perspectives on whether prior notification should apply as a caveat to the right of innocent passage persisted until 1982 when the USA and USSR issued a *Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage*:

“All ships, including warships, regardless of cargo, armament, or means of propulsion enjoy the right of innocent passage through the territorial sea in accordance with the international law, for which neither prior notification nor authorization is required.”⁸²

Nevertheless, a myriad of countries have at various times advocated the right of coastal states to demand prior notification or authorization to foreign navies or differentiate innocent passage depending on territorial waters or EEZs, including Malaysia, Saudi

77 Mogato, Manuel, “China Angers Neighbors With Sea Claims on New Passports”, Reuters (22 November, 2012): <https://www.reuters.com/article/us-china-southchinasea/china-angers-neighbors-with-sea-claims-on-new-passports-idUSBRE8AL09Q20121122>.

78 Yamaguchi, Shinji, “Creating Facts on the Sea: China's Plan to Establish Sansha City”, Asia Maritime Transparency Initiative (17 April, 2017): <https://amti.csis.org/chinas-plan-establish-sansha-city/>.

79 Haver, Zachary, “Sansha and the Expansion of China's South China Sea Administration”, Asia Maritime Transparency Initiative (12 May, 2020): <https://amti.csis.org/sansha-and-the-expansion-of-chinas-south-china-sea-administration/>; Williams, Zachary, “China's Tightening Grasp in the South China Sea: A First-Hand Look”, *The Diplomat* (10 June, 2020): <https://thediplomat.com/2020/06/chinas-tightening-grasp-in-the-south-china-sea-a-first-hand-look/>.

80 Nan, Li, “SCO Supports Peace and Stability in South China Sea”, *Beijing Review* (24 May, 2016): http://www.bjreview.com/World/201605/t20160525_800057621.html.

81 Ergina, Natalia, “The Regulation of International Navigation Through the Northern Sea Route”, *The Arctic Institute of Norway*, (September 2014): <https://munin.uit.no/bitstream/handle/10037/7161/thesis.pdf?sequence=1>.

82 Williams, Simon O., “Maritime Security: The Concept of Innocent Passage”, *Maritime Executive* (17 December, 2014): <https://www.maritime-executive.com/features/Maritime-Security-Private-The-Concept-of-Innocent-Passage>.

Arabia, Oman, Morocco and Yemen.⁸³ Only Beijing is doing so for the entire nine-dash line, not just its EEZ, and has the weight and clout to gradually enforce it. China has thereby assumed the role as the primary norm entrepreneur in socializing these disparate sentiments into broad support for its emergent norm revising the right of innocent passage.

The U.S., several European states including France and the UK, and partners in the region have attempted to counter the propagation of both of these norms by employing their own socialization tools. The overarching purpose has been to socialize China, and other hesitant actors, to accept the widely recognized norm of behavior rooted in the upholding of salient UNCLOS principles, such as Freedom of Navigation and Right of Innocent Passage. The West and other litigant states in the South China Sea have sought to reaffirm and challenge China's dismissal of international law, most notably in the 2016 tribunal case of the Philippines. Vietnam has contemplated similar legal measures and regularly referred to The UN charter and UNCLOS as its basis for negotiations with Beijing.⁸⁴ This reiteration of existing law has the effect of challenging China's emergent norm, reflecting a dynamic of norm emergence by which a norm may be strengthened through repetition and reiteration by its supporters.⁸⁵ Consequently, violations of internalized norms that go unchallenged have the effect of revising the normative status quo in favor of an emergent replacement or exemption.⁸⁶ Those states seeking to reaffirm UNCLOS refer to errors in China's interpretation of international law, namely that the clause regarding territorial waters or EEZs does not apply to the artificially created islands, as well as pointing out the legal insignificance of historic rights.⁸⁷ By doing this and pointing out individual behavioral transgressions, they framed China's behavior as unacceptable.⁸⁸ However, the effectiveness of these

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- 83 Jin, Shao, "The Question of Innocent Passage of Warships: After UNCLOS III", *Marine Policy* 13, no. 1, (January, 1989) pp. 56-67; Reilingh, Vries, "Warships in Territorial Waters, Their Right of Innocent Passage", *Netherlands Yearbook of International Law* (2), (December, 1971), pp. 29-67: <https://www.cambridge.org/core/journals/netherlands-yearbook-of-international-law/article/warships-in-territorial-waters-their-right-of-innocent-passage/9E960F2999F668121E3E42615ED3B4B7>.
- 84 Pearson, James; Vu, Khanh, "Vietnam Mulls Legal Action Over South China Sea Dispute", *Reuters*, (6 November, 2019): <https://www.reuters.com/article/us-vietnam-southchinasea/vietnam-mulls-legal-action-over-south-china-sea-dispute-idUSKBNIXG1D6>.
- 85 Payne, Rodger, "Persuasion, Frame and Norm Construction", *European Journal of International Relations* 7, no.1, (2001): <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.525.5373&rep=rep1&type=pdf>.
- 86 Romaniuk, Scott; Grice, Francis, "Norms, Norm Violators, and IR Theory", *E-international Relations*, (15 November, 2018): <https://www.e-ir.info/2018/11/15/norms-norm-violations-and-ir-theory/>.
- 87 Bader, Jeffrey, "The U.S. and China's Nine-Dash Line: Ending the Ambiguity", *Brookings*, (6 February, 2014): <https://www.brookings.edu/opinions/the-u-s-and-chinas-nine-dash-line-ending-the-ambiguity/>; Franki, Julie, "Seize the Sea: The Territorial Conflict Between the United States and China Over Military Operations in the South China Sea", *Emory International Law Review* (31), pp.1023-1024: https://law.emory.edu/eilr/_documents/volumes/31/recent%20developments/franki.pdf.
- 88 Asia Transparency Initiative, "Failing or Incomplete? Grading the South China Sea Arbitration" (11 July, 2019): <https://amti.csis.org/failing-or-incomplete-grading-the-south-china-sea-arbitration/>; Panda, Ankit, '5 Takeaways on China's Theft of a US Drone in Philippine Waters in the South China Sea', *The Diplomat* (17 December, 2016): <https://thediplomat.com/2016/12/5-takeaways-on-chinas-theft-of-a-us-drone-in-the-philippine-waters-in-the-south-china-sea/>; Chairman's Press, "Risch, Menendez, Gardner, Markey Comment on Chinese Coast Guard's Sinking of a Vietnamese Fishing Boat, Deployment of Military Aircraft in South China Sea", *Foreign Relations* (10 April, 2020): <https://www.foreign.senate.gov/press/chair/release/risch-menendez-gardner-markey-comment-on-chinese-coast-guards-sinking-of-a-vietnamese-fishing-boat-deployment-of-military-aircraft-in-south-china-sea>.

socialization tools remains doubtful for they have not produced tangible results on the ground or mobilized more widespread defense of the internalized UNCLOS norm.

Persuasion

China has used diplomacy, mostly in the form of bilateral talks, to persuade other states to accept its emergent norm that the UNCLOS either does not apply or should be caveated with anti-access maritime clauses. The common denominator shared across the 70+ countries that have voiced varying degrees of support for China's claim stem from a desire to avoid entanglement in a bilateral US-China standoff, and national self-interest.⁸⁹ More broadly, this sporadic support – including from countries with rival territorial claims to China – revolves around a lack of consensus on what 'China's position' is. This result is owing to Beijing's cultivated ambiguity in its 'take and talk' approach of outward willingness to peacefully negotiate. It has additionally leveraged disunity within ASEAN and the divergent interests of its members, particularly in their respective economic entanglements with China and disparate social outlooks and political priorities.⁹⁰ This lack of consensus has prevented a more unified front against China's norm violating behavior, and ceded its space to employ further persuasive incentives to stymie more robust affirmation of international law and existing norms.

These persuasive Chinese efforts to propagate its revisions to existing legal rulings and norms is most prominently shown in the disparate support for China's position in light of the 2016 international tribunal case. Countries as disparate as Thailand, Myanmar, Malaysia, Iran, Pakistan, and India voiced varying degrees of support for the Chinese position, though the exact number of countries with similar attitudes is purported to be much higher.⁹¹ Nonetheless, it is hard to assess whether this support is the result of active persuasion on the part of China, or mere anticipation of material or immaterial potential benefits in the future, or of independently developed positions.⁹²

The West and other regional countries have similarly sought to utilize persuasion to promote the maintenance of the existing norm rooted in UNCLOS principles.

89 Wen, Wang; Xiaochen, Chen, "Who Supports China in the South China Sea and Why", *The Diplomat* (27 July, 2016): <https://thediplomat.com/2016/07/who-supports-china-in-the-south-china-sea-and-why/>.

90 O'Neill, Daniel, "Dividing ASEAN and Conquering the South China Sea: China's Financial Power Projection", Hong Kong University Press, (September, 2018), p.41.

91 Dutton, Peter, "Cracks in the Global Foundation: International Law and Instability in the South China Sea", in "Cooperation From Strength: The United States, China and the South China Sea", (1 January, 2012): https://www.jstor.org/stable/resrep06426?seq=1#metadata_info_tab_contents; AMTI Leadership, "Arbitration Support Tracker", Asia Maritime Transparency Initiative", (16 June, 2016): <https://amti.csis.org/arbitration-support-tracker/>; Wen, Wang; Xiaochen, Chen, "Who Supports China in the South China Sea and Why", *The Diplomat* (27 July, 2016): <https://thediplomat.com/2016/07/who-supports-china-in-the-south-china-sea-and-why/>; PTI, "South China Sea Dispute: China Claims Support of 40 Countries", *Economic Times*, (12 July, 2018): <https://economictimes.indiatimes.com/news/defence/south-china-sea-dispute-china-claims-support-of-40-countries/articleshow/52363836.cms?from=mdr>.

92 There are dozens of countries advocating for some form of constrain on navigation, though not necessarily in the same form as China; see Pham, Trand; Truong-Minh Vu, "From Clash of Vision to Power Struggle: The US, China, and Freedom of Navigation", *E-International Relations* (31 October, 2014): <https://www.e-ir.info/2014/10/31/from-clash-of-vision-to-power-struggle-the-us-china-and-freedom-of-navigation/>.

Most active efforts in this direction stem from the continual diplomatic talks aimed at establishing a Code of Conduct in the South China Sea Context, though without tangible results so far.⁹³ Additionally, the diplomatic efforts of individual states have also pursued this persuasive logic; the U.S. and Australia, for example, have diplomatically supported both China and ASEAN in reaching the Code of Conduct agreement.⁹⁴ These efforts seem to have had some effect; The 36th ASEAN summit in Hanoi issued a joint statement which “reaffirmed that the 1982 UNCLOS is the basis for determining maritime entitlements, sovereign rights, jurisdiction and legitimate interests over maritime zones”.⁹⁵ These efforts have sought to cool rising U.S.-China tensions, offering bilateral and multilateral engagement as an alternative to FONOPs as the centerpiece for countering China’s assertions.⁹⁶ Taiwan, for example, has also proposed plans for achieving stability in the region within the framework of the South China Sea Peace Initiative.⁹⁷ The persuasive tools used by this side have produced limited results, mostly in the form of joint declarations and promises, but with no change to realities on the ground.

Coercion

China has utilized coercion jointly alongside its socialization and persuasion tactics in propagating its emergent norm.⁹⁸ These measures occur mostly through military and economic inducements to enforce both aspects of the emerging norm.⁹⁹ Beijing has repeatedly used force or threats of force, both covertly and overtly, in defense of its claims.¹⁰⁰ While China’s continuous and swift development of its blue water navy enables it to increasingly project power further away from its shores, it has mostly relied on law enforcement activities to propagate the EEZ-violating norm, masquerading its efforts as an enforcement of Chinese domestic law to bolster its claims rather than as a challenge to international maritime law.¹⁰¹ The incorporation of the Woody, Spratly and Paracel Islands as city districts brings its own coercive element, as alongside

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- 93 AFP-JIJI, “Beijing Says it is Ready to Work With ASEAN on South China Sea Code of Conduct”, Japan Times (3 November, 2019): <https://www.japantimes.co.jp/news/2019/11/03/asia-pacific/politics-diplomacy-asia-pacific/beijing-says-ready-work-asean-south-china-sea-code-conduct/#.XuY69kUzZPY>.
- 94 Starting, Rebecca, “Australia’s Approach to the South China Sea Dispute”, East-West Center (24 July, 2019): <https://www.eastwestcenter.org/publications/australia%E2%80%99s-approach-the-south-china-sea-disputes>; Cihang, Chen, “The U.S. Policy on the Code of Conduct in the South China Sea”, *The Journal of International Studies* 39(4), (August, 2018): <http://jtp.cnki.net/bilingual/detail/html/GJZY201804003>.
- 95 Associated Press, “ASEAN Leaders Cite 1982 UN Treaty in South China Sea Dispute”, *Guardian* (27 June, 2020): <https://www.theguardian.com/world/2020/jun/27/asean-leaders-cite-1982-un-treaty-in-south-china-sea-dispute>.
- 96 Li, Chien-pi, “The South China Sea Peace Initiative in a Transitional Security Environment”, *American Journal of Chinese Studies* 23, no. 1, (July, 2016): <https://www.jstor.org/stable/44289143?seq=1>.
- 97 Tsai, George, “Taiwan and Its South China Sea Peace Initiative”, *The Diplomat* (28 August, 2015): <https://thediplomat.com/2015/08/taiwan-and-its-south-china-sea-peace-initiative/>.
- 98 Corr, Andrew, “China’s Take-and-Talk in the South China Sea.” *Forbes*, (March 29, 2017): <https://www.forbes.com/sites/anderscorr/2017/03/29/chinas-take-and-talk-strategy-in-the-south-china-sea/#69887aa33216>.
- 99 Green et al., “Countering Coercion in Maritime Asia”, pp. 51–262.
- 100 Van Pham, “The Use or Threat of Force in the South China Sea Disputes Since 1945: A Timeline”, *Power Politics in Asia’s Contested Waters* (20 February 2016): https://link.springer.com/chapter/10.1007/978-3-319-26152-2_25.
- 101 Corr, Anders, “China’s Take-And-Talk in the South China Sea”, *Forbes* (29 March, 2017): <https://chinapower.csis.org/maritime-forces-destabilizing-asia/>.

increased administrative control China has introduced robust military and coastguard capabilities to bolster its presence in the area.¹⁰² While not coercive per se, China has sought to further normalize its maritime presence through joint-military exercises, such as the 2018 trilateral Peace and Friendship naval exercises with Malaysia and Thailand, as part of efforts to soothe regional tensions.¹⁰³

These actions reflect China's hardline outlook on issues it perceives as central to its sovereignty. President Xi has linked sovereignty with the accomplishment of his 'China Dream', proclaiming that "no foreign country should expect us to trade away our core interests" or expect China "to swallow the bitter fruit" of encroachment upon its "sovereignty".¹⁰⁴ More recently, in 2018, Xi Jinping commented to U.S. Secretary of Defense James Mattis that China "cannot lose even one inch of the territory left behind by our ancestors".¹⁰⁵ In this respect, China regularly employs coercive tactics against its neighbors in asserting its territorial claims, ranging from coastal patrols to the actual sinking of fishing vessels - as occurred most recently in the case of a Vietnamese fishing vessel rammed by a Chinese surveillance ship.¹⁰⁶ A major facet of China's coercive measures on the ground are patrols by the People's Armed Forces Maritime Militia (PAFMM), a civilian reserve force employed as part of China's broader military strategy that sees "confrontational operations short of war as an effective means of accomplishing political objectives".¹⁰⁷

Additionally, strong economic entanglement between China and other states also conveys the potential for economic coercion and the mere anticipation of said coercion may be sufficient for some Western and regional states to abstain from taking active countermeasures.¹⁰⁸ Indeed, it has been observed that recently China has relied on economic and law enforcement coercion more often than its military measures.¹⁰⁹ This

102 Haver, Zachary, "Sansha and the Expansion of China's South China Sea Administration", Asia Maritime Transparency Initiative, (12 May, 2020): <https://amti.csis.org/sansha-and-the-expansion-of-chinas-south-china-sea-administration/>.

103 Parameswaran, Prashanth, "What's in China's Military Exercise With Malaysia and Thailand?", The Diplomat, (17 October, 2018): <https://thediplomat.com/2018/10/whats-in-chinas-military-exercise-with-malaysia-and-thailand/>.

104 Fravel, Taylor, "China's Sovereignty Obsession", Foreign Affairs, (26 June, 2020): <https://www.foreignaffairs.com/articles/china/2020-06-26/chinas-sovereignty-obsession>.

105 CGTN, "Xi Tells Mattis China Won't Give Up 'One Inch' of Territory", (2018): https://news.cgtn.com/news/3d3d514d3545444e78457a6333566d54/share_p.html.

106 Vu, Khanh, "Vietnam Protests Beijing's Sinking of South China Sea Boat", Reuters (4 April, 2020): <https://www.reuters.com/article/us-vietnam-china-southchinasea/vietnam-protests-beijings-sinking-of-south-china-sea-boat-idUSKBN21M072>.

107 United States Office of the Secretary of Defense, "Annual Report to Congress - Military and Security Developments Involving the People's Republic of China 2019", Department of Defense, (2 May, 2019): https://media.defense.gov/2019/May/02/2002127082/-1/-1/1/2019_CHINA_MILITARY_POWER_REPORT.pdf.

108 Luc, Tuan Anh, "Decoding Australia's Strange Silence Over China's Transgressions in the South China Sea", The Diplomat (15 August, 2019): <https://thediplomat.com/2019/08/decoding-australias-strange-silence-over-chinas-transgressions-in-the-south-china-sea/>; Ravindran, Madhu Sudan (2012), "China's Potential for Economic Coercion in the South China Sea Disputes: A Comparative Study of the Philippines and Vietnam", *Journal of Current Southeast Asian Affairs*, 31, no. 3, pp. 105-132.

109 Zhang, K., "Cautious Bully: Reputation, Resolve, and Beijing's Use of Coercion in the South China Sea" *International Security* 44, no. 1, (2019), pp.117-159: doi:10.1162/isec_a_00354.

preference for economic coercion iterates Beijing's preference for tools of influence that fall below the threshold of the use of force, a strategic choice which it employs as a general principle in its 'talk and take' approach.¹¹⁰ Though the use of coercive tools has not yet led to the cascade or internalization of Chinese propagated norms in violation of UNCLOS principles, it has undermined the latter and influenced individual actors to abstain from taking more resolute countermeasures to maintain the incumbent norm.

The West and some other regional states have largely used active and passive tools of military coercion to propagate the pre-existing norm respecting the UNCLOS principles. The repeated conduct of FONOPs can be interpreted as a form of coercion whose purpose is the promotion of that pre-existing norm.¹¹¹ Furthermore, the military buildup of anti-access and area-denial bubbles, particularly on the side of Vietnam and the U.S., also has the potential to produce coercive effects.¹¹² Overall, the effectiveness of these coercive tools has fallen short as only a handful of countries partake in the reaffirmation of the existing UNCLOS norms, and their employment has not led to a Chinese change in behavior as president Xi is unlikely to budge for the U.S. or any other non-regional interference.

This case study shows the interactive dynamics between the promotion of emerging norms versus the defense of the previously internalized ones. Though both China and its opponents have used socializing, persuasive and coercive efforts to promote their normative behavior, the results remain inconclusive at best or favorable to China at worst. The emerging norm in violation of UNCLOS has not cascaded nor has it been internalized by other actors.

3.3.2 Second-Order Normative Effects of the Countermeasures

States may underestimate or even be unaware that countermeasures may establish new norms that conflict with their own long-term interests. As these norms are in their early emergence, they, and the countermeasures which initially formed them, may produce unanticipated long-term consequences. In this case study, we identify one negative externalities associated with the respective countermeasures that are not prohibitive

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- 110 Hicks, Kathleen; Shah, Hijab; Federici, Joseph; Akca, Asya; Sheppard, Lindsey, "By Other Means Part I: Campaigning in the Gray Zone", CSIS (8 July, 2019), p.35: <https://books.google.nl/books?id=28SrDwAAQBAJ&pg=PA7&lpq=PA7&dq=china+tools+of+influence+threshold+use+of+force+economic+coercion&source=bl&ots=QNfP5dvAEk&sig=ACFu3U0A1tFkY-ANVWFUG5jq4ZH15t5R7Q&hl=en&sa=X&ved=2ahUKEwjv9PzQmKnqAhXB2qQKHTBpCw0Q6AEwAHoECAoQAQ#v=onepage&q=south%20china%20sea&f=false>.
- 111 Lan, NGO Di, "The Usefulness of "Redundant" Freedom of Navigation Operations", Asia Maritime Transparency Initiative, (26 January, 2018): <https://amti.csis.org/usefulness-redundant-fo-nops/>.
- 112 Bonds, Timothy; Predd, Joel; Heath, Timothy; Chase, Michael; Johnson, Michael; Lostumbo, Michael; Bonomo, James; Mane, Muharrem; Steinberg, Paul, "What Role Can Land-Based, Multi-Domain Anti-Access/Area Denial Forces Play in Deterring or Defeating Aggression?", RAND (2017): https://www.rand.org/content/dam/rand/pubs/research_reports/RR1800/RR1820/RAND_RR1820.pdf.

but should be taken into consideration as they have an impact on the development of international norms and could run contrary to the interests of the entrepreneur.

The second order effects of U.S. countermeasures may incite escalation and legitimization of Chinese behavior. The second-order normative effects of FONOPs is considered to be limited because its mandate is enshrined within UNCLOS and customary international law. The credibility of American FONOPs may be undermined by the fact that the U.S. has not ratified UNCLOS. Furthermore, FONOPs have been interpreted as a provocation by China.¹¹³ This is so because China perceives these operations as constituting a threat to its sovereign rights over the area.¹¹⁴ Regular employment of FONOPs can feed the Chinese narrative that more control is required to bar U.S. and other powers outside of the region from pursuing their foreign policy goals in the South China Sea.¹¹⁵ In sum, the use of FONOPs may have created perceived domestic legitimacy for Chinese military buildup in the area as well as encouraged potential escalation of the conflict.

3.4 Key Takeaways

Firstly, both China and the U.S. have employed a combination of socialization, persuasion and coercion to propagate and cultivate respective norms, either seeking to reaffirm or revise the normative status quo. China's socialization efforts have shown promising initial signs; it has gained vocal and formal sympathies from actors such as Russia, Thailand, Myanmar, Malaysia, Iran, Pakistan, and India. It thereby challenged customary international law and the primary maritime security framework without ample disapproval and resistance from the international community. China has effectively propelled the rise of a revisionist emergent norm through the coercive leveraging of its neighbors' economic entanglements, persuasive incentives through setting a precedent for newly permissible actions and exploiting social and political divisions through linking and framing. In sum, it seems that the norm conflict currently hinges upon China's calculation of its gains in continuing to promote its position as a norm entrepreneur, relative to the reciprocal costs in challenging the normative status quo and the willingness of incumbent norm leaders to defend it. As of now, the established UNCLOS norm remains the more widely internalized norm, albeit under constant challenge by China's emergent rival interpretation, which may spillover to other emerging great powers, such as India.

113 Reuters, "China Urges United States to Stop Provocative Acts in South China Sea" (22 November, 2019): <https://www.reuters.com/article/us-usa-china-southchinasea-fonop/china-urges-united-states-to-stop-provocative-acts-in-south-china-sea-idUSKBNIXW07P>.

114 Xinjun Zhang, "The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-Balance?", *Journal of East Asia and International Law* 9, no. 1 (2016): pp.167–82.

115 Urchick, Daniel, "Tensions in the South China Sea National Intelligence Estimate: The Next Two to Three Years", *Small Wars Journal* (20 February, 2017): <https://smallwarsjournal.com/jrnl/art/tensions-in-the-south-china-sea-national-intelligence-estimate-the-next-two-to-three-years>.

By contrast, joint countermeasures – particularly those centered on U.S. FONOPs – have done little to challenge the substance of China’s claims. Chinese persuasive efforts have shown promising signs in gathering support and silencing opposition for their claims in the South China Sea and the challenge to UNCLOS norms on freedom of navigation. By contrast, the latter effort has produced little more than the vague prospects of establishing a Code of Conduct in the South China Sea, a move that China is likely to deflect through continued ‘talk and take’ tactics. These tactics and its political system allow the Chinese to take a long-term strategy through which they meet their objectives through-steps, which become major strides over time. Chinese use of coercion through law enforcement, militia, and PLA operations has propagated its emerging norm in spite of UNCLOS principles and, perhaps equally importantly, has silenced some regional voices in opposition to the norm. Comparatively, coercive tools employed by the U.S. and other regional states have not contributed to the further cultivation of pre-existing norms. In sum, the effectiveness of individual tools of propagation has heavily favored China, especially in its use of coercive and persuasive influence tools.

Finally, the risks flowing from the second-order normative effects produced by FONOPs are relatively low. Instead, they present operational side-effects that could justify Chinese assertiveness in the region and potentially escalate the conflict. Alternatively, the lack of tangible effects produced by FONOPs may signal weakness and lack of credibility on the U.S. side. These negative effects effectively place the U.S., and the West in general, in choosing between two unenviable options, in which both acting and not acting may damage its long-term interests.

4. Conclusions and Recommendations From the Paper Series

Hybrid conflict is characterized by the deployment of activities that occur across domains, overtly and covertly, including economic coercion, disinformation campaigns and cyberattacks. They are intended to circumvent detection, existing laws, and response thresholds to minimize the basis for decisive responses. Western countries that are on the receiving end of such activities are trying to counter them using a portfolio approach ranging from preventive resilience to proactive response and punishment of hybrid violations.

This report has considered the strategic utility of norms in shaping adversarial hybrid conflict behavior. Norms function via an actor's self-perception, their interests, values, and fear of stigma or material costs from other adherents in the international community if they do not conform to the norm. It is crucial to gain a better understanding of how norms develop and what states can do to support this process. To that purpose this report has used the norm lifecycle from academic literature to describe the process of norm development, starting from norm emergence towards norm cascade and internalization.

Typically, a norm emerges either out of habit or as the result of advocacy by *norm entrepreneurs* who *frame* their norm within a specific context and *link* it to other norms, laws or principles that reflect their interests. *Organizational platforms*, such as the EU, UN, or SCO, are often used to accelerate the *socialization* of a norm. At the same time, these platforms limit the scope and audience of the norm, thereby potentially barring it from broader acceptance. This report has outlined three strategies that can be used to promote norms: *socialization*, *persuasion*, and *coercion*. Socialization leverages the shared relations and identities between actors and institutions in order to push a norm towards conformity. Persuasion denotes the promotion of a norm through positive material incentives and/or immaterial incentives, such as *linking* and *framing*. Coercion encompasses the use of or threat of negative inducement toward another into accepting a norm.

The report then applied the norm lifecycle and the strategies of influence to five real-world case studies specifically looking at the promotion of norms by states in the context of countermeasures in response to hybrid threats. The premise of the report is

that countermeasures should be carried out in a responsible way, have an underlying legal or normative basis, and take into consideration the second-order normative effects which have often been underestimated or even ignored. In doing so, it analyzed a wide range of Western countermeasures in response to Russian and Chinese hybrid threats and assessed the norms that emerge from such countermeasures. The sample of cases was both too small and too diverse to draw generic conclusions about particularly effective combinations of strategies. Furthermore, because the case studies describe relatively young norms that are still under development, it is not yet possible at this stage to determine what combination of strategies may work best under what circumstances. An area of further research, therefore, includes the application of the lifecycle to a wider set of cases, including historical ones, within the context of interstate strategic bargaining that allows for the identification of best practices. At the same time, the richness of the cases certainly yielded a set of important insights concerning the role of norms in shaping hybrid threat behavior and the ways in which state entrepreneurs can build their strategies across the different phases of the norm lifecycle.

First and foremost, our analysis warrants the conclusion that norms are in fact relevant instruments to shape adversarial hybrid behavior. They by no means constitute a silver bullet and their emergence, cascade, internalization and sustenance require a concerted effort on the part of norm entrepreneurs. Norms cannot be launched and left to fend for themselves. They are not fixed products of agreements, nor are they static nodes of international relations. A norm previously taken for granted may come to be viewed as wholly objectionable given the passing of time and/or changing circumstances. Norms, therefore, need to be continually promoted by their norm entrepreneur, and that entrepreneur must continue to exercise leadership in building support and widening the like-minded coalition behind it. Historically it has been difficult to “transfer” leadership on a norm issue, even when there are other actors willing to step in.

Second, habit and repetition alone – in particular when they go unchallenged – create new norms, and similar norms reinforce each other. This not only applies to the hybrid threat actor – for example, China normalizing IP theft – but also to the victim undertaking countermeasures that denounces and breaks a pattern of behavior to keep the hybrid actor from establishing new norms. Similar norms of habit – be it towards violating sovereignty using cyber but also conventional means, for example – therefore reinforce each other. Likewise, similar norms of cooperation or prohibition – for instance towards protecting parts of civilian critical infrastructure in peacetime – tend to reinforce each other. If there are no adverse consequences for those who violate accepted norms, those norms become little more than words on paper and in time they may be challenged and changed as new habits take place.

Third, and in line with the second point, countermeasures typically have second-order normative effects which can cause problems. These effects can be more profound when states execute overt coercive countermeasures in peacetime, which can not only lead to direct tit-for-tat escalation but can also help set contrarian norms – like equating disinformation to kinetic operations. Our analysis clearly highlights the need for states to take the long-term strategic risks of second-order normative effects of countermeasures into consideration when they decide on their policy options in response to hybrid threats. It is important to view these consequences in the context of their impact upon the long-term strategic goals of the actor, particularly in how they set new precedents for escalatory responses in peacetime. We offer the observation that overt coercive countermeasures (including the leaking of covert measures) have the largest propensity for inadvertent effects, but that this risk can sometimes be mitigated by pursuing a simultaneous multi-fora diplomatic strategy.

Fourth, the promotion of norms is context-specific and its success rests not just in its content but in its process: who pushes it, what identity is associated with it, how and where is it pushed, on which basis (political, legal, ideational), and finally who accepts it and the reason why they do so. The case studies reinforce Finnemore’s notion that process is part of the product. Our analysis has only started to unpack some of the strategic dilemmas and trade-offs that shape the process and the adoption of norms in the hybrid realm. Because the norm-setting process within this field is relatively young, it is too early to tell whether there are more general precepts that can be established down the line. Yet, policymakers should be conscious that these choices affect their desired end result.

Fifth, norms can be spread or internalized by single or multiple tools of influence simultaneously – spanning persuasion (linking, framing and (material) incentives), coercion (threats, sanctions or indictments), and socialization (mimicry, bandwagoning, stigmatization). An entrepreneur should take advantage of the wider spectrum of tools and realize where they enforce their strategy or potentially crowd out other tools. Each tool comes with its own set of costs and benefits that require the entrepreneur to continuously (re)evaluate their choices based on their interests and changing contexts.

Sixth, entrepreneurs should adopt multilevel approaches to norm promotion that synchronize measures at the political, strategic, and tactical level. When the U.S. pursued a norm against economic cyber espionage, it first aimed to pursue it diplomatically through the United Nations. When that was turned down by Beijing, the U.S. opted for more coercive measures at the tactical (indictments) and strategic level (threat of sanctions) while exerting high-level political engagement (President Obama and Xi) that led to a bilateral agreement. While it operated across different domains and at various levels, the U.S. signaled consistently and uniformly to Beijing that cyber-enabled IP theft is unacceptable, and that the U.S. was willing to escalate

the issue while at the same time offering incentives for norm confirmation. This approach not only provided multiple avenues for reinforcement, it also contained the risk of inadvertent second-order effects, even when overt moves were employed. In contrast, the later U.S. strategy of persistent engagement was highly limited in its communication and engagement, employing a volatile mix of covert military effects and the overt disclosure of them, and consequently led to mixed signaling and a broad range of unintended and undesirably second-order normative effects.

Seventh, norm processes take time, effort and resources. Entrepreneurs should therefore have a clear long-term strategy in mind that takes into consideration the costs and timeframe of their strategic dilemmas, trade-offs, and tools of influence. For example, establishing new organizational platforms or persuasion through material incentives are costly options reserved for powerful or resourceful states. These are particularly relevant when entrepreneurs face opposition or countermobilization from other actors or when they deal with actors with very different value and interest systems – which makes it is extremely difficult to persuade them unless the norm is incompletely theorized.

Eighth, in order to facilitate norm cascade and internalization, entrepreneurs should strive to create broad coalitions which go beyond classic like-minded groups of states, and which represent true communities of interest of state and non-state actors. Together, these actors are better placed to isolate and call-out hybrid threat actors, stigmatize particular forms of behavior and mobilize support to impose costs on norm transgressors. Imposing costs for norm violations should also have a strong direct link to the violation rather than a sweeping broad range campaign that may lead the target to believe they have little to gain from continuing to honor the agreement. Rather than imposing unilateral costs, a state should mobilize large-scale responses utilizing the much wider resources of private sector and civil society actors that have joined the respective communities of interest. If a state sticks to government-to-government approaches it not only significantly limits the variety of response options that can be taken against the norm-violator, but it may also unnecessarily sacrifice additional legitimacy by failing to bring in other allied voices. In consequence this can also weaken a state's position vis-à-vis other friendly states, who may then not render the political support necessary, risking the degeneration of the norm violation purely into that of a bilateral issue. Further research is required as to how states can better leverage coalitions with non-state actors from the private sector and civil society to pursue norm adoption, implementation, and enforcement, an area which clearly seems to be a force-multiplier not only in building legitimacy for a norm, but also in increasing the scope of punishment for a transgressor.

Ninth, in countering the urgent challenge of disinformation and election meddling, we suggest that analysts and policymakers apply the insights concerning norm promotion identified in this study when developing a norm. As discussed in case study two, Western governments have highlighted the threat of disinformation within the context of undermining democratic processes, while Russian strategies, doctrines and thinking simultaneously highlight the potential threat of (Western) information and influence campaigns to the Russian regime. If it is determined that such a norm can be useful, Western analysts and policymakers should develop a norm strategy that links and frames the norm to a context that reflects its own interest and values, seek broad support for the norm from its partners, and engage diplomatically, with Track 2 diplomacy as a potential starting point, to facilitate strategic bargaining with Russia and China.

Tenth, and finally, policymakers should recognize that while we find ourselves in a hybrid conflict, it is important not to exacerbate it unnecessarily with responses that escalate the conflict beyond what is required to safeguard Western interests. Russian and Chinese hybrid operations test Western response thresholds within a gray zone that spans the border between wartime and peacetime. The Russian and Chinese *forever war* doctrine is based on the Leninist view that politics is an extension of war by other means. It implies that *all* measures are on the table at *all* times. It also reverses the Clausewitzian thinking of war as an extension of politics that implies a separation between peacetime and wartime, which lies heart of the international legal and security framework that Western liberal democracies established. Within this space, the migration of Western wartime countermeasures to the peacetime environment leads to higher second-order normative effects that undermine the West's long-term strategic interest in upholding the nature of the existing international legal order. Succumbing to the desire to respond in kind to hybrid attacks, therefore, may not only be tactically and operationally difficult, but strategically and politically unwise: it would reinforce the Leninist forever war doctrine that rejects not only international law and the rules-based order, but the very notion of a mutually beneficial win-win (rather than a zero-sum) world. In such a world, maximum escalation strategies would be a logical choice – until, of course, they go wrong.

We offer the following recommendations for democratic governments seeking to use norms as part of a wider strategy to respond to challenges in the sphere of hybrid conflict. We stand only at the beginning of the process of developing effective norms that can limit state and non-state behavior in this sphere. These recommendations are designed not to finalize that process, but to take the next positive steps forward, as part of a concerted norm campaign to shape hybrid threat behavior of adversaries:

1. Determine shared restraints on state action to help promote norms by behavior.

As noted in this report, one way in which norms arise is through restraint in state action – sometimes explicitly developed, sometimes organically emergent – which helps, through repeated patterns of behavior, to formalize a norm. European Union members and NATO allies in particular, in partnership with value-sharing democracies including Japan, India, South Korea, Australia and many others, should discuss specific forms of hybrid restraint they are willing to undertake – actions they agree to forgo – as part of a campaign to promote norms.

2. Develop joint commitments that go beyond classic like-minded groups of states to punish unacceptable behavior in the hybrid competition but do so cognizant of the risks of unintended consequences.

Norms gain strength in part through active enforcement. When they are enforced by a community of interest, the state and non-state actors involved are better placed to isolate and call-out hybrid threat actors, stigmatize particular forms of behavior and mobilize support to impose costs on norm transgressors. These communities can begin to identify behaviors they will seek to punish in this domain—a trend that is already well underway in the area of Russian disinformation and to some degree with regard to Chinese coercive maritime activities. A community of interest working to promote norms could accelerate this process with more explicit commitments of punitive responses to particular forms of hybrid aggression.

3. Sponsor Track 1.5 / Track 2 dialogues to identify specific behaviors that will be considered irresponsible in the hybrid conflict space.

A norm proposal against disinformation could be *framed* around covert election interference and *linked* to the nonintervention principle, which would prohibit concerted Russian covert influence operations aimed at undermining democratic processes, while allowing overt support for democratic processes and voices. One near-term step would be for broad-based coalitions of democracies to support non-governmental dialogues to help define the most feasible and potent set of norm proposals for further action. These dialogues should consciously address issues of unintended consequences raised in this report, including the second-order normative effects.

4. Direct resources to groups and individuals serving as norm entrepreneurs that serve as a force-multiplier for building legitimacy for a norm, but also in increasing the scope of punishment for a transgressor. This will enable states to better leverage coalitions with non-state actors from the private sector and civil society to pursue norm adoption, implementation, and enforcement. Democracies should increase the funding and other support for communities of interest that help drive norm emergence and cascading. These include civil society commissions that develop norm proposals, organizations devoted to fighting disinformation, groups that use open-source intelligence to name and shame hybrid threat attacks, and research organizations studying the content of helpful norms. Even before the final shape of proposed norms becomes clear, such norm entrepreneurs can help advance the general appreciation for the issue required for norms to emerge and become socialized.



The Hague Centre for Strategic Studies

info@hcss.nl

hcss.nl

Address:
Lange Voorhout 1
2514EA
The Hague
The Netherlands

