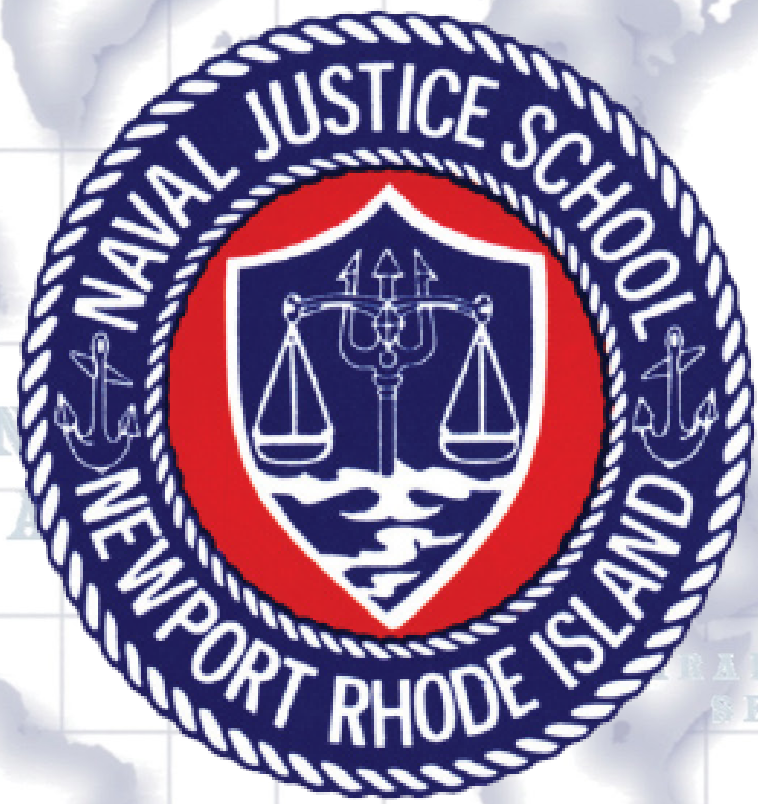
NAVAL LAW REVIEW



VOL. 67

NAVAL LAW REVIEW

2021

VOL. 67 2021

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ADDRESS BY CAPTAIN SHANE D. COOPER, COMMANDING OFFICER, NAVAL JUSTICE SCHOOL, AT THE COMMEMORATION OF THE 75TH ANNIVERSARY OF THE NAVAL JUSTICE SCHOOL NEWPORT, RHODE ISLAND, JULY 2021

Captain Shane D. Cooper, JAGC, USN (Ret.)

Welcome and Good Morning Distinguished Guests, Students, Staff and Friends of the Naval Justice School! Thank you so much for gathering here today to celebrate and commemorate an important milestone in the history of Naval Justice School (NJS)—our 75th Anniversary.

First, I want to extend my regrets that our Judge Advocate General of the Navy, Vice Admiral Hannink is unable to attend this event with us today—however, he expresses his best wishes and congratulations to us as we celebrate this important occasion.

In the audience today, I wanted to recognize that we are joined by special guests: Rear Admiral (ret.) Daniel O'Toole—former Chief Judge of the Department of the Navy and Assistant Judge Advocate General of the Navy. Thanks to Admiral O'Toole and his wife Ann for making the time to be with us today. I would like to recognize Rear Admiral (ret.) Dennis McCoy who is a longtime leader and friend of NJS. Admiral McCoy served as NJS's Commanding Officer (CO) from 1983 to 1987. He concluded his outstanding career of service as a Rear Admiral—his last tour on active duty serving as our Assistant Judge General of the Navy (Civil/General Law) and CO of the Naval Support Activity in Washington, DC. Admiral McCoy was one of the first leaders to greet me here as the new CO and made me feel very welcome. Admiral McCoy imparted upon me the importance of our history here at NJS as we have served the Fleet for the past seventy-five years. I would also like to thank Captain (ret.) Kent Willever, former CO of Naval Legal Service Office, Newport for attending and supporting our event. It is nice to see the connection between former judge advocates and alumni of Naval Justice School in support here.

I also see a number of NJS instructor alumni in the audience here with us. For all of us who have been honored to serve on the NJS staff, I think we quickly realize and appreciate the opportunity we have to be part of a long tradition and

history of service to the Fleet. We take pride in the roles we play as we impart our lessons learned onto our next generation of Judge Advocates and Legalmen.

Before I discuss the history of NJS and hopefully provide you with some better context for today's follow-on events, some thanks are in order. First, I would like to thank LT Jason Thelen, our NJS command historian. He is the sole reason that this commemoration event is happening today. Ordinarily, we know that a command historian's collateral duties might entail a filing of an annual command history or operations report. However, Jason sure signed up for an interesting year! Jason, I can't thank you enough for your hard work to make sure that we celebrated this important milestone.

Today, we are going to conduct a few events. Here's some context: After my remarks, I invite you to pass through the quarterdeck and you will see a photograph from the original staff and student body taken at Port Hueneme, California in July 1946. Fast forward seventy-five years later and we would like to take another group photograph with all in attendance today. I think a photograph of our group today will be a nice way to record and add to the rich history here. One can imagine how our successors will look upon those photographs, and what the Naval Justice School and its mission will be like when they do this again in 2046 for the 100th anniversary. I look forward to one of our students in attendance today or perhaps one of our younger instructors presiding over the 100th anniversary! If you could do me a favor: please send me an invitation—God willing, I would be happy to be back here to celebrate it with you.

In addition to our group photograph, we will also hold a brief "ribbon cutting" outside the first deck of Helton Morrison Hall where you will see the official unveiling of the Navy Judge Advocate General (JAG) Community and NJS history wall mural. It is here that a second round of thanks are in order: I would like to thank the Naval History and Heritage Command (NHHC) and the team at the Naval War College (NWC) Museum including Mr. Ryan Meyer, Director of the NWC Museum and Mr. Rob Dones, NWC Museum curator who both helped make this history display possible.

At NJS, we were looking for ways to "show and tell" our Navy JAG history and NJS schoolhouse history for the benefit of our students, staff and visitors. In turn, NHHC and the NWC Museum were seeking ways to bring their exhibits to life by bringing them out to the Fleet and to area commands. And after all of that is done, I would invite you all to be a part of our cake cutting ceremony and ensure that you get a chance to enjoy some cake while you look over the history display and get a chance to socialize with each other.

Now, if I could take you back seventy-five years in time and journey back with me to July 1, 1946. It was about a year removed from the close of World War II. I would like to explain how the Naval Justice School can trace its roots back to a few common themes: 1) a need for legal training for our Fleet leaders; 2) during a time of change and calls for studies and significant reforms of the military justice system; and 3) that resulted in a need for a rapid pivot and focus for improved legal education and training to improve the administration of "naval justice."[1]

It was in Port Hueneme, California on July 1, 1946 that the U.S. Naval School of Justice officially opened at a new building and it was recognized and celebrated on that day. You might wonder, as I initially did, why was it established in Port Hueneme? Port Hueneme is a hub now known for our Civil Engineer Corps and naval construction battalions that would later become well known as the "Sea Bees." Interestingly, in response to the devastating attacks on Pearl Harbor, it gave birth to the Seabees and rise of naval construction battalions out of Port Hueneme in 1942.[2]

It was in that context, where it was recognized in the naval construction battalion community that most of their new officers had the barest of knowledge of the proper administration of the naval justice system.[3] A reserve Navy Commander, Chalmers Lones, a Fresno-based attorney, who had also worked in the Office of the Judge Advocate General recognized a need. Commander Lones generated a few mimeographed sheets as a guide for Naval Courts and Boards. These mimeographed sheets were circulated across the Navy and by 1944, Commander Lones was regularly receiving calls for his guides. Eventually, due to popular demand, short courses were formed in Port Hueneme to provide regular classes on the topic of Naval Law. Courses for naval officers and enlisted on the administration of naval justice, organized by Commander Lones, grew to two weeks in length in 1945.

At about the same time, as World War II was coming to a close, there were several ongoing studies about the military justice system and how it had fared in the face of the stresses and strain of a global war and rapid expansion in the size of the armed forces. There are a few things to consider:

Before the adoption of the Uniform Code of Military Justice of 1950, the Army and land forces were regulated by Articles of War and the Navy was

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[1] *See generally* Oswald S. Colclough, *Naval Justice*, 38 J. CRIM. L. & CRIMINOLOGY 198 (1947).
[2] CAPT Casey E. Reed, USN (ret.), *The Seabees at 75*, NAVAL HISTORY AND HERITAGE COMMAND (May 10, 2010, 12:51 PM), https://bit.ly/3jdKKzq.
[3] SCHOOL OF NAVAL JUSTICE HISTORY BOOK (n.d.) (on file with author).

regulated by the Articles for the Government of the U.S. Navy with a Naval Boards and Courts Guide. So, if one ever stops and wonders about the term "Naval Justice," the namesake of our school, it is my observation that it is because in that era of 1946 there were distinct types of military justice systems (e.g., "naval justice") as opposed to how the land forces were regulated.

In 1947, our Judge Advocate General of the Navy, Rear Admiral O.S. Colclough observed in an article he wrote entitled, "Naval Justice[4]," that prior to World War II, the Navy and Marines had about 330,000 personnel and were averaging about 625 courts-martial, of all types, per month.[5] And during the war, the naval population including Navy, Marine and Coast Guard was at four million personnel averaging 14,000 courts-martial per month with a peak of 20,000 per month.[6] Admiral Colclough observed that prior to the war, naval justice was geographically limited to the Unites States, Iceland, Cuba and the Philippines.[7] But, during the war, "Naval Justice" needed to be carried out "in the Atlantic, Pacific, Europe and practically the entire world."[8] Not only was the Navy confronted on the logistics front for ships, aircraft and amphibious forces but so too was the administration of "Naval Justice under the stress and strain of war."[9]

Early in the war, it was a recognized that court-martial system, adequate for a relatively small and compact force would show weakness during wartime expansion.[10] So various studies were undertaken to examine this issue. One of those studies was taken up by Judge Arthur Ballantine who would later produce the Ballantine Committee report ordered by the Secretary of the Navy to study the Naval Justice System.[11] Out of this and other studies, Rear Admiral Colclough went onto note several substantive and procedural reforms that would take place to Naval Justice. I note two of them relevant for context here today:

First, Admiral Colclough noted the creation of the Law Specialist track in 1947.[12] This allowed line officers to specialize in restricted duty to perform legal services. Second, Admiral Colclough noted that there was a need 'for a higher quality of legal services to the accused and to the court. The first move in this direction got underway . . . . With the dedication in California of the School of

[4] *See* Colclough, *supra* note 1.
[5] *Id.* at 201.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 202.
[11] *Id.*
[12] *Id.* at 203.

Naval Justice."[13] It was at these dedication events in July 1946—that a two-day legal conference was held to also include Judge Ballantine to discuss his committee's review of Naval Justice. At this dedication event, 75 years ago at the U.S. School of Naval Justice, Admiral Colclough remarked, "This school, which begins on July 1, will take its place as a cornerstone in the structure of naval legal education and in the furtherance of an enlightened administration of naval justice."

Therefore, on July 1, 1946, Commander Lones took charge as the first Officer-in Charge of NJS.[14] Our school opened its doors for a seven-week legal course for naval leaders. Every two months, NJS trained 150 naval officers and fifty Yeomen. The objective of the course was to "acquaint naval personnel with the substantive and procedural law of naval justice."[15] The goal was that students would obtain a working knowledge of naval justice to aid them in the fulfillment of their duties. Thus, NJS was born out of our need to train the Fleet and its leaders and it remains one of our core missions to this very day embodied by our Senior Leader Legal Course, Legal Officers Course, Legal Clerk Course and the Intermediate and Junior Officer training provided by our teaching departments and Fleet Program.

Then we fast forward to May 5, 1950, when the Uniform Code of Military Justice, as the name implies, unified the military justice systems of all of our branches of the armed services. It is that same year that NJS moved from Port Hueneme to Newport Naval Station just up the road nearby where the Senior Enlisted Academy now resides. In 1961, our first Marine Corps instructors arrived to NJS. In 1963, our first Coast Guard students arrived to NJS.

In 1967, President Lyndon Johnson signed legislation that created a distinct Navy JAG staff corps that shifted the Navy from its approach of the previous twenty years with the law specialist program. In 1972, Secretary of the Navy John Chaffee, previously the Governor of Rhode Island and the namesake of the base's fitness center just up the road, approved the creation of the Legalman rating.

By 1984, something that Admiral McCoy is much more familiar with than I am, NJS moved to its current location here at Bradley Hall. During Admiral McCoy's tenure, he spent a great deal of time advocating for and working the designs for Helton-Morrison Hall. Helton-Morrison Hall provided significant additional training space for our JAG Community. Helton-Morrison Hall was eventually opened in 1991.

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[13] *Id.*
[14] *See* SCHOOL OF NAVAL JUSTICE HISTORY BOOK, *supra* note 3.
[15] *Id.*

Thirty years ago in 1991, at NJS's 45th anniversary, there was a dedication ceremony held at Helton-Morrison Hall. The hall is named in the memory of LN1(SW) Michael Helton and LN1(SW) Robert Morrison who perished along with forty-seven other Sailors onboard USS IOWA (BB-61) in a gun turret explosion during a training exercise in April 1989.

That same year in November 1991, we saw the establishment of the NJS branch office in Charlottesville which is co-located with the Army JAG School and we also established a detachment in San Diego to get our legal training out to other waterfront locations. In 1995, NJS established a detachment in Norfolk.

In the early 2000s, after the tragic events of 9/11, NJS would find itself pivoting to ensure it provided for basic operational law training to prepare our judge advocates going forward in support of the Global War on Terror. In 2007, NJS established the Legalman Paralegal Education Program which provided for an accredited program operated by Naval Justice School to ensure all Legalmen received Associate of Sciences Degrees in Paralegal Studies.

By 2011, an independent panel, under section 506 of the National Defense Authorization Act, conducted a review of the JAG Corps. Shortly after in 2012, we saw the publication of the Navy JAG Training instruction that included a significant overhaul of our training programs not seen since the 1990s. After the Military Justice Act of 2016 was passed, we witnessed some of the most sweeping changes to the UCMJ since 1950.

In the wake of the Military Justice Act, NJS was once again called upon to quickly partner with Office of the Judge Advocate General to create and deliver worldwide training on these changes and adapt its schoolhouse curriculum rapidly. In 2019, the Secretary of the Navy's directed Comprehensive Review of the JAG Corps was yet another catalyst for change. NJS, and in particular, many of the staff you see here today were involved in another significant and heavy lift to usher in reforms to the way in which we meet NJS's mission to train the Fleet's leaders, department heads, and junior officers along with our judge advocates and Legalmen.

Out of this Comprehensive Review, please note that we took a hard look at addressing our culture and identified five governing principles for the Navy JAG community: 1) Embody a Warfighting Spirit; 2) Lead with Character and Integrity; 3) Embrace Accountability; 4) Promote a Culture of Learning; and 5) Encourage Innovation. I invite you to note those governing principles highlighted when you review the history wall mural inside.

And now, as we are here to mark our proud 75th anniversary, I remind you of a common backdrop and a frame of reference by which NJS operates: 1) a need for legal training for our Fleet; 2) during a time of change and calls for study and reforms of military justice; and 3) that results in a need for a rapid pivot and focus for improved legal education and training to improve the administration of Naval Justice. As Mark Twain once commented, "[h]istory never repeats itself but it rhymes."

As we look ahead at more significant and imminent changes in military justice law, as Congress takes up review of the Military Justice Improvement and Increasing Prevention Act, we here at NJS stand ready. As we have done so for the past seventy-five years, and just like Commander Lones had done with his mimeographed sheets on Naval Courts and Boards, just like our team does now to update and publish our QUICKMAN (Commander's Quick Reference Legal Handbook)—and just like the initial seven-week course offered to naval officers in 1946 and like we provide now in 2021 including our Basic Lawyer Course for our newest Sea Service judge advocates, Navy Legalmen Accessions Course, Marine Corps Legal Specialist courses and court reporters courses—NJS stands ready and evolves to meet the Fleet's needs.

I remain proud and more importantly, supremely confident of this staff at Naval Justice School and our legacy of service to the Fleet to ensure that our leaders and Sea Service legal community are receiving the very best up-to-date legal training to ensure the proper administration of military and naval justice.

For all of us here today to mark this special occasion, I thank you for your attendance, time and participation. I now invite you to join us for the remainder of today's festivities!

FOREIGN RELATIONS LAW IN MARITIME INTERCEPTION OPERATIONS

Commander Timothy G. Boyle, JAGC, USN*

The international law foundation for maritime interception operations (MIO) is a familiar topic in legal scholarship, but the domestic legal underpinnings of MIO are often overlooked. This Article examines the domestic legal bases for MIO through the lens of foreign relations law. Foreign relations law is the province of domestic law formed by the interactive dynamic that exists between international and domestic authorities. By examining MIO in the context of foreign relations law, this Article explores features of constitutional law and criminal law that inform decisions by policy makers and military commanders. Its aim is to formulate a holistic legal approach to MIO that enables U.S. naval forces to act within the full extent of legal authority and national power.

I. Introduction

Today's maritime domain is flush with illicit actors skulking in anonymity amid vast oceans, unprecedented levels of shipping, and massive volumes of oceangoing cargo.[1] Both registered merchant ships and stateless vessels serve as conduits for criminality, enabling rogue States, criminal organizations, and violent extremists to exploit seams in the global maritime security architecture.[2] Despite determined efforts by the international community, trafficking in narcotics, humans, and weapons remains widespread, and illicit actors are ever more vigilant in avoiding detection.[3]

* The author presently serves as the Chief of National Security Law at U.S. Indo-Pacific Command. He wishes to thank his family for their unwavering support, the Naval Law Review team for their tireless edits, and Captain (ret.) Shane Cooper for planting the idea that grew into this article. The thoughts and opinions expressed in this Article are the author's own and do not necessarily represent the views of the Department of Defense or U.S Navy.

[1] *See generally* MARC LEVINSON, THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER (2006) (noting how the rise of the shipping container led to an increase in global trade).

[2] *See generally* WILLIAM LANGEWIESCHE, THE OUTLAW SEA: A WORLD OF FREEDOM, CHAOS, AND CRIME 5–8 (2004).

[3] *See infra* § III.E. (discussing the prevalence of Iran-backed illicit traffic in the Arabian Sea).

The U.S. Navy[4] plies seas around the world countering these threats through a variety of maritime security operations (MSO),[5] including maritime interception operations (MIO). U.S. military doctrine defines "MIO" as, "[e]fforts to monitor, query, and board merchant vessels in international waters to enforce sanctions . . . and/or prevent the transport of restricted goods."[6] MIO may include "interdiction" when restricted goods or other illegal activity is discovered. An interdiction can be either a military operation to "divert, disrupt, delay, or destroy the enemy's military surface capability" or an action in support of law enforcement to "divert, disrupt, delay, intercept, board, detain, or destroy . . . vessels, vehicles, aircraft, people, cargo, and money."[7] A great deal of scholarship is committed to the international law of interdiction at sea.[8] Often overlooked, however, is how U.S. law conforms with and implements international law's governing framework. The confluence of international and domestic authority is the province of foreign relations law,[9] and it is the critical node between international obligation and national execution. By examining MIO through the lens of foreign relations law, this article unwinds the strands of constitutional law and criminal law that inform decisions by U.S. policy makers and military commanders.

Foreign relations law in MIO rests on a foundation of international law underscored by the principle of "exclusive flag State jurisdiction".[10] In peacetime, exclusive flag State jurisdiction prohibits a State from interdicting a vessel registered in another State, except in limited circumstances, such as when authorized by the United Nations (UN) Security Council.[11] Today, for example,

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[4] Hereinafter "the Navy." This article's primary focus is on issues affecting the Navy and United States' naval forces (i.e., the Navy and Coast Guard).

[5] MSO are "[t]hose operations to protect maritime sovereignty and resources and to counter maritime-related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and illegal seaborne migration." DEP'T OF DEF., JOINT PUB. 1-02: DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 137 (2021).

[6] *Id.* at 136.

[7] *Id.* at 109.

[8] *See, e.g.*, James Kraska, *Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure*, 16 OCEAN & COASTAL L.J. (2010).

[9] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)] ("The foreign relations law of the United States . . . consists of (a) international law as it applies to the United States; and (b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences.").

[10] *See* DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 3.4 (2017) [hereinafter COMMANDER'S HANDBOOK] ("As a general principle, vessels in international waters are immune from the jurisdiction of any State other than the flag State."); *see also* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 92, § 1 [hereinafter UNCLOS] ("Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this [treaty], shall be subject to its exclusive jurisdiction on the high seas.").

[11] Pursuant to Chapter VII of the UN Charter, the Security Council may authorize military forces of member States to intercept and board vessels on the high seas to "maintain or restore international peace and security" in response to a "threat to the peace" or a "breach of the peace." U.N. Charter art.

there are United Nations Security Council Resolutions (UNSCRs) in effect for crises in Yemen,[12] Somalia,[13] and Libya,[14] which authorize MIO for specific purposes and under certain conditions.

MIO in peacetime is also supported by a growing compendium of international agreements designed to suppress illicit activities through interstate cooperation and prearranged ship boarding procedures.[15] The United States is party to dozens of bilateral ship boarding agreements, including some that preemptively waive exclusive flag State jurisdiction. Bilateral ship boarding agreements function together with multilateral agreements such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) to augment MIO authorities under international law.
Absent an UNSCR or international agreement, States conduct MIO in peacetime pursuant to customary international law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS).[16] The law of the sea grants States authority to board foreign flagged vessels with flag State approval; master's consent;[17] or in the exercise of the right of "approach and visit" when there is "reasonable ground" to suspect that a vessel is "stateless" or otherwise engaged in piracy, slave trade, or unauthorized broadcasting.[18]

Together, the bases for MIO in peacetime comprise a web of UNSCRs, international agreements, and customary international law. During armed conflict

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39, art. 51. Article 41 of Chapter VII explicitly empowers the Security Council to authorize MIO through the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication." U.N. Charter art. 41. Resolutions adopted under Chapter VII are generally viewed as legally binding on the affected parties.

[12] *See infra* note 69.

[13] *See infra* note 68.

[14] *See infra* note 66.

[15] *See infra* § III.B.

[16] *See* UNCLOS, *supra* note 10. The United States is not a party to UNCLOS, but considers the navigation and overflight provisions therein reflective of customary international law and thus acts in accordance with UNCLOS, except for the deep seabed mining provisions. *See* COMMANDER'S HANDBOOK, *supra* note 10, § 1-1. Customary international law reflected in UNCLOS will hereinafter be referred to collectively as "the law of the sea."

[17] COMMANDER'S HANDBOOK, *supra* note 10 § 3-14 ("The master's plenary authority over all activities related to the operation of his vessel while in international waters is well established in international law, and includes the authority to allow anyone, including foreign law enforcement officials, to come aboard the vessel as his guest. However, some States do not recognize a master's authority to assent to a consensual boarding.").

[18] *See* UNCLOS, *supra* note 10, art. 110. Article 110 of UNCLOS describes the customary right of warships to conduct "approach and visit". The right of approach and visit applies throughout the high seas and pursuant to Article 58 of UNCLOS, throughout the exclusive economic zone of all coastal States. *See id.* art. 58. That is, the right of approach and visit applies for all warships outside the territorial sea of foreign coastal States. The U.S. considers the majority of UNCLOS customary international law. *See* COMMANDER'S HANDBOOK, *supra* note 10, § 1.1.

the paradigm for MIO shifts to the law of armed conflict (LOAC), which provides for broad exceptions to exclusive flag State jurisdiction consistent with the laws of targeting and the belligerent right of "visit and search" to determine the enemy character of a merchant vessel or its cargo.[19] And finally, in limited circumstances to include the protection of nationals at sea, the inherent right of self-defense affords a distinct legal justification for MIO.[20]

As a practical matter, the international law of MIO is widely familiar to national security attorneys and policy-makers. Less familiar, but equally important are the domestic legal foundations for MIO. Indeed, MIO must abide by both international law *and* domestic law. Foreign relations law in MIO is the domestic law manifestation of the interactive relationship which exists between international and domestic authorities. It is an overlooked, yet critical aspect of military decision-making, essential to determining the scope of authority and risk in any MIO execution.

This Article's examination of foreign relations law in MIO is by no means an exhaustive survey. Fiscal law and admiralty[21] considerations are largely ignored, as are foreign relations law aspects of human trafficking, immigration, safety of life at sea, and illegal, unreported, and unregulated (IUU) fishing. It is an Article written by a U.S. Naval officer and its content is accordingly Navy-centric. By offering a holistic legal approach to MIO authorities, this Article's aim is to enable naval forces to conduct MIO in support of U.S. policy objectives within the full extent of the law.

II. Deconstructing Foreign Relations Law Elements of Maritime Interception Operations

This Article focuses on the constitutional law and criminal law elements of MIO. Both constitutional law and criminal law serve as domestic legal channels through which the United States implements the international law of MIO. Constitutional law underpins operational authority to conduct MIO abroad. The

[19] *See* SAN REMO MANUAL ON INT'L LAW APPLICABLE TO ARMED CONFLICTS AT SEA arts. 118–24 (1994).

[20] Although the concept of an inherent right of self-defense predates the UN and is recognized in customary international law, it is also reflected in Article 51 of the UN Charter: "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Thus, Article 51 recognizes the inherent right to both individual and collective self-defense. The United States independently recognizes that States may conduct MIO as an instrument of self-defense and that such actions may be justified either pursuant to customary international law or Article 51 of the UN Charter. *See* COMMANDER'S HANDBOOK, *supra* note 10, § 4.4.4.1.8.

[21] *See infra* notes 40 and 272 for brief discussions on fiscal law and admiralty, respectively.

President routinely employs powers under Article II of the Constitution[22] to give operational effect to UNSCRs, international agreements, and the law of the sea. In parallel, Congress authorizes[23] and regulates[24] tools of national power, leveraging its constitutional appropriations power to either enable or constrain operations.[25] Unlike constitutional law, criminal law does not confer operational authority to conduct MIO, but instead furthers U.S. policy objectives by prescribing extraterritorial offenses and enabling the adjudication and enforcement of offenses committed at sea. In this context, U.S. criminal code integrates international law obligations into the establishment of national criminal jurisdiction on the high seas and the statutory criminalization of a range of illicit maritime activities.

As a threshold matter, it is critical to acknowledge that international law and domestic law are inextricably interwoven in MIO, and that the pertinent strands of foreign relations law serve distinct ends. Ultimately, all MIO must be grounded in constitutional law, but not every MIO will result in a prosecutable domestic criminal law offense. Indeed, the scope of constitutional authority to act against maritime threats to national security far outstrips the enforceability of domestic criminal law in international waters. As such, constitutional law necessarily empowers naval forces to conduct MIO for national security ends, irrespective of a nexus to domestic criminal law.

Nevertheless, the significance of criminal law cannot be undersold. Criminal law opens the aperture on law enforcement capabilities and authorities while providing supplemental avenues for deterrence and accountability. As such, examining both the constitutional law and criminal law elements of MIO during operational planning helps deliver on whole-of-government policy objectives, enabling informed decision-making and holistic application of national power. Toward that end, the following sections explore the constitutional law and criminal law elements of MIO in greater detail.

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[22] *See* U.S. CONST. art. II, § 1 (vesting the Executive power in the President) and § 2 (designating the President Commander in Chief of the armed forces); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The Executive not only dispenses the honors, but holds the sword of the community.").
[23] *See, e.g.*, S.J. Res. 23, 107th Cong. (2001) (Authorization for Use of Military Force) [hereinafter AUMF].
[24] *See, e.g.*, War Powers Resolution of 1973, 50 U.S.C. §§ 1541–48 (2012).
[25] *See* U.S. CONST. art. I, § 8.

III. Constitutional Power, International Law, and the "Interactive Dynamic"[26]

History suggests that legal strength (or weakness) in the international law context influences domestic interpretations of constitutional powers.[27] For example, when international law underpinning a proposed U.S. military action is strong, so too is the President's power to authorize that action unilaterally. Conversely, presidential power is more tenuous when the international law justification for military action is weak.[28] In such cases, presidential power can be enhanced by legislative authorizations that provide political cover and offset vulnerabilities in the international law context.[29] This so-called "interactive dynamic" between international law and domestic law is vital to assessing the relative strength of legal authority to conduct MIO in any given circumstance.[30]

The President's broad foreign affairs mandate under Article II of the Constitution is commonly leveraged unilaterally to heed legal obligations on the

[26] The term "interactive dynamic" is borrowed from an article written by Curtis Bradley and Jean Galbraith describing the concept as it relates to presidential war powers. *See* Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 693 (2016) ("[W]e theorize that these two bodies of law [international and domestic] are interconnected in U.S. practice in previously overlooked ways. Our core insight is that how the executive branch interprets law in one context can be informed by the other legal context. We call this the *interactive dynamic*.").

[27] *Id.* at 713–18.

[28] For example, in August 2012, President Obama announced that the use of chemical weapons by the Assad regime in Syria would cross a "red line" that would carry "enormous consequences." Remarks by the President to the White House Press Corps (Aug. 20, 2012), https://bit.ly/3B3RrKt. A year later when that line was crossed, the President began to prepare a military response, but decided to request congressional authorization. Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES (Aug. 31, 2013), https://nyti.ms/3gnGqMm. The President's decision to request congressional authorization was notable because in 2011, he had authorized air strikes in Libya without congressional authorization. A fundamental difference between the two situations was that the Libya strikes were supported by a UNSCR, while a strike on the Assad regime would have had not have had similar support under the UN Charter. As such, the President likely sought authorization from Congress as a means of political cover and offsetting the comparatively weak basis in international law for a strike on the Assad regime. *See* BRADLEY & GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 664 (6th. ed. 2017).

[29] President Obama explained his decision to request authorization for a strike on the Assad regime in 2013 as follows: "[H]aving made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. I've long believed that our power is rooted not just in our military might, but in our example as a government of the people, by the people, and for the people. And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress . . . . [W]hile I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective." *Id.* at 665.

[30] *See* Bradley & Galbraith, *supra* note 26.

international plane.[31] In this regard, the Constitution empowers the president to deploy and employ the armed forces pursuant to international law "'for the purpose of protecting important national interests,' even without specific prior authorization from Congress."[32] To be sure, the President's power to "act in external affairs without congressional authority"[33] and to exercise "independent authority 'in the areas of foreign policy and national security'"[34] is firmly rooted not just in Article II, but in a history of Congressional acquiescence[35] and judicial deference.[36]

In recent decades, presidents have approved the use of force in Grenada (1983), Panama (1989), Haiti (1994), Afghanistan/Sudan (1998), Kosovo (1999),

[31] The President is the Chief Executive and "Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2. The Constitution has been interpreted to give the President broad power as the "sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); *see also* Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988) (noting the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'") (quoting Haig v. Agee, 453 U.S. 280, 293-94 (1981)). Although Article I vests in Congress the power appropriate funds, "make rules concerning captures on Land and Water"; "declare War"; "raise and support Armies"; and "provide and maintain a Navy," the President is not otherwise limited from deploying and employing the armed forces in furtherance of national interests. As then-Attorney General Robert Jackson explained, the President's authority as Commander in Chief "has long been recognized as extending to the dispatch of armed forces outside of the United States . . . for the purpose of protecting . . . American interests." *See* Training of British Flying Students in the United States, 40 Op. Att'ys Gen. 58 (1941). The President's authority to employ and deploy armed forces through the Commanders of Combatant Commands is codified in 10 U.S.C. § 164.

[32] Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6 (2011) (quoting Authority to Use U. S. Military Forces in Somalia, 16 Op. O.L.C. 6, 9 (1992)).

[33] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring).

[34] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 429 (2003) (quoting *Haig*, 453 U.S. at 291).

[35] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite a potentially conflicting statute, given Congress' historical acquiescence to similar agreements); *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . . congressional inertia, indifference or quiescence may . . . invite, measures on independent Presidential responsibility . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."). *But see* Medellín v. Texas, 552 U.S. 491, 531–32 (2008) (suggesting the *Dames & Moore* analysis regarding significance of congressional acquiescence might be relevant only to a "narrow set of circumstances," where presidential action is supported by a "particularly longstanding practice" of congressional acquiescence).

[36] Courts often deflect cases involving decisions by the Executive Branch relating to military operations, citing justiciability doctrines, lack of standing, national security, or state secrets. *See*, *e.g.*, Jack Goldsmith, *The Libya UNSCR Helps the President's Domestic Constitutional Arguments*, LAWFARE (Mar. 18, 2011, 7:04 AM), https://bit.ly/384yXgt (noting that Executive Branch practices in employment of military power without congressional authorization is "not the final word on constitutionality, of course. But nothing in Supreme Court precedent contradicts them. And if history is any guide, courts are not likely to adjudicate a case that raises the legality of unilateral presidential uses of force abroad.").

Libya (2011), and Iraq (2020) in accordance with international law, but without explicit congressional authorization.[37] Likewise, on a far more routine basis, presidential powers are exercised to authorize national security activities below the threshold of actual hostilities such as intelligence activities; influence operations; cyber defense and other cyber activities not rising to the level of an attack; security assistance; and freedom of navigation operations.[38] MIO occurs during both peacetime and armed conflict, sometimes as a function of unilateral presidential power exercised through the Commanders of Combatant Commands.[39]

Although the President's foreign affairs authority is considerably broad, it is checked and balanced by Congress' constitutional power to appropriate funds; [40] advise and consent on treaties; "make Rules concerning Captures on Land and Water";[41] "declare War"; "raise and support Armies"; and "provide and maintain

[37] *See* BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2020 (2020). The reference to Iraq (2020) pertains to the strike against Qassim Suleimani and preceding actions. *See Notice on Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (Feb 13. 2020).

[38] *See* Michael J. Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 HARV. NAT'L SEC. J. 377, 381 (2014) (coining the term *jus extra bellum* to define "the state's right outside of war" and noting that "there is a significant gap in the field of international law relating to national security activities conducted below the threshold of armed conflict. . . . not adequately addressed by historic conceptions of war and peace or legal models that [Mr. Adams] has uncovered."). *See also* Kathryn L. Einspanier, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L. J. 985, 985–90 (2008) (considering constitutional implications of the theory of "perfect and imperfect war" developed by Grotius and Burlamaqui and noting that imperfect war "is fought with limited, particular means and that it may be waged without disturbing civil society in general"; and that "as in defensive wars, the sovereign is not required to declare war.").

[39] *See* DEP'T OF DEF., JOINT PUB. 3-03, JOINT INTERDICTION II-4 (2016) (describing bases for MIO in peacetime and armed conflict). *See also* 10 U.S.C. § 164.

[40] *See* U.S. CONST. art. I, § 8. Analysis of the fiscal appropriations germane to MIO goes beyond the scope of this article, but suffice to say, appropriations are authorized to naval forces to conduct MIO. As an example, The John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 [hereinafter FY-19 NDAA] specifies the budget, expenditures and policies of the DoD. The FY-19 NDAA provides the statutory authority for the Navy to spend appropriated funds on MIO. The FY-19 NDAA includes specific appropriations relating to counter-narcotics interdictions, counter-WMD interdictions, and regional maritime security initiatives. Additionally, the Navy budgets for MIO-related requirements within its annual Operations and Maintenance appropriations. *See, e.g.*, DEP'T OF THE NAVY, FISCAL YEAR (FY) 2019 BUDGET ESTIMATES JUSTIFICATION OF ESTIMATES, OPERATION AND MAINTENANCE, NAVY (2018).

[41] U.S. CONST. art. I, § 8. This article stands for the proposition that the "captures clause," to the extent it is exercised by Congress, manifests in congressional provision and maintenance of naval forces, to include appropriations for Navy execution of MIO. Notably, however, Professor Ingrid Wuerth takes a different approach, arguing that the Founders intended the captures clause to not just apply at sea in the context of interdictions based on letters of marque and reprisal, but also more generally to "important decisions about strategy and compliance with international law." Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1728 (2009). She concludes that, "any claim that the president, as a matter of constitutional text and history, controls all tactical decisions about how force is deployed, is put to rest by a careful reading of the Captures Clause." *Id.* at 1745.

a Navy."[42] Indeed, Congress is afforded various constitutional levers for enabling or constraining presidential power. Moreover, consistent with Justice Jackson's canonical[43] concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, presidents are incentivized to seek congressional authorization when confronted with tenuous international law authority for military action.[44] Even with a compelling basis to act under international law, congressional authorizations reinforce presidential power. *Youngstown* cements this proposition that presidential power is at its maximum when coupled with express or implied authorization of Congress.[45] On the other hand, presidential power is at its "lowest ebb" when the President acts against the will of Congress.[46] And when Congress has been silent on an issue, presidential power resides in the proverbial "zone of twilight."[47]

The *Youngstown* framework does not exist in isolation from international law. Rather, international law is central to the exercise of presidential power and has long been recognized by U.S. courts as "part of our law,"[48] suggesting that it independently implicates the President's power to faithfully execute "the Laws" in the international sphere.[49] But the measure of international law's influence on presidential power is not a simple calculus. Indeed, not all international law is created equal. It comes in gradations of strength that have a corresponding influence on presidential power. For instance, as the preeminent treaty in foreign relations, the UN Charter's[50] status as the "Law of the Land"[51] is unquestioned, at least as it relates to U.S. conduct on the international plane.[52] In contrast, the effect

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[42] U.S. CONST. art. I, § 8.
[43] United States v. Belmont, 301 U.S. 324, 330 (1937).
[44] *See* Bradley & Galbraith, *supra* note 26.
[45] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").
[46] *Id.* at 637.
[47] *Id.*
[48] The Paquete Habana, 175 U.S. 677, 700 (1900) (declaring that "[i]ntemational law is part of our law").
[49] U.S. CONST. art. II, § 3. *See also In re* Neagle, 135 U.S. 1, 64 (1890) (holding that the President's constitutional responsibility to "take care that the laws be faithfully executed" is not "limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*," but rather includes "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.").
[50] U.N. Charter art.103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").
[51] U.S. CONST. art. VI ("[A]ll Treaties made . . . shall be the supreme Law of the Land.").
[52] To what degree the UN Charter is the Law of the Land on the domestic plane is a more nuanced question. *See, e.g.*, Marty Lederman, *Why the Strikes Against Syria Probably Violate the U.N. Charter (and Therefore) the U.S. Constitution*, JUST SECURITY (April 6, 2017), https://bit.ly/3zdvsjU ("The obligation in

of customary international law as "part of our law" of foreign relations is more nuanced, particularly in light of case law suggesting that presidential power includes the ability to violate customary international law.[53] It is thus critical when analyzing MIO authorities in a given situation to assess the relative strength of the international law justification, balanced against its interactive influence on constitutional powers. The following subsections examine the interactive dynamic in the context of the distinct international legal bases for MIO.

A. United Nations Security Council Resolutions

The UN Security Council is empowered to authorize MIO against flagged vessels under Article 41 of Chapter VII of the UN Charter.[54] UNSCRs adopted under Chapter VII of the UN Charter are binding on all nations.[55] Beginning in 1966 with an UNSCR calling on the United Kingdom to "prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia,"[56] the Security Council has periodically used MIO under Chapter VII as a tool for responding to "any threat to the peace" or any "breach of the peace."[57]

In 1990, at the outset of the Gulf War, UNSCR 665 obliged coalition forces to "halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations".[58] Comparable resolutions for crises in the

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Article 2(4) is not only international law, but also a treaty provision to which the U.S. is bound, and thus is the "supreme Law" of the land under Article VI of the U.S. Constitution. It is, that is to say, a "domestic law" constraint, too . . . . It is simply a non sequitur to reason, as OLC did, that because Article 2(4) is "non-self-executing" in the sense that it does not provide a basis for judicial intervention, the President is therefore free as a matter of domestic law to ignore that provision and deliberately put the U.S. in breach of its treaty obligations. That deeply counterintuitive position does not reflect the views either of the parties to the Charter (every nation in the world), or of the President and the Senate that approved it for the United States in 1945").

[53] *See, e.g.*, Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 124–28 (2005) (discussing uncertainties associated with customary international law). *See also* Hamdan v. United States, 696 F.3d 1238, 1250 (D.C. Cir. 2012) (Kavanaugh, J.) ("It is often difficult to determine what constitutes customary international law, who defines customary international law, and how firmly established a norm has to be to qualify as a customary international law norm."), *overruled on unrelated grounds by* Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

[54] *See supra* note 11.

[55] *See* UN Charter art. 48.

[56] S.C. Res. 221, ¶ 5 (Apr. 9, 1966). For more on the Beira patrol, as well as the argument that the UNSCR was issued under Art. 41 (rather than Art. 42), see BOB MCLAUGHLIN, UNITED NATIONS NAVAL PEACE OPERATIONS IN THE TERRITORIAL SEA AT 134–35 (2009). *See also* James Cable, GUNBOAT DIPLOMACY 1919–1979 at 126 (2nd ed. 1981); J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L L. 103, 109 (1965–66).

[57] *See* UN Charter art. 39.

[58] S.C. Res. 665, ¶ 3 (Aug. 18, 1990).

former Yugoslavia,[59] Haiti,[60] and Sierra Leone,[61] respectively, were issued throughout the 1990s. In 2006, the Security Council turned to a more limited MIO construct, authorizing a UN interim force to interdict arms bound for Lebanon, but only upon request of the Lebanese government.[62] Similarly, in 2009, UNSCR 1874 empowered States to inspect vessels transiting to or from North Korea, subject to flag State discretion on whether to permit the inspection at sea or at the nearest "convenient" port.[63]

Following September 11, 2001, the Security Council adopted a range of UNSCRs dedicated to counter-proliferation of weapons of mass destruction (WMD). For example, in 2004, UNSCR 1540 resolved that "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security", thereby obliging coastal States to restrict innocent passage and interdict prohibited items within their territorial seas.[64] With regard to Iran's nuclear program, the Security Council has issued seven UNSCRs (six of which were prior to the 2015 nuclear deal), including two that specifically authorized interdiction of cargo prohibited by UNSCR 1540.[65]

Since 2011, the Security Council has released a series of UNSCRs concerning arms shipments to Libya.[66] Although these resolutions evolved to add restraints on States executing enforcement measures, early iterations conferred broad authority for the inspection of Libya-bound vessels in international waters

[59] S.C. Res. 787, ¶ 12 (Nov. 16, 1992).
[60] S.C. Res. 875, ¶ 1 (Oct. 16, 1993); S.C. Res. 917, ¶ 9 (May 6, 1994).
[61] S.C. Res. 1132, ¶ 6 (Oct. 8, 1997). This authorization was terminated in S.C. Res. 1940 (Sep. 29, 2010).
[62] S.C. Res. 1701, ¶¶ 12–14 (Aug. 11, 2006).
[63] S.C. Res. 1874, ¶¶ 11, 13 (Jun. 12, 2009).
[64] S.C. Res. 1540, preamble (Apr. 28, 2004).
[65] The "2015 nuclear deal" is more formally known as the Joint Comprehensive Plan of Action (JCPOA). Joint Comprehensive Plan of Action, July 14, 2015, https://bit.ly/3D6TGi3. None of the six pre-JCPOA UNSCRs remain in effect. S.C. Res. 2231, ¶ 7(a) (July 20, 2015). The primary aims in the six pre-JCPOA resolutions were that Iran suspend its uranium enrichment program, reconsider the construction of its heavy-water reactor, and ratify an International Atomic Energy Agency Additional Protocol. S.C. Res. 1696 (2006); S.C. Res. 1737 (Dec. 23, 2006); S.C. Res. 1747 (Mar. 24, 2007); S.C. Res 1803 (Mar. 3, 2008); S.C. Res. 1835 (Sep. 27, 2008); S.C. Res. 1929 (June 9, 2010). More recently, UNSCR 2231 endorsed JCPOA, delineated an inspection process, and established a timeline for the removal of weapons-related sanctions by October 2020. S.C. Res. 2231 (July 20, 2015). Prior to the expiration of sanctions, and despite having publicly abrogated its ties to JCPOA, the United States sought to leverage UNSCR 2231's so-called "snapback" provision in which any JCPOA member can demand the restoration of all UN sanctions. *Id.* at ¶ 11. Various other UN member States have rejected the United States' invocation of the "snapback" provision.
[66] *See* S.C. Res. 1970, ¶¶ 9–14 (Feb. 26, 2011); S.C. Res. 2240, ¶¶ 8–10 (Oct. 9, 2015). In addition to weapons, UNSCR 2240 authorized MIO of vessels on the high seas suspected on reasonable grounds of human trafficking. S.C. Res. 2240, ¶¶ 5–6 (Oct. 9, 2015) UNSCR 1970 formed the international law basis for Operation Unified Protector, a NATO operation to implement an arms embargo, a no-fly zone, and protect Libyan civilians. S.C. Res. 1970 (Feb. 26, 2011).

in order to "prevent the direct or indirect supply, sale or transfer . . . of arms and related materiel of all types."[67] In 2015, UNSCR 2142 and its subsequent renewals impose a similar model vis-à-vis arms shipments to Somalia, empowering multi-national forces to enforce a general and complete embargo on all deliveries of weapons and military equipment to Somalia.[68] A UNSCR-mandated arms embargo also applies to shipments bound for Houthi rebels in Yemen, but because it is subject only to coastal State enforcement in accordance with the law of sea, it has limited effect on MIO authorities.[69]

The framework of UNSCR-mandated MIO regimes has varied considerably over the decades, and the scope of MIO authority dictated has largely depended on the measure of the particular threat balanced against States' sovereignty, the law of the sea, and evolving dynamics of international relations. Likewise, the extent of U.S. participation in enforcement regimes has varied based on national security interests, resource availability, and political considerations. Often, the United States conducts UNSCR-mandated MIO as part of a multinational coalition, as it did during the Gulf War and continues to do as a member of the North Atlantic Treaty Organization (NATO) and Combined Maritime Forces.[70]

As internationally binding manifestations of preeminent treaty law, UNSCRs frequently underlie broad invocations of presidential power.[71] UNSCRs were central to the Executive Branch's defense of President Truman's constitutional authority to direct large-scale hostilities in Korea without

[67] S.C. Res. 1970, ¶¶ 9–14 (Feb. 26, 2011). Later iterations added language requiring flag State consent before boarding of a vessel suspected of carrying prohibited cargo.

[68] *See* S.C. Res. 2142 (Mar. 5, 2015). UNSCR 2142 sparked the current series of restrictions vis-à-vis arms shipments to Somalia. An earlier iteration of the weapons embargo was established in UNSCR 733, issued in 1992, as "a general and complete embargo on all deliveries on weapons and military equipment to Somalia." S.C. Res. 733, ¶ 5 (Jan. 23, 1992). In 2002, UNSCR 1425 expanded the weapons embargo to also cover the financing of acquisitions and deliveries of weapons and military equipment, as well as "direct or indirect supply to Somalia of technical advice, financial and other assistance, and training related to military activities." S.C. Res. 1425, ¶ 2 (July 22, 2002). A related series of UNSCRs, including UNSCR 2182, authorizes MIO against vessels suspected of illegal trade in charcoal. S.C. Res. 2182, ¶ 15 (Oct. 24, 2014).

[69] *See* S.C. Res. 2216 (Apr. 14, 2015); S.C. Res. 2266 (Feb. 24. 2016); S.C. Res. 2342 (Feb. 23, 2017); S.C. Res. 2402 (Feb. 26, 2018). S.C. Res. 2511 (Feb. 25, 2020). The embargo prohibits shipment of arms to Houthi leadership, as well as other persons and entities supporting Houthis. S.C. Res. 2511, ¶ 4 (Feb. 25, 2020).

[70] Combined Maritime Forces is a multi-national naval partnership focused on defeating terrorism, preventing piracy, encouraging regional cooperation, and promoting a safe maritime environment. *See Combined Maritime Forces*, U.S. NAVAL FORCES CENTRAL COMMAND, https://bit.ly/3B6cmwj (last visited Jun 19, 2021).

[71] *See supra* note 37 (discussing President Obama's decision to use force in Libya backed by a UNSCR). *See* also Goldsmith, *supra* note 36.

congressional authorization.[72] More recently, UNSCRs were cited as bolstering presidential power for military engagements without congressional authorization in Somalia (1992),[73] Haiti (2004),[74] and Libya (2011).[75] Indeed, there is a long line of precedent supporting action by the President up to a reasonably high threshold when backed by a UNSCR and where the President "could reasonably determine that [the action] was in the national interest."[76]

It follows from this precedent that presidential power to direct UNSCR-mandated MIO is not dependent on congressional legislation. Rather, the strength of UNSCRs in the international law context will typically influence presidential power to a degree that congressional authorization is unnecessary reinforcement. Nevertheless, the Executive Branch does not act entirely on its own authority when it comes to UNSCR-mandated MIO. Indeed, UNSCRs are binding extensions of the UN Charter; which was ratified by the Senate in 1945.[77] Moreover, Congress granted the President explicit authority in the UN Participation Act[78] to apply measures necessary to implement UNSCRs issued under Chapter VII, Article 41

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[72] *See* Dean Acheson, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT, at 404-05, 415 (1969). *But see* Goldsmith, *supra* note 36 (noting that such sweeping claims of inherent Executive authority have been "sharply criticized").

[73] *See* Goldsmith, *supra* note 36 ("In December 1992, President Bush sent U.S. Forces to Somalia without congressional authorization in order to assist the United Nations in preventing a humanitarian disaster there. He did so following a UNSCR that authorized "'all necessary means' to establish a secure environment for the delivery of humanitarian aid in Somalia. Relying heavily on the Korea precedent, OLC chief Tim Flanigan concluded that President Bush was 'entitled to rely on [the Somalia UNSCR], and on its finding that the situation in Somalia "constitutes a threat to international peace and security," in making his determination that the interests of the United States justify providing the military assistance that [the UNSCR] calls for.' Attorney General William Barr added in a cover letter that the President could 'reasonably and lawfully conclude that it is necessary to use United States military personnel to support the implementation of [the Somalia UNSCR] and other Security Council resolutions concerning Somalia.'").

[74] Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 1, 4 (2004) ("[I]n exercising his authority as Commander in Chief and Chief Executive, the President could choose to take the [UNSCR] into account in evaluating the foreign policy and national security interests of the United States that are at stake in Haiti.").

[75] *See Authority to Use Military Force in Libya supra* note 32.

[76] Deployment of United States Armed Forces to Haiti, 28 Op. O.L.C. 1, 8 (2004*)* (suggesting a possible constitutional limit on "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period"). The magnitude of force contemplated was not, however, a prevailing consideration for the Truman administration in Korea.

[77] Andrew Glass, *Senate Ratifies United Nations Charter, July 28, 1945*, POLITICO (July 28, 2010, 4:37 AM), https://politi.co/2XPtN6b.

[78] The UN Participation Act authorizes the President to apply UNSCRs enacted under Article 41 "through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations of rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States." United Nations Participation Act of 1945, 59 Stat. 619 (1945). *See also* 22 U.S.C. § 287(a) (delegating authority to the president to appoint the U.S. representative in the UN Security Council).

of the UN Charter. Since MIO is a form of economic sanction under Chapter VII, Article 41 of the UN Charter,[79] UNSCR-mandated MIO occurs with the implied authorization of Congress as prescribed in the UN Participation Act.[80] Thus, when naval forces conduct UNSCR-mandated MIO, they do so pursuant to presidential power at its maximum under the *Youngstown* model.[81]

B. International Ship Boarding Agreements

Unlike UNSCRs, international ship boarding agreements (ISBAs) remain beholden to the principle of exclusive flag State jurisdiction inherent in the law of the sea.[82] As such, ISBAs supplement—rather than replace—the law of the sea, forging methodologies for interstate cooperation and mobilizing resources to counteract common threats in the maritime domain.

An ISBA can be styled under U.S. law as a treaty, executive agreement, or political commitment, with each incarnation having distinct implications on constitutional powers.[83] Treaties receive the advice and consent of the Senate and are ratified by the President.[84] Executive agreements are entered into without the advice and consent of the Senate, but instead pursuant to presidential power conferred by Congress or derived from the Constitution.[85] Both treaties and executive agreements are legally binding on the United States internationally.[86] In contrast, political commitments constitute assurances by the Executive Branch that

[79] Most UNSCRs issued under Chapter VII of the UN Charter do not reference a specific article. However, contemporary UNSCR-mandated MIO is understood to be an economic sanction under Article 41, as opposed to a military sanction under Article 42. To be sure, the most robust UNSCR-mandated MIO regime in recent history—the Libyan arms embargo imposed in 2011 by UNSCR 1970—specifically cites Article 41. S.C. Res. 1970, preamble (Feb. 26, 2011). *See also* Magne Frostad, *United Nations Authorized Embargos and Maritime Interdiction: A Special Focus on Somalia* (Mar. 31, 2017), https://bit.ly/3zlYRYU (discussing the prevailing view that UNSCR-mandated MIO occurs under Chapter 41).

[80] *See* United Nations Participation Act of 1945, 59 Stat. 619 (1945).

[81] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[82] *See* UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 92.

[83] *See* CONG. RSCH. SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 1–5 (2001); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1203, 1207–09 (2018).

[84] *See* U.S. CONST. art. II, § 2.

[85] *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 85, at 38; Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (discussing "executive agreements to settle claims of American nationals against foreign governments" dating back to "as early as 1799").

[86] CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 2 (2018) ("For purposes of U.S. law and practice, pacts between the United States and foreign nations may take the form of treaties, executive agreements, or nonlegal agreements, which involve the making of so-called 'political commitments.' In this regard, it is important to distinguish 'treaty' in the context of international law, in which 'treaty' and 'international agreement' are synonymous terms for all binding agreements.").

are not binding under international law, but nonetheless reflect U.S. policy and intent to undertake certain activities.[87]

The United States' portfolio of ISBAs is voluminous and composed of agreements from within each category.[88] With at least 166 State Parties, including the United States, the SUA Convention is perhaps the most comprehensive MIO regime to date.[89] It establishes coordination procedures for extradition and prosecution while committing member States to domestically criminalize a range of offenses including, *inter alia*, seizure of a ship by force, acts of violence at sea, and, pursuant to the 2005 Protocol, maritime transportation of WMD and related materials.[90] The 2005 Protocol is particularly significant in that it devises a streamlined framework for States to request flag State approval for interdiction based on "reasonable grounds to suspect" an offense identified in the treaty.[91] Additionally, it provides that States may pre-approve boarding of their flagged vessels via declarations to the International Maritime Organization.[92]

The counter-proliferation provisions of the 2005 Protocol mirror the objectives of the Proliferation Security Initiative (PSI), which preceded it by two years.[93] A political commitment spearheaded by the United States in 2003 and presently endorsed by 107 nations, the PSI is "a global effort that aims to stop trafficking of [WMD], their delivery systems, and related materials to and from

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[87] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 85, at 58–64 (discussing political commitments and their status under domestic and international law). The Joint Comprehensive Plan of Action (i.e., the Iran nuclear deal) and the Paris Agreement on climate change are prominent recent examples of political commitments. *See, e.g.*, Joint Comprehensive Plan of Action, July 14, 2015, https://bit.ly/3D6TGi3.

[88] The range of ISBAs is too expansive to address with specificity in this article. For a more comprehensive treatment of ISBAs, see Douglas Guilfoyle, SHIPPING INTERDICTION AND THE LAW OF THE SEA at 21-262 (2009).

[89] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201 [hereinafter SUA Convention]. Amendments to the SUA Convention were adopted by the Diplomatic Conference on the Revision of the SUA Treaties, which was held in October 2005. *See* Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Nov. 1, 2005, LEG/CONF.15/21; Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Nov. 1, 2005, LEG/CONF.15/22.

[90] *See supra* note 89. The SUA Convention's criminal provisions are implemented domestically in 18 U.S.C. § 2280.

[91] Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Nov. 1, 2005, LEG/CONF.15/21.

[92] International Maritime Organization, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or other Functions*, at 389–93 (Oct. 5, 2010).

[93] *See* Press Release, The White House, Fact Sheet on Proliferation Security Initiative and Statement of Interdiction Principles (Sept. 4, 2003), https://bit.ly/3msXfsT; Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L LAW 526 (2004); U.S. Dep't of State, Proliferation Security Initiative, https://bit.ly/2WfxXDW.

States and non-State actors of proliferation concern."[94] It consists of a Statement of Interdiction Principles (SIP) which defines and directs PSI activities.[95] The SIP explicitly acknowledges the foreign relations law aspects of MIO by asking States to take "specific actions . . . to the extent their national legal authorities permit consistent with . . . international law" and to "work to strengthen their relevant national legal authorities where necessary to accomplish [the PSI's international] objectives."[96]

The Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Drug Convention) prescribes a comparable ship boarding model to the SUA, but contained to the counter-narcotics sphere.[97] Of note, the treaty compels the United States and 189 other member States to "respond expeditiously" to inquiries concerning the nationality of vessels suspected of illicit narcotics trafficking.[98] States that take action under the treaty's terms must "promptly inform the flag State."[99] To facilitate these interactions, the United Nations Office of Drugs and Crime (UNODC) maintains a Directory of Competent National Authorities.[100]

The United States' compendium of bilateral ISBAs are outgrowths of SUA, PSI, and the Vienna Drug Convention, framed under domestic law as executive agreements. Presently, the United States is party to bilateral agreements across the spectrum of illicit transnational maritime activity, including counter-narcotics, counter-proliferation, human trafficking, and IUU fishing.[101] Of note,

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[94] U.S. Dep't of State, Proliferation Security Initiative, https://bit.ly/2WfxXDW.
[95] U.S. Dep't of State, Proliferation Security Initiative: Statement of Interdiction Principles (Sep. 4, 2003), https://bit.ly/3y9rtmT.
[96] *Id.*
[97] UN Economic and Social Council, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1989, art. 17.
[98] *Id.*
[99] *Id.*
[100] *See* U.N. Off. on Drug and Crime, *Competent National Authorities under the International Drug Control Treaties*, https://bit.ly/3j87l0l ("This directory lists the competent national authorities empowered to issue certificates and authorizations for the import and export of narcotic drugs and psychotropic substances, and to regulate or enforce national controls over precursors and essential chemicals. The legal bases for designating these authorities are the Single Convention on Narcotic Drugs of 1961 (article 18), the Convention on Psychotropic Substances of 1971 (article 16), and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (article 12).").
[101] The U.S. Coast Guard manages a portfolio of bilateral maritime law enforcement agreements, sometimes called "shiprider agreements." Under these agreements, law enforcement officials of each party embark on vessels of the other party. These "shipriders" are empowered on behalf of their respective governments to authorize the other party's vessels to take action against suspect vessels of the shiprider's nationality, and within that nation's territorial sea. *See* Andrew Norris, *Bilateral Agreements: They're Not Just for Drugs Anymore*, COAST GUARD PROCEEDINGS 70 (Summer 2009), https://bit.ly/2WgBOQC. *See also* Department of State, List of Treaties and Agreements,

the United States has entered into agreements with several of the major flag States of convenience, thereby providing naval forces with predetermined ship boarding guidance vis-à-vis more than half the world's registered shipping fleet.[102]

Generally, bilateral ISBAs establish State-to-State mechanisms meant to expedite ship boarding approvals.[103] In some cases, they also confer reciprocal rights on the parties to conduct boardings with implied flag State approval when the requested party fails to respond within a period of time (normally two hours).[104] Bilateral ISBAs are commonly employed tools in counter-narcotics MIO, but in the counter-proliferation field, there is less publicly available information on the prevalence of MIO and the corresponding utility of bilateral ISBAs.[105]

The extent of a particular ISBA's influence on presidential power depends partly on the agreement's domestic characterization as either a treaty, executive agreement, or political commitment. MIO grounded in treaty law imports the broadest interpretations of presidential power. Treaties are the "Law of the Land"; a constitutional equal to federal law, subject to the Senate's advice and consent.[106] Thus, when the President commits to military action based on a treaty obligation, his power is not derived solely from Article II, but also from Article VI and in the senatorial advice and consent inherent in the treaty making process.[107] To be sure, Presidents have long cited treaties as cornerstones of their power to direct military action abroad. In a famous exchange between President Roosevelt and his War Secretary in 1906, the President exclaimed, "I should not

https://bit.ly/3kg9OFh; Department of State, List of Maritime Counter Narcotics Law Enforcement Agreements, https://bit.ly/3za8Hx8.

[102] Panama, Liberia, and the Marshall Islands together make up nearly 40% of the world's registered tonnage. *See* Lloyd's List, *Top 10 Flag States* (2019).

[103] *See, e.g.*, Proliferation Security Initiative Ship Boarding Agreement with Liberia, arts. 2, 3, Feb. 11, 2004 (describing the process for exchanging ship boarding requests and approvals and establishing a two-hour response window, after which flag state approval is presumed).

[104] *Id.*

[105] In a June 2006 speech, then-Undersecretary of State Robert Joseph noted that between April 2005 and April 2006 the United States had conducted "roughly two dozen" PSI interdictions to prevent transfers of concern; and in May 2005 Denmark's ambassador to the United States asserted that "the shipment of missiles has fallen significantly in the lifetime of PSI." Arms Control Association, *Proliferation Security Initiative at a Glance* (Oct. 2016) https://bit.ly/3jaJcGx. However, absent hard data in the public domain some critics remain skeptical. Much of the criticism of the PSI centers on the "secretive" nature of the initiative. It has been argued that "the secretiveness surrounding PSI interdictions and the methods employed make it difficult to evaluate its effectiveness or its legitimacy." *See* Mark Valencia, Policy Forum 08-043: Put the Proliferation Security Initiative Under the UN," NAPSNet Policy Forum, May 29, 2008, https://bit.ly/3mD1Mt5.

[106] *See* U.S. CONST. art. VI.

[107] Similar reasoning can be applied to action taken pursuant to UNSCRs issued under Chapter VII of the UN Charter insofar as the UN Charter received the advice and consent of the Senate.

dream of asking the permission of Congress [for treaty-based intervention in Cuba]. That treaty is the law of the land and I shall execute it."[108]

Even though the UN Charter monopolized the use of force under international law, the influence of other treaties on U.S. national security activities persists in the post-Charter era. The Charter of the Organization of American States (OAS)[109] and the Southeast Asia Treaty Organization (SEATO)[110] were key sources of presidential power during the Cuban Missile Crisis and the Vietnam War, respectively.[111] Following Vietnam, the War Powers Resolution (WPR) sought to rein in treaty-based presumptions of presidential power by requiring that Presidents not use "any treaty . . . as grounds for inferring a constitutional authority to use force."[112] Still, a range of post-WPR military interventions suggest that treaties continue to influence broad invocations of presidential power.[113]

Additionally, the checks imposed on presidential power by the WPR are only germane to the extent treaty-based MIO contemplates introduction of naval forces "into hostilities, or into situations where imminent involvement in hostilities

[108] Letter from President Theodore Roosevelt to William Howard Taft (Sept. 17, 1906). *See also* David Gartner, *Foreign Relations, Strategic Doctrine, and Presidential Power*, 63 ALA. L. REV. 499, 501 (2012) (noting that "Roosevelt self-consciously sought to create precedents for expanded presidential power and both the expanded use of executive agreements and the deployment of armed forces without congressional approval continued after his time in office").

[109] Organization of American States (OAS), Charter of the Organisation of American States, 30 Apr. 1948, 3 U.N.T.S. 47.

[110] Southeast Asia Collective Defense Treaty (Manila Pact), Sept. 8, 1954, 6 U.S.T. 81.

[111] *See* President John F. Kennedy, Proclamation 3504, Interdiction of the Delivery of Offensive Weapons to Cuba (noting that OAS' support figured prominently in the decision to implement a naval quarantine); *see also* Curtis Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 737 (2016) ("The SEATO treaty was invoked not just in asserting that the United States was acting in the collective self-defense of Vietnam for purposes of international law, but also in justifying the constitutionality of presidential actions. The State Department reasoned that 'the SEATO treaty establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States,' and therefore triggered the President's powers of constitutional self-defense. With this move, the executive branch transformed a commitment intended for an international legal purpose into a source of constitutional power.").

[112] 50 U.S.C. § 1547(a)(2) (2012) (excepting treaties where Congress passes implementing legislation that serves as a specific congressional authorization).

[113] *See* Bradley & Galbraith, *supra* note 111, at 737 ("In subsequent years [after the WPR], the executive branch has similarly appeared most comfortable with broad invocations of American interests as a matter of constitutional law where the enforcement of Security Council resolutions are at issue—or at the very least where the United States is acting as a part of NATO. This is the case for the following U.S. interventions: Haiti in 1994, which was authorized by the Security Council; 198 Bosnia in 1995, which was authorized by the Security Council and carried out through NATO; 199 Kosovo in 1999, which was carried out through NATO; 200 Haiti in 2004, which was authorized by the Security Council; 201 and most recently Libya in 2011, which was authorized by the Security Council and eventually carried out through NATO (after initial actions by the United States and certain allies.").

is clearly indicated by the circumstances."[114] Normally, treaty-based MIO occurs below armed conflict with the support of congressional implementing legislation. Indeed, with respect to the SUA Convention and the Vienna Drug Convention, Congress has enacted domestic implementing legislation to criminalize offenses listed in the treaties.[115] Thus, when naval forces conduct MIO to enforce the domestically implemented criminal provisions of the SUA Convention and the Vienna Drug Convention, they do so at the height of presidential power under the *Youngstown* framework.[116]

Executive agreements in the form of bilateral ISBAs pose a different paradigm for appraising presidential power. On the international plane, "treaty" and "international agreement" are synonymous terms for all binding agreements.[117] But under U.S law, treaties are a subset of international agreements that receive the Senate's advice and consent.[118] Executive agreements are a distinct class of agreements that are not subject to the Senate's advice and consent.[119] Executive agreements are further subdivided into three categories: *congressional-executive agreements* (where Executive authority to enter the agreement is derived from an existing or subsequently enacted statute),[120]

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[114] *See* 50 U.S.C. § 1541(a) (2012).

[115] *See, e.g.*, 18 U.S.C.S. § 2280 (implementing the SUA Convention and criminalizing violence against maritime navigation); 18 U.S.C.S. § 2280a (implementing the SUA Convention and criminalizing maritime transport involving weapons of mass destruction); 46 U.S.C.S. § 705 (known as the maritime drug law enforcement act, criminalizing a range of narcotics trafficking offenses including those activities described in the Vienna Drug Convention).

[116] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[117] United Nations, *Vienna Convention on the Law of Treaties*, May 23, 1969 art. 2. Although the United States has not ratified the Vienna Convention, courts and the Executive Branch generally regard it as reflecting customary international law. *See, e.g.*, De Los Santos Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it 'as an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices." (quoting Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 80 n.8 (2d Cir. 2005))); Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 433 (2d Cir. 2001) ("[W]e rely upon the Vienna Convention here as an 'authoritative guide to the customary international law of treaties.'" (quoting Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 309 (2d Cir. 2000))).

[118] However, the term "treaty" is not always interpreted domestically to refer only to Article II agreements. *See* Weinberger v. Rossi, 456 U.S. 25, 31-32 (1982) (interpreting statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912) (construing the term "treaty," as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

[119] *See* CONG. RSCH. SERV., *supra* note 86.

[120] *See, e.g.*, The Foreign Assistance Act of 1961, Pub. Law No. 87-195 (codified as amended at 22 U.S.C. §§ 2151-2431k) (authorizing the President to furnish assistance to foreign nations "on such terms and conditions as he may determine, to any friendly country"). *See also* The International Narcotics Control Act of 1992, 22 U.S.C. § 2291(a)(2) (authorizing the President to "conclude agreements, including reciprocal maritime agreements, with other countries to facilitate control of the production, processing, transportation, and distribution of narcotics analgesics, including opium and its derivatives, other narcotic and psychotropic drugs, and other controlled substances.")

executive agreements made pursuant to a treaty (where Executive authority to enter the agreement is based on a ratified treaty),[121] and *sole executive agreements* (where Executive authority to enter the agreement comes from independent Executive power in the Constitution).[122]

Under the *Youngstown* model, congressional-executive agreements empower the President to act at the height of his powers.[123] Congressional-executive agreements can be "used as an alternative to the treaty method in every instance."[124] Agreements made pursuant to treaties are not directly reinforced by congressional legislation, but are nevertheless subject to a measure of congressional reinforcement by virtue of the treaty making process.[125] Treaty-based executive agreements thus confer at least some legislative weight to presidential power as contemplated in *Youngstown*.[126] On the other hand, sole executive agreements are wholly derived from and limited to the extent of the President's Article II powers. As such, when the President acts pursuant to a sole executive agreement, he likely does so in *Youngstown*'s "zone of twilight."[127]

Classifying bilateral ISBAs within a specific subdivision of executive agreement is not an entirely straightforward endeavor. Indeed, many executive agreements, including bilateral ISBAs, do not fit cleanly into the "tidy framework" described above.[128] Rather, as noted by Professor Harold Koh, "authority in this area sits not on isolated stools, but rather runs in a spectrum."[129] If viewed through a narrow lens, one might see bilateral ISBAs as sole executive agreements.

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[121] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 9, § 303(3).
[122] *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate . . . this power having been exercised since the early years of the Republic."); Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) ("Congress has implicitly approved the practice of claim settlement by [sole] executive agreement"); United States v. Belmont, 301 U.S. 324, 330 (1937) ("[A]n international compact . . . is not always a treaty which requires the participation of the Senate.").
[123] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[124] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 9.
[125] Agreements made pursuant to treaties are also well-established as constitutional. *See supra* note 121. *See also* Wilson v. Girard, 354 U.S. 524, 528-29 (1957) (giving effect to an executive agreement defining jurisdiction over U.S. forces in Japan that was concluded pursuant to a treaty). There is occasionally disagreement as to whether a particular treaty authorizes the Executive to conclude an agreement in question. *See* TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 83, at 86–87 (describing examples in which senators contended that certain executive agreements did not fall within the purview of an existing treaty and required separate authorization).
[126] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[127] *Id.*
[128] *See* Harold Koh, Remarks, *Twenty-First International Law Making*, 101 GEO. L.J. 725 (2012), https://bit.ly/3B35BLX.
[129] *Id.*

Professor Koh's spectrum approach is, however, more apt. To be sure, the terms of the SUA Convention and the Vienna Drug Convention specifically encourage direct cooperation between States in carrying out their treaty obligations. Thus, even though bilateral ISBAs are not explicitly authorized in legislation, they are at least implicitly authorized by ratified treaties as a necessary method of furthering treaty obligations.[130] As such, bilateral ISBAs can perhaps most appropriately be cast as executive agreements made pursuant to a treaty.

Notwithstanding the above, bilateral ISBAs are, as a practical matter, interwoven with treaty-based ship boarding regimes. They do not function independently, but rather as corollaries to treaty law. In this sense, presidential power inferred from a bilateral ISBA cannot be extricated from that which is inferred from its corresponding treaty. Therefore, in practice, when naval forces carry out MIO pursuant to processes dictated in a bilateral ISBA, they are likely to do so at the apex of presidential power under *Youngstown*, especially when the bilateral ISBA in question is leveraged to enforce the domestically implemented criminal provisions of the SUA Convention or the Vienna Drug Convention.[131]

Unlike treaties and executive agreements, political commitments such as the PSI incur no legal obligations on the international plane.[132] Given the lack of obligation under international law, it follows that the President cannot infer constitutional power to execute a political commitment of his own making.[133] The PSI is therefore not *ipso facto* legal authority for MIO under international or domestic law. As such, it is a common misperception that the PSI's SIP are an affront to high seas freedoms; a misperception that may be aided in part by the secrecy of PSI activities.[134] But much like MIO conducted pursuant to bilateral ISBAs, MIO couched in the PSI does not occur in a vacuum of authority. Rather, as noted above, key tenets of the PSI's SIP are captured in the 2005 Protocol to the

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[130] *Id.* Professor Koh applied similar reasoning in regard to Executive authority to enter into the Anti-Counterfeiting Trade Agreement, noting the lack of explicit *ex ante* authorization for the agreement, but also citing legislation that conferred presidential power "to work with other countries to establish international standards and policies for the effective protection of intellectual property rights." *Id.* at 733. It also bears noting that the Executive Branch has consistently maintained that bilateral ISBAs do not violate the Emoluments Clause of the Constitution insofar as they do not authorize the government of another State to enforce U.S. law, but rather, prescribe that each State would enforce its own laws with the assistance of the other party. *See* 20 U.S. Op. O.L.C 346 (1996).

[131] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[132] *See supra* text accompanying note 87.

[133] *See generally* Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507 (2009) (discussing the origins and constitutional implications of political commitments).

[134] Not surprisingly, China and Iran are among the state critics of the PSI. The crux of their criticism is that that the PSI's SIP is inconsistent with Article 23 of UNCLOS, which allows ships "carrying nuclear or other inherently dangerous or noxious substances" the right of innocent passage through territorial seas. *See supra* note 105.

SUA Convention and its 11 corresponding bilateral ISBAs. In contrast to the PSI itself, these agreements *do* incur international law obligations, which influence presidential power in the ways previously described. Thus, MIO conducted under the auspices of the PSI requires some layered analysis to determine the actual underlying sources of legal authority. In all likelihood, the MIO in question will be supported by a treaty-based regime, enabling naval forces to operate at the maximum of presidential power under *Youngstown*.[135]

C. The Law of the Sea

UNCLOS serves as the "constitution" of the world's oceans, providing a comprehensive framework for peacetime maritime security.[136] The United States is not among the 168 parties to UNCLOS, but nevertheless considers the bulk of its provisions reflective of customary international law (CIL).[137] Historically, U.S. courts[138] and U.S. officials[139] have understood CIL to be part of U.S. law in the absence of controlling domestic legislation.[140] Recent jurisprudence implies a more nuanced vision of CIL's effect in U.S. courts,[141] but in terms of foreign relations, CIL remains firmly "part of our law".[142] Like other bodies of international law, CIL is invoked on the international plane in two fundamental ways: as implicating the President's power to "take care that the Laws are faithfully executed" and as support for the President's authority as Commander in Chief.[143]

The notion that CIL is included within the "Laws" that the President must faithfully execute in the performance of his Commander in Chief duties first

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[135] *See Youngstown*, 343 U.S. 579.
[136] *See* Kraska, *supra* note 8 (referring to UNCLOS as the "constitution" of the world's oceans).
[137] *See supra* text accompanying note 16.
[138] *See* The Nereide, 13 U.S. 388, 423, 3 L. Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land."); Respublica v. De Longchamps, 1 U.S. 111, 116 (Pa. O. & T. 1784) (describing a "crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State."). *See also* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) ("[T]he law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land.").
[139] *See, e.g.*, 1 Op. Att'ys Gen. 26, 27 (1792) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially the law of the land."); 1 Op. Att'ys Gen. 69, 69 (1797) ("[T]he common law has adopted the law of nations in its full extent, made it a part of the law of the land.); 5 Op. Att'ys Gen. 691, 692 (1802) ("[T]he law of nations is considered as part of the municipal law of each State.").
[140] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 9, § 102(2).
[141] *See infra* Section IV. *See also* U.S. CONST. art. III § 2 ("The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction.").
[142] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 9, § 102(2).
[143] *See* U.S. CONST. art. II, § 3.

surfaced in Alexander Hamilton's writings as Pacificus.[144] Hamilton contended that President Washington's duty to execute the laws extended to CIL rules regarding neutrality, thereby empowering him to issue the Neutrality Proclamation and its infamous threat to prosecute any citizen caught providing assistance to belligerent European powers.[145] The Hamiltonian view of CIL took hold in nineteenth century prize courts and precipitated a series of notable Supreme Court decisions around the turn of the century.[146] Most prominently, the Supreme Court in *The Paquete Habana* cemented the view that "international law is part of our law," a proposition that the majority invoked in support of presidential power to direct a naval blockade on Cuba consistent with CIL.[147] Also around the turn of the century, *In re Neagle* held that presidential power is not "limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms," but rather includes "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[148]

Modern Supreme Court rulings largely affirm *The Paquete Habana* and *In re Neagle* Courts' interpretation of CIL's effect on presidential power. Indeed, "[t]he best reading of Supreme Court precedent is that the law of nations [CIL] applies as preemptive federal law . . . when necessary to preserve and implement distinct . . . Article II powers to recognize foreign nations, conduct foreign relations, and decide momentous questions of war and peace."[149] In the maritime domain, the implementation and preservation of CIL as contemplated by the Supreme Court entails more than simple conformance with the law of the sea. Rather, as the Supreme Court held in *Banco Nacional de Cuba v. Sabbatino*, "[when] articulating principles of [CIL] in its relations with other States, the Executive Branch speaks not only as interpreter of generally accepted and traditional rules. . .but also as an *advocate* of standards it believes desirable for the community of nations and protective of national concerns [emphasis added]."[150]

Consistent with *Sabbatino*, naval operations generally–and MIO specifically–are a mechanism for the Executive Branch to *advocate* customary law

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[144] ALEXANDER HAMILTON & JAMES MADISON, *Pacificus* 1, *in* LETTERS OF PACIFICUS AND HELVIDIUS (Richard Loss ed., Scholars' Facsimiles & Reprints 1976) (1845).
[145] *Id.*
[146] *See, e.g.*, The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 at 670 (1863) ("The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world.").
[147] The Paquete Habana, 175 U.S. 677, 700 (1900).
[148] *In re* Neagle, 135 U.S. 1 (1890).
[149] Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Customary International Law*, 98 VA. L. REV. 729 (2012) (arguing that CIL can be applied by U.S. courts to help implement the Constitution's foreign affairs powers).
[150] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

of the sea standards determined to be the national interest. In fact, as a function of presidential power the Navy has a long history of leveraging the law of the sea in furtherance of national interests. Counter-piracy operations are illustrative of this phenomenon. In a prominent example from the nineteenth century, President Monroe sought congressional authorization to pursue pirates onto the territory of foreign States in the Caribbean, but Congress rejected legislation as unnecessary.[151] It concluded that because pirates are "the common enemies of mankind," they could not "avail [themselves] of the protection of the territory of the third power. . . . Under this rule, the pursuit and capture of pirates anywhere, and everywhere, may be justified. The Executive has acted upon it."[152]

In its refusal of President Monroe's request for legislative authorization, Congress reasoned that the special status of pirates under the law of the sea afforded the President a broad mandate to unilaterally authorize counter-piracy operations he determined were in the national interest.[153] In a similar vein, more recent presidents have leaned on the universal criminality of piracy as constitutional justification for committing naval forces to counter-piracy campaigns, such as the ongoing multi-national counter-piracy effort off the coast of Somalia. Piracy is, however, a unique creature under both the law of the sea *and* domestic law. Indeed, Congress is expressly empowered by the Constitution to define and punish "piracies . . . committed on the high seas,"[154] and it has done so through domestic legislation criminalizing piracy "as defined by the law of nations."[155]

Although legally distinctive, the prohibition on piracy is not the only law of the sea principle advocated by the Navy as an extension of presidential power. Moreover, universal criminality is not dispositive to inferences of presidential power that arise from the law of the sea. To be sure, upholding high seas freedoms by contesting excessive maritime claims[156] and preserving the sovereign immunity

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[151] *See* President James Monroe, Eighth Annual Message (Dec. 7, 1824) (submitting to Congress for consideration whether pirates should be pursued in foreign territories).

[152] H.R. Comm. of Foreign Relations, 19th Cong., *Report on Piracy and Outrages on American Commerce by Spanish Privateers* (Jan. 25, 1825), *as reprinted in* 2 AMERICAN STATE PAPERS: NAVAL AFFAIRS 187, 188 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860) (noting that unless Spain "wanted either the power or the will to do her duty," it would be inappropriate to conduct searches outside the context of pursuit).

[153] *Id.*

[154] *See* U.S. CONST. art. I, § 8.

[155] 18 U.S.C. § 1651. *See also* 33 U.S.C. §§ 381-387 (providing a broad statutory framework for the Executive Branch and its agents to suppress piracy through, *inter alia*, seizure and condemnation of piratical vessels).

[156] *See generally* DEPARTMENT OF DEFENSE INSTRUCTION S-2005.01: FREEDOM OF NAVIGATION PROGRAM. *See also* COMMANDER'S HANDBOOK, *supra* note 10, § 2-8 (noting that "[s]ince the early 1970s, the United States, through DoDI S-2005.01 Freedom of Navigation (FON) Program (U), has reaffirmed its long-standing policy of exercising and asserting its FON and overflight rights on a

of naval vessels[157] are representative of national interests underpinned by the law of the sea and advanced routinely by the Navy on behalf of the Executive Branch.

In the same way that Freedom of Navigation program assertions contest excessive maritime claims that deviate from U.S. interests,[158] MIO is among the tools of national power employed by the Executive Branch to address national interests linked to maritime security; counter-illicit trafficking in weapons, drugs, and humans; counter-terrorism; and counter-proliferation of WMD.[159] In this regard, operational authorities are drawn from a history of practice and jurisprudence which supports the notion that CIL–in the form of the law of the sea–may be leveraged to "preserve and implement distinct . . . Article II powers"[160] in a manner that "advocate[s] . . . standards . . . desirable for the community of nations and protective of national concerns."[161]

In light of the above, naval forces operate on sound constitutional footing when conducting MIO based on a customary law of the sea principle (e.g., the right of approach and visit), particularly when acting as an advocate for a national policy objective (e.g., counter-illicit trafficking).[162] Additionally, Congress has incorporated the law of the sea into a range of criminal statutes including 18 U.S.C. § 7, which allows for the extraterritorial exercise of U.S. criminal jurisdiction over

worldwide basis. Under the FON Program, challenges of excessive maritime claims of other States are undertaken both through diplomatic protests by the Department of State and by operational assertions by U.S. Armed Forces. U.S. Freedom of Navigation Program assertions are designed to be politically neutral as well as nonprovocative and have encouraged States to amend their claims and bring their practices into conformity with UNCLOS").

[157] The law of the sea recognizes the complete immunity of "any warship, naval auxiliary, other vessels or aircraft owned or operated by a State. . ." only for non-commercial purposes on the high seas and in territorial waters of a coastal state. Sovereign immune vessels are exempt from arrest, search, taxation, and regulations requiring the flying of a foreign flag. Crewmembers and acts performed onboard sovereign vessels fall under the exclusive control of the flag state. UNCLOS art. 236. *See also* COMMANDER'S HANDBOOK, *supra* note 10, § 2-3. In practice, the United States preserves sovereign immunity in a variety of ways including by not providing crew lists to host nation authorities and by not allowing health inspections or release of individual health records.

[158] *See supra* note 156.

[159] *See* DEP'T OF DEF., JOINT PUB 3-03, JOINT INTERDICTION II-4 (2016) (describing the policy underpinnings of MIO).

[160] *See* Bellia & Clark, *supra* note 149.

[161] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 433 (1964).

[162] *But see* The Paquete Habana, 175 U.S. 677, 700 (1900). *See also, e.g.*, Galo-Garcia v. Immigration and Naturalization Service, 86 F.3d 916 (9th Cir. 1996) (noting that "[w]here a controlling executive or legislative act . . . exist[s], customary international law is inapplicable.").

vessels and persons who are interdicted in accordance with the law of the sea.[163] In so doing, Congress has reinforced presidential power under *Youngstown*.[164]

Finally, the law of the sea is a distinctly ubiquitous peacetime MIO construct. While other MIO paradigms can be limited in scope or duration, the law of the sea is agnostic in application. It is entrenched within the "constitution" of the world's oceans;[165] an ever-present foundation for MIO in international waters. But the law of the sea is not merely the default when other legal bases are inapplicable to a given circumstance. Rather, the law of the sea is authoritative in its own right. Additionally, the law of the sea transects legal regimes and can be applied cumulatively with other legal justifications to add strength to both international and domestic legal authority.[166]

D. Self-Defense

A State's right to defend itself (national self-defense) and to defend other States (collective self-defense) is enshrined in Article 51 of the UN Charter.[167] The UN Charter is primarily concerned with *jus ad bellum* (a State's right *to* war)[168] in its treatment of self-defense at the national level, with States as singular actors. Under CIL, however, the right of self-defense and collective self-defense extends not just to States, but also to units and individuals.[169] Importantly, Article 51

[163] 18 U.S.C. § 7 (stating that "[t]he term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."). *See infra* Part IV.

[164] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

[165] *See* Kraska, *supra* note 8.

[166] For example, a MIO authorized by an UNSCR might also be conducted with consent of a flag State in accordance with the law of the sea.

[167] U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

[168] *Jus ad bellum* along with *jus in bello* (a State's right *in* war) govern the international legal bases for initiating war and the conduct of warfare, respectively. *Jus in bello* is also knowns as "international humanitarian law," the "law of war," or the "law of armed conflict." *See* DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2016), 78–89 [hereinafter LAW OF WAR MANUAL].

[169] *Id.* at 47 ("The UN Charter was not intended to supersede a State's inherent right of individual or collective self-defense in customary international law.") *See also* Letter from Daniel Webster to Lord Ashburton (6 August 1842), *reprinted in* 2 International Law Digest 412 (John Bassett Moore ed., 1906)–(describing the CIL standard of self-defense as applied in the Caroline case, which ruled that

characterizes self-defense as an "inherent" right, reinforcing its applicability outside the context of the Article.[170] Indeed, the inherent right of self-defense and collective self-defense is not limited by any provision in the UN Charter, the law of the sea, or any other body of international law.[171]

The inherent right of self-defense is incorporated domestically in Article II of the Constitution, which binds the President to "preserve, protect and defend" the United States.[172] Additionally, it is interpreted in U.S. law to apply across the peace-war continuum,[173] filtering down in national policy from the strategic level to the tactical level.[174] When naval forces conduct MIO in self-defense, they do so pursuant to presidential power as promulgated in military orders issued via the National Command Authority.[175] U.S. policy explicitly recognizes the inherent

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defensive force in the context of is permitted when the "[n]ecessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation"); *The Sixth Annual Waldemar A. Sow Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 94 (1989) ("The United States rejects the notion that the U.N. Charter supersedes customary international law on the right of self-defense. Article 51 characterizes that right as 'inherent' in order to prevent its limitation based on any provision in the Charter. We have always construed the phrase 'armed attack' in a reasonable manner, consistent with a customary practice that enables any State effectively to protect itself and its citizens from every illegal use of force aimed at the State.").

[170] *See* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.")

[171] The practice of States in applying the law of self-defense through releasable ROE shows that States do not consider self-defense to be limited by the UN Charter or any other body of international law. *See generally* FEDERAL MINISTRY OF DEFENCE (Germany) ZDV 15/2, LAW OF ARMED CONFLICT MANUAL (2013); UNITED KINGDOM MINISTRY OF DEFENCE, THE JOINT SERVICE LAW OF ARMED CONFLICT MANUAL 383 (2004). The United States employs the inherent right of individual and collective self-defense in accordance with the Standing Rules of Engagement (SROE). *See infra* note 178.

[172] *See* U.S. CONST. art. II, § 1 (establishing the President's Oath or Affirmation as "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States").

[173] *See* LAW OF WAR MANUAL, *supra* note 168, at 48 ("The inherent right of self-defense, recognized in Article 51 of the Charter of the United Nations, applies in response to any 'armed attack,' not just attacks that originate with States.").

[174] *See* LAW OF WAR MANUAL, *supra* note 168, at 1019 ("Decisions about whether to invoke a State's inherent right of self-defense would be made at the national level because they involve the State's rights and responsibilities under international law. For example, in the United States, such decisions would generally be made by the President. The Standing Rules of Engagement for U.S. forces have addressed the authority of the U.S. armed forces to take action in self-defense in response to hostile acts or hostile intent.").

[175] The National Command Authority comprises the President and the Secretary of Defense jointly.

right of self-defense as a basis for MIO[176] while acknowledging that no body of international law impairs that right.[177]

The Navy applies the inherent right of self-defense in accordance with the Standing Rules of Engagement (SROE).[178] Informed by policy and law, the SROE provides that "unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstration of hostile intent."[179] Individuals may act in self-defense in response to a hostile act or demonstrated hostile intent, "[u]nless otherwise directed by a unit commander."[180] A "hostile act" is an "attack or other use of force against the United States, U.S. forces, or other designated persons or property," including "vital" U.S. government property.[181] "Hostile intent" means the "threat of imminent use of force against the United States, U.S. forces or other designated persons or property."[182] Whether a threat is "imminent" is a determination made "based on an assessment of all facts and circumstances," but imminent threats are "not necessarily . . . immediate or instantaneous."[183] Classified annexes to the SROE combine with theater and mission-specific annexes to provide additional guidance to naval forces charged with carrying out MIO. The SROE "are carefully constructed to ensure that the protection of U.S. vessels and U.S. nationals and their property at sea conforms to U.S. and international law and reflects national policy."[184]

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[176] *See* COMMANDER'S HANDBOOK, *supra* note 10, § 4-8 ("States can legally conduct [MIO] pursuant to customary international law under circumstances that would permit the exercise of the inherent right of individual, collective, and national self-defense as recognized in Article 51 of the United Nations Charter.").

[177] *See Responses of Rear Admiral John E. Crowley, Chief Counsel and Judge Advocate General, U.S. Coast Guard, to Additional Questions for the Record Submitted by Senator Joseph R. Biden, Jr., Senate Executive Report 108-10, United Nations Convention on the Law of the Sea,* 108th Congress, Second Session, 170, 172 (Mar. 11, 2004) ("It should also be noted that nothing in [UNCLOS] restricts the inherent right of individual or collective self-defense or rights during armed conflict, and the administration is recommending that the United States express such an understanding."); *United Nations Convention on the Law of the Sea*: *Hearing Before the Committee on Environment and Public Works*, 108th Cong., 77 (2004) (William H. Taft, Legal Adviser, Department of State, Response to an Additional Question from Senator Inhofe) ("As stated in the resolution of advice and consent now before the Senate, nothing in [UNCLOS] impairs the inherent right of individual or collective self-defense or rights during armed conflict.").

[178] The SROE establish U.S. policy concerning the use of force during "all military operations and contingencies" occurring during peacetime. Classified portions of the SROE pertain to rules that apply during periods of armed conflict. *See* JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, (June 13, 2005), *available at* https://bit.ly/3y9SYww.

[179] *Id.* at 3.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] COMMANDER'S HANDBOOK, *supra* note 10, § 3-8.

The inherent right of self-defense is especially germane in the context of maritime terrorism, vessel hijacking, hostage-taking, piracy, and other forms of violent crime at sea. Recent history offers numerous high-profile examples, including the hijacking of the *Achille Lauro* in 1985 by the Palestine Liberation Front;[185] the attacks by al Qaeda on the USS Cole in 2000[186] and on the French tanker, *Limburg*, in 2002;[187] the 2004 bombing of the Philippines' *Superferry 14* by Abu Sayyaf;[188] the seizure by Somali pirates of the *Maersk Alabama* in 2009;[189] the 2010 attack by an al Qaeda linked groups on the Japanese oil tanker, *M Star*;[190] the hijacking of the *Quest* by Somali pirates in 2011;[191] and a series of covert attacks by Iran against merchant ships in 2019.[192] Several of these events ended tragically in civilian deaths.

A common thread in MIO grounded in self-defense is the protection of U.S. nationals. The right to protect nationals abroad flows from the inherent right of self-defense and is reinforced by a history of State practice.[193] The United States asserts the right to take action to protect U.S. nationals when the government of the territory in which they are located is "unwilling or unable" to protect them.[194]

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[185] The hijacking of the cruise ship, *Achille Lauro*, ended in the murder of American passenger, Leon Klinghoffer. *Capture of Hijackers; Excerpts from White House News Conference on Hijackers*, N.Y. TIMES (Oct. 11, 1985), https://nyti.ms/3DcJK6O.

[186] *See* Kraska *supra* note 8, at 9 ("The slow, low-tech suicide assault on the USS *Cole* killed seventeen sailors and nearly sank the powerful warship.").

[187] *Id.* The Limburg attack resulted in the death of one crew member and caused 90,000 barrels of oil to spill in the Gulf of Aden.

[188] *Id.* ("The deadly bombing of *Super Ferry 14* in 2004 by the Abu Sayyaf organization in the Philippines killed 116 people—the world's greatest maritime terrorist attack.").

[189] *See generally* CAPTAIN PHILLIPS (Sony Pictures 2014) (depicting the *Maersk Alabama* hijacking and hostage rescue in a Hollywood film starring Tom Hanks).

[190] *See Japanese Tanker was Damaged in Terror Attack, UAE Says*, BBC NEWS (Aug. 6, 2010), https://bbc.in/3Db3QhG.

[191] *See Four American Hostages Killed by Somali Pirates*, NBC NEWS (Feb. 22, 2011), https://nbcnews.to/3gnDY8C.

[192] *See, e.g.*, David D. Kirkpatrick, Richard Pérez-Peña & Stanley Reed, *Tankers Are Attacked in Mideast, and U.S. Says Video Shows Iran Was Involved*, N.Y. TIMES (Jun. 13, 2019), https://nyti.ms/385qcCM.

[193] Ambassador William Scranton, U.S. Representative to the United Nations, *Statement in the U.N. Security Council Regarding Israeli Action at Entebbe* (Jul. 12, 1976) *as reprinted in* 1976 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 150 ("[T]here is a well-established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the State in whose territory they are located either is unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.").

[194] *See, e.g.*, Jimmy Carter, Letter to Thomas P. O'Neal, Jr., Speaker of the House of Representatives, and Warren G. Magnuson, President pro tempore of the Senate regarding the rescue attempt for American hostages in Iran (Apr. 26, 1980) ("In carrying out this operation [to rescue the American hostages in the U.S. embassy in Tehran] the United States was acting wholly within its right, in

Actual violence against a national is not required before taking such action if an attack is imminent.[195] Although the "unwilling or unable" doctrine is more familiar in land-based operations, it is equally viable when a U.S. national faces an imminent attack while on a foreign-flagged vessel or within foreign territorial waters. Recent presidents have acted unilaterally in approving operations to protect U.S. nationals at sea. Of note, the *Mayaguez* incident (1975)[196] as well as the hijackings of the *Maersk Alabama* and *Quest*, respectively, prompted presidentially approved missions in defense of U.S. nationals. International law regarding the protection of nationals has historically been held to buttress presidential power.[197]

MIO based on collective self-defense presents a more challenging legal framework for the Executive Branch. The United States interprets the international law of collective self-defense at sea as providing authority for

> the use of proportionate force necessary for the protection of foreign flag vessels and aircraft and foreign nationals and their property from unlawful violence, including terrorist or piratical attacks, at sea. In such instances, consent of the flag State should first be obtained unless prior arrangements are already in place or the necessity to act immediately to save human life does not permit obtaining such consent.[198]

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accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unwilling or unable to protect them.").

[195] *See* LAW OF WAR MANUAL, *supra* note 168, at 48.

[196] President Gerald R. Ford approved a rescue mission after the Cambodian Navy seized the American merchant ship, SS *Mayaguez*, in international waters off Cambodia's coast. Thirty-nine crew members including U.S. citizens were ultimately rescued, but 23 service members were killed in action during an extended firefight with Cambodian troops. *See* David Vergun, *Lessons Learned from the 1975 The Mayaguez Incident*, U.S. DEP'T OF DEF. (Dec. 11, 2018), https://bit.ly/3D7C3yw.

[197] For example, the Executive Branch's reliance on international law to justify presidential power to defend U.S. citizens is evident in a 1912 State Department legal memorandum titled, "Right to Protect Citizens in Foreign Countries by Landing Forces." Much of the memorandum addresses protection of nationals under international law, but the memorandum also links the legality of the actions under international law to the constitutionality of unilateral presidential action. The memorandum contends that, because international law is part of U.S. law (as declared in *The Paquete Habana*), presidential power to take care that the laws are faithfully executed includes the authority to take military action to protect U.S. citizens when such action is allowed by international law. Curtis Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 718 (October, 2016). *See also*, *Note, Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1776 (1968) ("Since international law as well as statutes and treaties had long been considered part of the 'laws' to which the 'faithfully executed' clause refers, any interests evidenced by those laws became a potential subject for presidential protection by force.").

[198] COMMANDER'S HANDBOOK, *supra* note 10, § 3-9.

U.S. policy on collective self-defense has come under recent criticism by some scholars who contend that collective self-defense is bound by Article 51 of the UN Charter, which only mentions collective self-defense of other States, subject to consent from the State to be protected.[199] Thus, as the argument goes, collective self-defense of non-State partners like the Syrian Democratic Forces has no basis in *jus ad bellum* given that no State has consented to be protected under the terms of the UN Charter. As noted above, however, this argument is flawed in that the right of collective self-defense espoused in U.S. policy is "inherent" under CIL with applicability beyond Article 51.[200]

Members of Congress have also has raised concerns regarding collective self-defense against attack by groups not covered under a congressional authorization for the use of military force (AUMF).[201] The substance of this critique is that collective self-defense has evolved into an overextension of presidential power insofar as simply designating a "partner force" enables the use of force against actors that threaten the "partner force," but pose no threat to the United States. The Department of Defense's (DoD's) response to this criticism is that "collective self-defense is not typically limited to particular groups or individuals . . . including not being limited to groups covered by the 2001 AUMF or other congressional authorizations for the use of force" and that "U.S. and partner forces on the ground are not obligated to identify whether the attackers are part of a particular group."[202]

Although critiques of U.S. collective self-defense policy have arisen mainly from land-based conflicts, the same critiques are transferable to the maritime domain. As such, MIO to defend "foreign flag vessels and aircraft and foreign nationals and their property" will inevitably be scrutinized as a matter of policy.[203] Analyses of presidential power in these instances will be necessarily

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[199] *See, e.g.*, Elvina Pothelet, *The U.S. Military's Collective Self-Defense of Non-State Partner Forces: What Does International Law Say?*, JUST SECURITY (OCT. 24, 2018), https://bit.ly/3z5i2WW. *But see* BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 675 (1994) ("Art. 51 of the Charter allows not only individual, but also collective self-defence. The latter is not, as the wording might suggest, restricted to a common, co-ordinated exercise of the right to individual self-defence by a number of states . . . . It is not required for the exercise of the right of collective self-defence that the state invoking the right be under an obligation resulting from a treaty of assistance. Rather, it is sufficient, but also necessary, that the support be given with the consent of the attacked state. But this consent does not, as the ICJ states for the right of self-defence under customary law, need to be declared in the form of an explicit 'request'.").

[200] *See supra* note 169.

[201] *See, e.g.*, Senator Tim Kaine, Letter to Secretary of Defense James Mattis (Oct. 2, 2018), https://bit.ly/384DpMf.

[202] *Id.* (quoting a response to previous queries on the subject posed to an unnamed DoD official).

[203] COMMANDER'S HANDBOOK, *supra* note 10, § 3-9.

situation dependent. In any case, it is likely that the authority to approve MIO in collective self-defense will be retained at high levels of government.

Notwithstanding academic and political scrutiny on collective self-defense, U.S. courts are disposed to invoke justiciability doctrines or high levels of deference in cases challenging presidential power to use force, especially when lives of U.S. citizens are at stake.[204] Moreover, as then-Attorney General Robert Jackson once said, presidential power "has long been recognized as extending to the dispatch of armed forces outside of the United States either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests."[205] Undoubtedly, the defense of U.S. citizens at sea is a core national interest. And, in certain cases, protection of allies and partners may rise to a comparable level of national interest to justify the exercise of collective self-defense. As held in *Durand v. Hollins*—a seminal case involving the defense of U.S. interests abroad by a Navy commander—the core "object and duty" of governments is to protect their citizens "whether abroad or at home" and the President is the appropriate actor within the United States to whom "citizens abroad must look for protection of person and of property."[206]

E. The Law of Armed Conflict

During armed conflict the legal basis for MIO shifts from previously discussed peacetime regimes to the LOAC. DoD policy is to "comply with the [LOAC] during all armed conflicts, however such conflicts are characterized."[207] Thus, in both international armed conflict (IAC)[208] and non-international armed conflict (NIAC),[209] MIO is subject to the legal principles underlying the LOAC: military

[204] *See, e.g.*, Doe v. Bush, 323 F.3d 133, 135 (1st Cir. 2003) (Iraq); Campbell v. Clinton, 203 F.3d 19, 19 (D.C. Cir. 2000) (Kosovo); Kucinich v. Obama, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (Libya); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1197 (2006) ("In matters implicating foreign affairs and national security, for example, judicial review of executive branch statutory interpretation is extremely infrequent." (citing Dames & Moore v. Regan, 453 U.S. 654, 660-61 (1981))).

[205] Robert Jackson, Training of British Flying Students in the United States, 40 Op. O.L.C. Supp. 58 (1941), https://bit.ly/3km6aKe.

[206] Durand v. Hollins, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860).

[207] *See, e.g.*, DEP'T OF DEF., DOD DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM, 4.1 (Feb. 22, 2011), https://bit.ly/2XNj8Jg ("Members of the DoD Components comply with the law of war during all armed conflicts; however, such conflicts are characterized, and in all other military operations.").

[208] IACs generally involve two or more opposing States. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug, 12, 1949, 75 U.N.T.S. 287 (stating that, "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.").

[209] NIACs include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. *See id.* art. 3 ("Common Article III" applies

necessity,[210] distinction,[211] proportionality,[212] humanity,[213] and honor.[214] There are, however, differences in IAC and NIAC that bear on how MIO may be conducted pursuant to the LOAC.

During IAC, enemy merchant vessels, auxiliaries, and warships may be interdicted based on enemy status[215] or pursuant to the belligerent right of visit and search to "determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict."[216] Neutral merchant vessels are liable to capture by belligerents if engaged in prohibited activities such as the carrying of contraband.[217] Captured vessels and cargo are subject to prize rules.[218] Officers, crew, and enemy nationals may be detained,[219] but neutral nationals should be released unless found to be participating in acts of hostility.[220]

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to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.").

[210] *See* LAW OF WAR MANUAL, *supra* note 168, at 94 ("*Military necessity* may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.").

[211] *Id.* at 62 ("*Distinction*, sometimes called *discrimination*, obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects.")

[212] *Id.* at 86 ("[I]n *jus ad bellum*, *proportionality* refers to the principle that the overall goal of the State in resorting to war should not be outweighed by the harm that the war is expected to produce. However, the principle of proportionality in *jus in bello* generally refers to the obligations to take feasible precautions in planning and conducting attacks and to refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive.").

[213] *Id.* at 59 ("*Humanity* may be defined as the principle that forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.").

[214] *Id.* at 65 ("*Honor* demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing military forces.")

[215] Such interdictions would be subject to LOAC considerations relating to targeting and prize.

[216] COMMANDER'S HANDBOOK, *supra* note 10, § 7-9.

[217] Captured neutral or enemy merchant vessels are called *prizes*. Prize procedures are used to transfer title of captured property. *See* Oakes v. United States, 174 U.S. 778, 786–87 (1899) ("By the law of nations, recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors.").

[218] *See* OPPENHEIM'S INTERNATIONAL LAW II at 482 (7th ed., London, 1952) ("[T]the capture of a private enemy vessel has to be confirmed by a Prize Court, and that it is only through its adjudication that the vessel becomes finally appropriated.").

[219] *See* LAW OF WAR MANUAL, *supra* note 168, at 999.

[220] *See* Robert Tucker, *The Law of War and Neutrality at Sea: Enforcement of the Laws of War*, INT'L L. STUD. 363, 347 (1955) ("In seizing neutral vessels the belligerent incurs certain duties that have long enjoyed the sanction of state practice. Unless the neutral nationals serving as officers and crew of neutral vessels have taken a direct part in the hostilities they may not be treated as prisoners of war.").

Although international law governing MIO in IAC is well-established by centuries of naval warfare, the existence of an IAC is not always easily discernible, especially in current operations occurring across a span of grey-zone competition and conflict. Recent hostilities between the United States and Iran offer a noteworthy case study. Following a spate of State-on-State attacks the United States and Iran submitted notifications to the United Nations in January, 2020, asserting legal justification under Article 51 of the UN Charter.[221] These notifications in effect documented the existence of an IAC as the concept is understood in international law.[222] Time will tell if IAC endures, but to the extent it does, the applicability of the right of visit and search will merit consideration. As a starting point, neither the scale of hostilities nor the involvement of Iranian proxies in hostilities is determinative. In other words, international law does not expressly constrain the right of visit and search to conventional or large-scale IACs, even though there is a notable lack of State practice in "low-intensity"[223] IACs.

Questions surrounding the right of visit and search could take on added significance if Iran continues leveraging its proxies to smuggle advanced conventional weapons (ACW)[224] that threaten U.S. personnel and interests. To date, the United States has relied solely on peacetime authorities under the law of the sea to interdict illicit Iranian ACW, with notable success in November, 2019, and February, 2020, respectively.[225] It remains to be seen, however, whether legal

[221] See U.N. Charter art. 51 ("Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council . . ."); *see also* Ambassador Kelly Craft, United State Mission to the United Nations letter of 8 Jan. 2020; Ambassador Majid Tahkt Ravanchi, Permanent Mission of the Islamic Republic of Iran to the United Nations letter of 8 Jan. 2020.

[222] *See supra* note 208.

[223] *See* JOHN M. COLLINS, CONG. RSCH. SERV., 9100155 U.S. LOW INTENSITY CONFLICTS, 1899–1990 4 (1990), https://bit.ly/2WcP9cQ. ("This survey locates LIC [Low-Intensity Conflict] on the conflict spectrum just above normal peacetime competition and just below any kind of armed combat that depletes U.S. forces slightly, if at all. Limitations on violence, rather than force levels and arsenals, determine the indistinct upper boundary of LIC. Large military formations conceivably could conduct low-intensity operations for limited objectives using the most lethal weapons (perhaps for signaling), provided few U.S. casualties and little U.S. damage ensued. The lower boundary, where nonviolent LICs abut normal peacetime competition, is equally inexact. Political, economic, technological, and psychological warfare, waged for deterrent, offensive, or defensive purposes, occupy prominent places. So do nonviolent military operations, typified by shows of force and peacekeeping. Insurgencies, counterinsurgencies, coups d'etat, transnational terrorism, anti/counterterrorism, minor conventional wars, and narco conflict lie between those poles. Variations within each category, overlaps, and interlocks are virtually endless.").

[224] ACW include, but are not limited to, precision-guided munitions, fuel air explosives, cruise missiles, ballistic missiles, low observability aircraft, other radar evading aircraft, advanced military aircraft, electromagnetic weapons, and laser weapons. *See* 22 U.S.C § 1841.

[225] *See* U.S. Central Command Public Affairs Statement on Dhow Interdictions, U.S. CENT. COMMAND (Feb. 19, 2020), https://bit.ly/3y656id.

authorities drawn from the law of the sea are a sustainable approach to a sophisticated State adversary who exploits the peacetime norms those authorities take for granted. The right of visit and search under the LOAC is significantly broader than peacetime authorities under the law of the sea and may ultimately allow for more proactive curtailment of Iranian weapons smuggling in an enduring IAC.

Under domestic law, a limited application of the right of visit and search in a low-intensity IAC with Iran may not require congressional authorization provided that right can be flexed within the ambit of presidential power. More specifically, recent precedent supports the exercise of unilateral presidential power when anticipated military operations will (1) further a sufficiently important national interest; and (2) be "limited in nature, scope, and duration" so as not to amount to "war" in the constitutional sense.[226]

Indeed, while congressional authorization may bolster presidential power to direct MIO in IAC, it is not compulsory. A long history of U.S. jurisprudence recognizes a distinction between "perfect war" and "imperfect war," reinforcing the premise that congressional authorization does not dictate application of IAC rules pertaining to MIO.[227] The Korean War, for instance, lacked congressional authorization.[228] So too did NATO's intervention in Libya in 2011.[229] Both the Korea[230] and Libya conflicts included MIO as a component of broader military operations. In the Libya conflict, however, MIO occurred under Chapter VII, Article 41 of the UN Charter, as an economic sanction governed by peacetime rules, rather than a military sanction beholden to the LOAC.[231] The point to take away from Korea and Libya is that State-on-State conflicts may (or may not)

[226] *See Authority to Use Military Force in Libya*, *supra* note 32.
[227] Historically, courts have recognized the notion of perfect war (i.e., declared war) and imperfect war (i.e., war that has not been formally declared by Congress, in which authorization to commit hostile acts is limited to certain people, times, and places). *Bas v. Tingy,* 4 U.S. 37 (1800) highlights this phenomenon. That case involved two conflicting statutes relating to prize payments. The later-in-time statute applied only with respect to vessels captured from an "enemy." This turned the issue for the Court into whether France was the "enemy," and the larger question of whether the U.S. was at war with France. The Supreme Court held that France qualified as an enemy under the later-in-time statute, even though no war had been declared and only limited hostilities had been authorized by Congress. *See also* Kathryn L. Einspanier, *Burlamaqui, the Constitution, and the Imperfect War on Terror*, 96 GEO. L.J. 985, 985–88 (2008) (considering constitutional implications of the theory of "perfect and imperfect war" developed by Grotius and Burlamaqui and noting that imperfect war "is fought with limited, particular means and that it may be waged without disturbing civil society in general"; and that "as in defensive wars, the sovereign is not required to declare war").
[228] *See supra* note 73.
[229] The Obama Administration maintained that the limited scale of hostilities in Libya did not amount to armed conflict. *See Authority to Use Military Force in Libya*, *supra* note 32.
[230] *See* MALCOLM CAGLE & FRANK MANSON, THE SEA WAR IN KOREA 296 (1957) (describing the vast scale of MIO during the Korean War).
[231] *See supra* note 66 and accompanying text (describing basis for MIO during the Libya conflict).

implicate IAC rules on MIO. Likewise, Congressional authorizations do not determine the *lex specialis* in international law. A layered, contextual analysis is therefore essential.

With Great Power Competition[232] shaping national defense strategy,[233] naval forces will be increasingly challenged to distinguish between peacetime operations and IAC. Making that distinction properly is critical. Doing so not only determines the international legal rules in effect during operations but also informs interpretations of domestic legal authority.

Although the rise of Great Power Competition presages the possibility of future MIOs based in IAC, the United States remains engaged in a NIAC[234] with no twilight on the horizon. Roots of the present NIAC emerged in the aftermath of September 11, 2001, when a U.S. led coalition invaded Afghanistan pursuant to Article 51 of the UN Charter and the Washington Treaty's Article 5[235] collective self-defense provisions.[236] The United States remains in Afghanistan with the consent of the Afghan government to support NIAC within Afghan borders; however,[237] NIAC is not contained to Afghanistan. The global distribution of al

[232] The term "Great Power Competition" is used in reference to the present operating environment wherein leading navies engage in a variety of peacetime activities designed to gain a competitive advantage over strategic adversaries.

[233] *See, e.g.*, John M. Richardson, *A Design for Maintaining Maritime Superiority*, 69 NAVAL WAR COLL. R., no. 2, Spring 2016 (describing the Navy's strategic objectives set against the rise of Great Power Competition).

[234] *See* Common Art. III, *supra* note 208 (defining NIAC). Although there are a range of views on what constitutes a NIAC, "the intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between non-international armed conflict and internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature." The term "transnational" is sometimes used to describe NIACs that take place in more than one State. LAW OF WAR MANUAL, *supra* note 168, at 1027–29; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (noting that an armed conflict "does not involve a clash between nations"); The Prize Cases, 67 U.S. 635, 666 (1863) ("[I]t is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.").

[235] Article 5 states: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." The North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

[236] UNSCRs 1368 and 1373 further reinforced U.S. action under *jus ad bellum*. UNSCR 1368 noted the international community's "determination" to "combat by all means threat[s] to international peace and security caused by terrorist acts" while UNSCR 1373 notes support for "international efforts to root out terrorism." *See* S.C. Res. 1368, (Sept. 12, 2001); S.C. Res. 1373, (Sept. 28, 2001).

[237] *See* INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 10–11 (2011) (classifying the conflict in Afghanistan as a "multinational NIAC").

Qaeda and its associated forces engendered a NIAC that is transnational in nature.[238] To counter these transnational threats, the United States relies on consent[239] or self-defense[240] to satisfy *jus ad bellum* and NIAC as the *jus in bello* context for counterterrorism activities inside foreign States and in international waters. The notion of a transnational NIAC challenges traditional conceptions of war; its legal justification remains disputed by some in the international community as well as the International Committee of the Red Cross (ICRC).[241] Additionally, the seminal international law texts governing NIAC—Common Article III[242] to the Geneva Conventions and Protocol Additional II to the Geneva Conventions (AP II)[243]—do not contemplate terrorism, much less terrorism that knows no borders.

Nevertheless, Common Article III and AP II are not without merit in the present NIAC. The lack of specificity in Common Article III and AP II relative to IAC's robust legal architecture reflects the unpredictable complexities of NIAC and the practical reality that not every IAC rule is transferable to a NIAC context.[244] In turn, the silently permissive nature of international law embodied in

[238] *See* AUMF, *supra* note 23.

[239] The United States' position is that consent is not required where the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for attacks. *See, e.g.*, Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) ("ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself.").

[240] *See* MICHAEL N. SCHMITT, ESSAYS ON LAW AND WAR AT THE FAULT LINES 49–86 (2012) (arguing that "self-defense is a legitimate ground for actions against non-State actors such as terrorist groups, even when such groups are located in another State's territory").

[241] *See, e.g.*, INT'L COMM. OF THE RED CROSS, *supra* note 237, at 10–11 (emphasizing that "the ICRC does not share the view that a conflict of global dimensions [the transnational armed conflict] is or has been taking place").

[242] *See* Common Art. III, *supra* note 208.

[243] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. The United States is not a party to AP II due partly to the additional protections the Protocol provides to irregular forces. AP II nonetheless has been ratified by 168 countries and is thus a relevant guidepost for assessing the international community's positions on NIAC.

[244] *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib for the Former Yugolsavia Oct. 2, 1995) ("Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.").

the *Lotus* principle[245] affords States latitude in determining how best to address asymmetric threats in NIAC subject to conformance with the pillars of the LOAC. Owing to State discretion in this regard, the laws of naval warfare manifest differently in IAC and NIAC, and these differences, though discreet, impact the ways in which MIO may be conducted.[246] To be sure, the legal distinctions between NIAC and IAC at sea exist necessarily and the rationale underpinning these distinctions is important to informing interpretations of domestic legal authority as well as policy decisions concerning MIO execution.

Perhaps the most fundamental difference in IAC and NIAC at sea relates to the types of vessels authorized to engage in belligerency. During IAC, warships[247] are the only vessels that may exercise belligerent rights, including both the right to conduct offensive attacks[248] and the right of visit and search.[249] No such limitation applies in NIAC.[250] This distinction exists because warships are, by definition, State vessels, rendering it inevitable that non-State actors, to the degree they engage in armed conflict at sea, will do so from a non-warship; perhaps a dhow, a fishing boat, a sailboat, or other small craft. MIO against unconventional threats of this ilk may necessitate use of non-warships with capabilities and operational authorities not typically employed in wartime. International law appreciates this reality by permitting State use of any government vessel in NIAC including, potentially, a law enforcement vessel (e.g., a customs and border patrol

[245] *See* The Case of S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7); *see also* Armin von Bogdandy & Markus Rau, *The Lotus*, *in* 6 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW at 946, 948 (2006) ("[T]he *Lotus* principle holds that "what is not prohibited is permitted in international law.").

[246] *See* Wolff Heintschel von Heinegg, *Methods and Means of Naval Warfare in Non-International Armed Conflicts*, 88 INT'L L. STUDIES 211, 211–12 (Watkin & Norris eds., 2012) (describing arguments that NIAC and IAC regimes have merged).

[247] *See* UNCLOS, *supra* note 10, art. 29 (defining "warship" as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline").

[248] *See* COMMANDER'S HANDBOOK, *supra* note 10 §, 2-2 ("During international armed conflict at sea, warships are the only vessels that may exercise belligerent rights, which include the right to conduct offensive attacks.").

[249] *Id. See also Declaration Respecting Maritime Law*, Apr. 16, 1856, 115 C.T.S. 1, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 1056 (Dietrich Schindler & Jiri Toman, 4th ed. 2004) (indicating this rule dates back to the prohibition on privateering under the 1856 Paris Declaration).

[250] *See* COMMANDER'S HANDBOOK, *supra* note 10, at § 2-2 (noting that "these limitations do not apply to non-international armed conflicts").

vessel), an auxiliary, or a non-traditional vessel[251] even when hostilities are foreseeable.[252]

Additionally, NIAC allows States to exercise not only belligerent rights but also sovereign rights.[253] This means that States are not beholden to the Third Geneva Convention's requirements concerning prisoners of war as they otherwise would be in IAC,[254] but instead may impose their own domestic law, including ordinary criminal law, to punish non-State actors.[255] Thus, captured personnel may be subject to criminal prosecution and seized vessels and cargo may be kept or disposed of pursuant to domestic criminal law.

A final key component of NIAC at sea rests on the international law definition of NIAC as occurring *within* a State.[256] Of course, NIAC may also occur in international waters outside the territory of any particular State. But given that international law expressly recognizes NIAC *within* States, it follows that a State may conduct MIO *within* another State's territorial sea provided there is a justification for doing so under *jus ad bellum* (e.g., the coastal State is unwilling or unable to address an imminent threat).[257]

Unlike IAC rules cultivated by State-on-State conflicts throughout history, NIAC rules are premised on a slimmer body of State practice hastened by September 11, 2001 and a consequent necessity to reevaluate the domestic and

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[251] *See generally* Timothy Boyle, *At the Edges of Peace and War: Non-traditional Vessels in Great Power Competition and International Armed Conflict*, *in* THE LAW OF NAVAL WARFARE, Ch. 15, (Dale Stephens & Mathew Stubs eds., 2019) (stating that a non-traditional vessel (NTV) is understood colloquially as "a vessel whose actual purpose differs from what would otherwise be reasonably inferred from its presentation").

[252] *See* Heinegg, *supra* note 246, at 219 ("The government forces may make use of any vessel or aircraft, including, for example, those used for law enforcement and customs enforcement, in the conduct of hostilities.").

[253] *See, e.g.*, The Prize Cases, 67 U.S. 635, 673 (1863) ("Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights."); LAW OF WAR MANUAL, *supra* note 168, at 1084 ("A State may exercise both sovereign and belligerent rights over non-State armed groups. This means that a State may use not only its war powers to combat non-State armed groups, but it may also use its domestic law, including its ordinary criminal law, to combat non-State armed groups.").

[254] *See* INT'L AND OPERATIONAL. L. DEP'T, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 232 (5th ed., 2015) (summarizing Michael Matheson's speech "[w]e do not support the relaxation of requirements contained in the Third Geneva Convention concerning POW treatment for irregular forces. We do not believe persons entitled to combatant status should be treated as prisoners of war in accordance with the 1949 Geneva Conventions; combatant personnel must distinguish themselves from the civilian population while engaged in military operations").

[255] *See, e.g.*, *The Prize Cases*, 67 U.S. at 673.

[256] *See* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Int'l Crim. Trib for the Former Yugolsavia Oct. 2, 1995) (noting that NIACs occurs in a state's territory).

[257] *See* Heinegg, *supra* note 246, at 217.

international law frameworks in which MIO is conducted. For its part, Congress enacted an AUMF[258] in 2001 that couples with the President's constitutional powers as the domestic legal authority for ongoing U.S. counterterrorism operations at sea. The AUMF provides Congressional support to MIO directed against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons" while also recognizing the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[259]

U.S. forces conduct "expanded" MIO (EMIO) consistent with the AUMF, to include "the boarding and search or inspection of suspect vessels and taking custody of vessels that are carrying out activities in support of terrorist organizations."[260] Originally coined "leadership interdiction operations," the Navy first conducted EMIO to capture escaping enemies following the invasion of Afghanistan[261] and again at the start of the Iraq War.[262] EMIO took hold in U.S. policy after release of President Bush's National Strategy for Maritime Security in 2005.[263] In pertinent part, it provides that:

> The United States will prevent potential adversaries from attacking in the maritime domain or committing unlawful acts there by monitoring and patrolling its maritime borders, maritime approaches, and exclusive economic zones, as well as high seas areas of national interest, and by stopping such activities at any stage of development or deployment. The United States will work to detect adversaries before they strike . . . to block their freedom of movement . . . [and] stop them from entering the United States . . . If terrorists cannot be deterred by the layered maritime security, then they must be interdicted and defeated, preferably overseas.[264]

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[258] *See* AUMF, *supra* note 23.
[259] *See id.*
[260] Daily Press Briefing, Philip T. Reeker, Deputy Spokesman U.S. Department of State (June 3, 2002), https://bit.ly/3B1vFa5.
[261] *See* G. K. Herring, *The War in Afghanistan: A Strategic Analysis*, *in* NATIONAL SECURITY CHALLENGES FOR THE 21ST CENTURY 161, 170 (Williamson Murray ed., 2003) (noting that leadership interdiction operations in the North Arabian Sea specifically targeted Al-Qaeda members attempting to escape to Somalia and Yemen).
[262] *See Interview with Vice Admiral Timothy J. Keating, U.S. Navy—This Was a Different Kind of War*, PROCEEDINGS (June 2003), https://bit.ly/3khEiqw (pointing out that during Operation Iraqi Freedom, several states continued their Operation Enduring Freedom efforts through leadership interdictions in the North Arabian Sea, Gulf of Oman, and the Red Sea).
[263] THE WHITE HOUSE, THE NATIONAL STRATEGY FOR MARITIME SECURITY (2005).
[264] *Id.* at 7.

Under international law, EMIO is justified based on status (i.e., a determination that the vessel to be interdicted is of enemy character)[265] or pursuant to the right of visit and search.[266] Although the right of visit and search has been used sparingly in NIAC, there are a number of historical examples indicative of State practice. France, for instance, instituted an extensive maritime control zone in the Mediterranean from 1956–58 to prevent the flow of arms to rebels in Algeria, resulting in interdiction of more than 2,500 ships per year.[267] Additionally, in 2008–09, Israel exercised the right of visit and search to prevent the flow of arms into the Gaza Strip.[268]

In his article, *Methods and Means of Naval Warfare in Non-International Armed Conflict*, Professor Wolff Heintschel von Heinegg concludes, based on the Algerian and Gaza conflicts, that States are entitled to the right of visit and search in NIAC when the following conditions are met: (1) vital security interests of the State are at stake; (2) there are reasonable grounds for believing that the foreign vessels are engaged in activities jeopardizing those security interests (e.g., by supplying the non-State party with arms); and (3) the measures are undertaken in close proximity to the conflict area.[269]

Although Professor von Heinegg presents a useful framework for analyzing the right of visit and search in NIAC, it is far from an all-encompassing solution for addressing non-State threats to U.S. interests in the maritime domain. Despite nonetheless affecting national security interests, a great deal of illicit traffic in weapons, narcotics, and humans falls outside the ambit of NIAC and the AUMF. Likewise, many U.S. adversaries and competitors are not covered under the AUMF, including both non-State actors (e.g., Houthi rebels in Yemen, pirates in Somalia) and State actors (e.g., China, Russia, Iran, North Korea). In these circumstances, the United States remains reliant on other legal bases for MIO.

Ultimately, regardless of whether an armed conflict is characterized as IAC or NIAC, the LOAC affords greater flexibility to conduct MIO than exists under peacetime regimes. At the same time, however, modern armed conflict at sea transects a hazy continuum, exemplified by the rise of transnational terrorist groups and Iran's proxy smuggling networks. Thus, even in cases when the LOAC might be applied as a basis for MIO, it behooves naval forces to consider cumulative international law justifications. As discussed, by accumulating

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[265] *See supra* note 215 and accompanying text.
[266] *See* COMMANDER'S HANDBOOK, *supra* note 10.
[267] *See* Heinegg, *supra* note 246, at 215.
[268] *Id.*
[269] *Id.* at 226–27.

strength in the international law context, domestic legal authority is enhanced consistent with the interactive dynamic.[270]

IV. Criminal Law Enforcement in the Special Maritime Jurisdiction

The preceding section dealt with the influence of international law in the exercise of constitutional powers abroad. This section shifts focus to the effects of international law in U.S. criminal code and the enforcement of U.S law in international waters. Although it is generally accepted that "international law is part of our law,"[271] the domestic implications of this premise are far from settled in U.S. jurisprudence. Normally, for an international law obligation to give rise to a private cause of action[272] or otherwise be enforceable in U.S. courts, it must either be self-executing[273] *or* implemented by legislation.[274]

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[270] *See supra* note 166 and accompanying text.

[271] *See* Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement"); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) ("the United States had, by taking a place among the nations of the earth, become amenable to the law of nations"); Letter from Thomas Jefferson, Secretary of State to M. Genet, French Minister (June 5, 1793), https://bit.ly/3jjs5Sh (describing the law of nations as an "integral part" of domestic law).

[272] The international law bases for MIO are not automatically enforceable as private causes of action in U.S. courts; however, statutory incorporation of international law affords claimants standing for redress in admiralty, either through judicial or administrative processes. *See* 46 U.S.C. § 30901 et seq. (2018); § 31101 et seq. Admiralty law involves liability arising out of maritime incidents such as collisions, groundings, spills and personal injury. Domestically, the exceptional nature of admiralty law is reflected in the Constitution's explicit grant of original jurisdiction to U.S. federal courts over admiralty and maritime matters. *See* U.S. CONST. art. III, § 2, cl. 3. In the judicial context, the justiciability of suits in admiralty is limited by the discretionary function exception implicit in the controlling statutes. *See, e.g.*, Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986). Akin to political question doctrine, the discretionary function exception compels courts to refrain from passing judgment on the propriety of discretionary judgments of naval personnel. Actions during MIO that are within the broad strictures of permissible policy judgement are generally protected from judicial review as discretionary functions, but torts that occur independent of policy-based decisions may subject the U.S. government to liability. Regardless, the Navy has broad statutory authority to pay admiralty claims extrajudicially via administrative processes when doing so furthers policy objectives. *See* 10 U.S.C. § 7622 (2018). The domestic implications of admiralty law are, if nothing else, a peripheral consideration in the planning and execution of MIO. For examples of admiralty suits involving MIO. *See* Uralde v. United States, 614 F. 3d 1282 (11th Cir. 2010); Tarros S.P.A. v. United States, 982 F. Supp. 2d 325 (S.D.N.Y. 2013).

[273] *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 505 n.2 (2008) ("[w]hat we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification"); Cook v. United States, 288 U.S. 102, 119 (1933) ("[f]or in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); Foster v. Neilson, 27 (2 Pet.) U.S. 253, 254 (1829) (Marshall, C.J.) (describing a treaty as "equivalent to an act of the legislature" when it "operates of itself without the aid of any legislative provision").

[274] *See* RESTATEMENT (THIRD), *supra* note 9, § 111 ("[a] non self-executing agreement will not be given the effect of law in the absence of necessary implementation . . . . In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations.

International agreements germane to MIO—the UN Charter, multi-lateral treaties, bilateral agreements—are uniformly non-self-executing.[275] Similarly, CIL bases for MIO—the law of the sea, self-defense, and the LOAC—are not automatically enforceable in U.S. courts.[276] As such, the international law governing MIO only applies domestically to the extent Congress has enacted implementing legislation.[277] Elements of international law are statutorily incorporated into U.S. criminal code, creating mechanisms for enforcement and adjudication of specified crimes. Presidential power exercised through the authority of Combatant Commanders is normally sufficient to direct MIO regardless of a nexus to domestic criminal law and the necessity to conduct MIO for national security ends will inevitably exceed instances when MIO results in a domestic criminal prosecution. Still, criminal law is significant in its ability to unlock law enforcement authorities and as a tool for deterrence.

Of course, as a prerequisite to criminal prosecution, the United States must exercise its domestic criminal jurisdiction. Three categories of "jurisdiction" are distinguished in international law: the jurisdiction to prescribe (i.e., legislate), to adjudicate (i.e., judge), and to enforce (i.e., execute).[278] This Article has already implicitly examined several international law features of jurisdiction over criminal acts in international waters. Of note, under international law, a flag State's "exclusive" jurisdiction includes criminal jurisdiction over vessels of its own flag;[279] that is, international law normally prohibits a State from prescribing, adjudicating, and enforcing its own criminal law in respect to offenses committed by foreign nationals on board vessels flagged in another State. There are, however, exceptions to this rule.[280] Notably, the law of the sea entitles all States to prescribe,

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Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action").

[275] *See, e.g.*, *Medellín*, 552 U.S. 491, 504–06 (2008) (holding that the UN Charter is non-self-executing). There is no affirmative case law concerning the non-self-executory nature of the SUA Convention or the Vienna Drug Convention, but the enactment of implementing criminal legislation implicitly suggests that the treaties and their progeny of bilateral ISBAs were not intended to be self-executing.

[276] *See* Letter from John Norton Moore to Senator Richard Lugar Regarding the Legal Effects of the Law of the Sea Convention in U.S. Courts (Oct. 29, 2007) (indicating international law is generally viewed by U.S. courts as creating State-to-State, rather than State-to individual obligations).

[277] *See, e.g.*, David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 197–216 (1999) (arguing that, although non-self-executing provisions lack a private right of action, litigants can still invoke non-self-executive provisions defensively in criminal proceedings or when another source for a cause of action is available).

[278] *See* RESTATEMENT (THIRD), *supra* note 9 § 401.

[279] *See* COMMANDER'S HANDBOOK, *supra* note 10.

[280] *But see M/V NORSTAR* (Pan. v. It.), Case No. 25, judgment of Apr. 10, 2019, https://bit.ly/3ycqTVs (suggesting that the law of the sea precludes a State from exercising prescriptive jurisdiction with regard to a vessel's conduct other than those of its nationality unless expressly provided for in UNCLOS or

adjudicate, and enforce criminal law against Stateless vessels and their embarked personnel.[281] Likewise, States may prescribe, adjudicate, and enforce the "universal"[282] crimes of piracy, illegal broadcasting, and slave trading, no matter the flag of the perpetrating vessel or the nationality of its crew.[283] Toward that end, the United States has domestically criminalized "universal" crimes in a range of statutes.[284]

The basis for extraterritorial criminal jurisdiction rests on several international law principles: the objective territoriality principle, the passive personality principle, and the protective principle.[285] The "objective territoriality" principle enables the United States to exercise jurisdiction over criminal offenses in international waters when the conduct could have a substantial effect within U.S. territory and the exercise is "not unreasonable."[286] Alternatively, the "passive personality" principle allows for domestic criminal jurisdiction over offenses committed against a United States citizen.[287] Finally, the "protective" principle

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by other international agreement); *see also* U.S. Response Paper to Japan concerning Scope of Navigational Rights Beyond Territorial Sea and Jurisdiction of Non-Flag States, submitted to the Major Maritime Powers Meeting, Sep. 25–26, 2019 (asserting in its rejection of the *M/V NORSTAR* case the U.S. delegation stated that "[c]ontrary to what the Tribunal appears to have found in the *M/V NORSTAR* case, States need not rely on some permissive rule of international law as the basis for exercising prescriptive jurisdiction beyond their territory, so long any law enforcement action taken pursuant thereto rests on a recognized international law basis, such as flag State consent if that enforcement action occurs beyond the enforcing State's territorial sea").

[281] *See* UNCLOS, *supra* note 10, art. 110; *see also* United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) ("[r]estrictions on the right to assert jurisdiction over foreign vessels on the high seas and the concomitant exceptions have no applicability in connection with stateless vessels. Vessels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas") (footnote omitted).

[282] *See* RESTATEMENT (THIRD), *supra* note 9, § 404 ("[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, unauthorized broadcasting, and perhaps certain acts of terrorism"); Kraska, *supra* note 8, at 27 ("[a]rticles 100–110 of UNCLOS reaffirm the duty and obligation of all states to act against piracy and maritime slave trafficking. Both crimes, as well as the crime of illegal broadcast from the sea, constitute crimes of universal jurisdiction, and all states may assert jurisdiction over those offenses.").

[283] *See* UNCLOS, *supra* note 10, arts. 99–110.

[284] *See, e.g.*, 18 U.S.C. §§ 1581–88 (2018) (anti-slavery legislation); §§ 1651–61 (anti-piracy legislation); 33 U.S.C. §§ 381–84; 49 U.S.C. §§ 781–89, 14 U.S.C. 89; 22 U.S.C. 2291; 46 U.S.C. app'x 1903 et seq. (counter-narcotics legislation); 47 U.S.C. § 50 (unauthorized broadcasting).

[285] *See* RESTATEMENT (THIRD), *supra* note 9, § 402 cmts. c–d, f.

[286] *Id.* This would seem to be the primary international law justification for U.S. terrorism offenses. For example, 18 U.S.C. § 2332b prescribes a range of offenses with extraterritorial reach, but maintains that the offense in question must have some effect "within the United States." *See also Marino-Garcia*, 679 at 1381 (noting "under the objective [territorial] principle, a vessel engaged in illegal activity intended to have an effect in a country is amenable to that country's jurisdiction").

[287] *See, e.g.*, 18 U.S.C. § 2332f (2018) (granting jurisdiction to federal courts for extraterritorial crimes where a victim of the crime is a national of the United States); *see also Marino-Garcia*, 679 at 1382 ("[j]urisdiction may also be obtained under the passive personality principle over persons or vessels that injure the citizens of another country").

affords the United States grounds to assert domestic criminal jurisdiction over any person whose conduct threatens national security.[288]

Regardless of the international law principle used to assert domestic criminal jurisdiction, international law generally permits the prescription, adjudication, and enforcement of domestic criminal law when "conduct outside [a State's] territory . . . has or is intended to have substantial effect within its territory" and when "certain conduct outside its territory by [foreign] nationals . . . is directed against the security of the State or against a limited class of other State interests."[289] The right to exercise domestic criminal jurisdiction in international waters is limited by a reasonableness standard, which accounts for "the link of the activity to the territory of the regulating State, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory."[290]

Scholars tend to debate the relative applicability of international law principles to particular statutory grants, but as a practical matter, such debates are purely academic. Indeed, the international law principles behind U.S. assertions of criminal jurisdiction in international waters are implicitly incorporated into U.S. statutory law and accepted as valid by U.S. courts.[291] Moreover, from a constitutional law perspective, Congress is empowered to "define and punish" not just universal crimes (e.g., "piracies"), but also "Felonies committed on the high Seas, and Offenses against the Law of Nations."[292] As such, Congress' power to establish criminal jurisdiction over high-seas crimes is inherently constitutional, and the President's power to execute statutory grants to accomplish that end is equally ingrained.

On occasions when the United State's assertion of criminal jurisdiction in international waters has been challenged on international law grounds, the "*Ker-Frisbie*" doctrine compels deference to domestic criminal law by barring acquittal even if the grounds for initial detention were illegal.[293] In cases involving alleged

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[288] *See Marino-Garcia*, 679 F.2d at 1381 ("[s]imilarly, the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions.").
[289] *See* RESTATEMENT (THIRD), *supra* note 9, § 402(l)(c)(3).
[290] *Id.* at § 403(2)(a).
[291] *See, e.g.*, *Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982); United States v. Rivard, 375 F.2d 882 (5th Cir. 1967); United States v. Layton, 519 F. Supp. 942 (N.D. Cal. 1981).
[292] *See* U.S. CONST. art. I, § 8.
[293] Frisbie v. Collins, 342 U.S. 519, 522 (1952) (holding "that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction' . . . . There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will"); Ker v. Illinois, 119 U.S. 436, 444–45 (1886) (declining to overturn defendant's conviction, where defendant

violations of international law during drug interdictions carried out by the Coast Guard, courts have consistently held that a defendant cannot "assert the illegality of his detention to defeat the court's jurisdiction over him."[294] Moreover, in the counter-narcotics sphere, failure to comply with international law is statutorily excluded as a defense.[295]

In view of the various international law theories of extraterritorial jurisdiction and its constitutional power to define and punish offenses on the high seas, Congress enacted 18 U.S.C. § 7, which creates the "special maritime and territorial jurisdiction" of the United States (hereafter the "Special Maritime Jurisdiction").[296] The Special Maritime Jurisdiction explicitly includes the "high seas" and "any other waters . . . out of the jurisdiction of any particular State."[297] In effect it prescribes the full reach of domestic criminal jurisdiction to extraterritorial waters.[298]

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was illegally and forcibly abducted in Peru in order to bring defendant before an Illinois court to stand trial for larceny and embezzlement charges). For a more detailed discussion on the *Ker-Frisbie* doctrine see Doug Daniels, *How to Allocate the Responsibilities Between the Navy and Coast Guard in Maritime Counterterrorism Operations*, 61 U. MIA. L. REV 487 (2007).

[294] United States v. Best, 304 F.3d 308 (3d Cir. 2002) (applying the *Ker-Frisbie* doctrine to overturn the trial court's dismissal of migrant smuggling charges against defendant, where the trial court erroneously held that the defendant's apprehension by the Coast Guard in the U.S. contiguous zone near St. Croix violated international law and therefore defeated the court's jurisdiction), *rev'g* United States v. Best, 172 F. Supp. 2d 656 (D. V.I. 2001); *see also* United States v. Postal, 589 F.2d 862, 873 (5th Cir. 1979) (citing the *Ker-Frisbie* doctrine). For an alternative viewpoint and a critique of the *Best* decision and the *Ker-Frisbie* doctrine generally see Brandy Sheely, *Recent Development, United States v. Best: International Violation Schmiolation—The Ker-Frisbie Doctrine Trumps All*, 11 TUL. J. INT'L & COMP. L. 429 (2003).

[295] *See* 46 U.S.C. § 70505 (2018); *see also* United States v Bellaizac-Hurtado, 779 F. Supp. 2d 1344 (S.D. Fla. 2011) (holding that 46 U.S.C. § 70505 did not authorize the United States to engage in wholesale violations of international law in criminal prosecutions; rather, that provision simply limited actors that had standing to challenge validity of prosecution under the Maritime Drug Law Enforcement Act).

[296] 18 U.S.C. § 7 (2018) ("[t]he term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.").

[297] *Id.*

[298] *See, e.g.*, United States v Holmes (1820) 18 U.S. 412, (5 Wheat) 412 (1820) ("[t]o exclude jurisdiction of courts of United States in cases of crimes committed upon high seas, vessel in which offender was or to which he belonged had to be at time, in fact, as well as in right, property of subject of foreign state; but if offense was committed in vessel, not at time belonging to subjects of foreign state, but in possession of persons acknowledging obedience to no government or flag, and acting in defiance of all law, courts of United States had jurisdiction"); United States v. Rojas, 53 F.3d 1212, 1214–15 (11th Cir. 1995) (upholding the validity of a grant from the Government of Panama to the United States to board, search, and seize one of its vessels found to be smuggling cocaine on the high seas); United States v. Davis, 905 F.2d 245, 249–50 (9th Cir. 1990) (validating the exercise of United

Nevertheless, not every crime defined in U.S. Code has extraterritorial applicability.[299] Indeed, while Congress prescribed a wide forum to exercise domestic criminal jurisdiction, it prescribed fewer tools for adjudication and enforcement. There are, however, a handful of statutes that expressly criminalize activities in international waters, enabling the United States to prosecute foreign national offenders after arrest on stateless or foreign-flagged vessels. Besides the aforementioned statutory enactments of universal crimes, 18 U.S.C. § 2332 criminalizes terrorist[300] acts transcending national boundaries, including those committed in the Special Maritime Jurisdiction.[301] Punishable activities include, *inter alia*: killing, hostage-taking, assault, illegal transport of WMD,[302] smuggling of terrorist operatives, use of a ship as a weapon, and attempts or conspiracies aimed at all of the above. Of note, there is no requirement that the defendant be associated with a terrorist group identified under an AUMF. Any individual may be convicted provided the elements of an enumerated offense are satisfied. The statute does, however, require that the criminal act be directed against U.S. nationals or property.[303]

In the counter-narcotics sphere, the Maritime Drug Law Enforcement Act (MDLEA) is a comprehensive statute outlawing the manufacture, distribution, and possession of narcotics as well as concealing or destroying merchandise or cargo on a smuggling vessel.[304] It applies against any vessel subject to the jurisdiction

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States jurisdiction over a United Kingdom-flagged vessel pursuant to authorization by the flag State to subject the vessel to American customs laws); United States v. Padilla-Martinez, 762 F.2d 942, 950 (11th Cir. 1985) ("[m]erely because a vessel is of foreign registry or outside the territorial waters of the United States does not mean that it is beyond the jurisdiction of the United States.").

[299] *See, e.g.*, United States v. Plumer, 27 F. Cas. 561, 573 (CC Mass. 1859) (holding that "United States courts do not possess jurisdiction over crime of murder when committed onboard of foreign vessel, except to very limited extent, and never where perpetrator of crime and deceased were both foreigners").

[300] *See* 18 U.S.C. § 2331. The term "international terrorism" means activities that: (a) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (b) appear to be intended--(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (c) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum."). *See also* 8 U.S.C. §§ 2339A–2339B (prohibiting the provision of material support to an entity that has been designated as a terrorist organization).

[301] 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries) prohibits creating the substantial risk of serious bodily injury to any person within the United States, where the offense in question transcends national boundaries and occurs within the "special maritime and territorial jurisdiction of the United States."

[302] *See also* 18 U.S.C. § 831 (prohibiting transactions involving nuclear materials).

[303] *Id.*

[304] *See* Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. § 705.

of the United States, including foreign and stateless vessels interdicted on the high seas as well as vessels "in the territorial waters of another nation where that nation consents to the enforcement of U.S. law by the United States."[305] The MDLEA is complemented by the Drug Trafficking Vessel Interdiction Act, which bans the use of stateless submersibles and semi-submersibles in international waters with the intent to evade detection.[306]

Finally, 18 U.S.C. § 2280 and 18 U.S.C. § 2280a serve as the SUA Convention's implementing legislation, creating domestic crimes from the broad range of illicit acts listed in the treaty.[307] Both statues cover acts that threaten safety of navigation including, *inter alia*: violence on board a ship, ship seizure by force or threat of force, placement of a "device or substance"[308] on a ship when it is likely to cause damage to that ship or its cargo, damage to maritime navigation facilities, unlawful transport of "any explosive;"[309] and knowing communication of false information to the detriment of safe navigation.[310] Unlike 18 U.S.C. § 2332, 18 U.S.C., § 2280, and 18 U.S.C. § 2280a do not require a direct effect on U.S. nationals or property, so long as the offenders are subject to the Special Maritime Jurisdiction.[311]

As the Executive Branch's principal agent for domestic law enforcement within the Special Maritime Jurisdiction, the Coast Guard is empowered by Congress to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."[312] In practice, however, the Coast Guard does not have a monopoly on domestic law enforcement at sea. The Navy and Coast Guard often conduct MIO

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[305] *Id.*

[306] Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110-407, 122 Stat. 4296.

[307] *See* 18 U.S.C.§ 2280 (violence against maritime navigation); 18 U.S.C. § 2280a (maritime transport involving weapons of mass destruction).

[308] *See* 18 U.S.C. § 921. It is not clear from legislative history or case law what precisely is meant by "a device or substance" or "any explosive," but 18 U.S.C. § 921 (firearms definitions) defines "destructive device" broadly to include "any explosive" or "any type of weapon . . . which will expel a projectile and which has any barrel with a bore of more than one-half inch in diameter."

[309] Subject to general knowledge by the trafficker of its intended use.

[310] *Id.*; *see also* United States v. Lei Shi, 525 F.3d 709 (2008) (holding that because 18 U.S.C. § 2280 offenses involved interference with property on open sea through use of force, they were within Congress's power to define and to punish crimes of piracy; additionally, Congress derived authority to promulgate 18 U.S.C. § 2280 by virtue of Necessary and Proper Clause, since § 2280 implements the SUA Convention, a lawfully ratified treaty).

[311] 18 U.S.C. § 2332f.

[312] 14 U.S.C. § 522 (2018). The phrase "waters over which the United States has jurisdiction" does not limit Coast Guard authority to those areas over which the United States has exclusive Sovereignty. It is a term synonymous with the Special Maritime Jurisdiction. *See, e.g.*, United States v. Padilla-Martinez, 762 F.2d 942, 950 (11th Cir. 1985).

jointly, pursuant to distinct, yet complementary domestic legal authorities.[313] During such operations, the Coast Guard may execute its law enforcement authority under 14 U.S.C. § 522 while the Navy operates under military directives issued pursuant to the statutory authority of Combatant Commanders.[314] Coast Guard and Navy authorities are not mutually exclusive.[315] Thus, Coast Guard elements assigned to the Navy do not sacrifice their organizational and individual law enforcement authorities.[316] Likewise, when a Navy unit shifts tactical control over a MIO to a Coast Guard law enforcement detachment (LEDET), it does not become a *de facto* appendage to the Coast Guard.[317] Rather, Navy forces retain the ability to exercise inherent military authorities as circumstances may require. In this respect, the LEDET model is a whole-of-government approach to MIO through which complementary legal authorities are flexed to achieve effects in furtherance of national interests.[318]

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[313] DEP'T OF DEF., JOINT PUB. 1-02: DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2018). Coast Guard authority deals primarily with "Homeland Security" while Navy authority is centered on "Homeland Defense." Often, however, these terms and their related authorities will overlap. "Homeland Security" is "[a] concerted national effort to prevent terrorist attacks within the United States; reduce America's vulnerability to terrorism, major disasters, and other emergencies; and minimize the damage and recover from attacks, major disasters, and other emergencies that occur. "Homeland Defense" is "[t]he protection of United States sovereignty, territory, domestic population, and critical infrastructure against external threats and aggression or other threats as directed by the President.

[314] *See* 14 U.S.C. § 1; 10 U.S.C. § 101; 6 U.S.C. § 468; 10 U.S.C. § 164.

[315] The Coast Guard is at all times a military service and branch of the armed forces. It is a distinct entity within the Department of Homeland Security (DHS), except when Congress directs in a declaration of war or when the President directs that the Coast Guard shall operate as a service in the Navy. *See* 14 U.S.C. § 1; 10 U.S.C. § 101; 6 U.S.C. § 468. The Coast Guard may assist DoD in the performance of any activity for which the Coast Guard is especially qualified, and with the consent of the Secretary of Defense, the Coast Guard may avail itself of such DoD officers and employees, advice, information, and facilities as may be helpful in the performance of its duties. *See* 14 U.S.C. § 141. DoD may support time-critical, short-duration Maritime Homeland Security Operations, defined as time-critical requests by the Coast Guard for DoD support in countering immediate maritime security threats lasting less than 48 hours. *See DoD-DHS Memorandum of Agreement for Department of Defense Support to the United States Coast Guard for Maritime Homeland Security* (2006). The Navy's inherent military authority supersedes Coast Guard authority in law enforcement matters if pursuing a law enforcement disposition would adversely affect military preparedness. *See* 10 U.S.C. § 376. The Coast Guard may support the National Military Strategy and other national-level defense and security strategies. *See DoD-DHS Memorandum of Agreement on the Use of U.S. Coast Guard Capabilities and Resources in Support of the National Military Strategy* (2008).

[316] DoD-DHS Memorandum of Agreement on the Use of U.S. Coast Guard Capabilities and Resources in Support of the National Military Strategy (2008).

[317] 10 U.S.C. § 376 ("Support (including the provision of any equipment or facility or the assignment or detail of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States."). *See also* 10 U.S.C. § 379.

[318] The Navy-LEDET team has been highly effective and has historically been responsible for more than half of the total annual amount of worldwide drug seizures. *See* BUREAU OF TRANSP. STAT., *U.S. Coast Guard Drug Statistics* (2011), https://bit.ly/3sEloh5.

Although the Navy and Coast Guard cooperate extensively in MIO, the Navy lacks stand-alone statutory authority to enforce U.S. domestic law. The degree to which the Navy may participate in domestic law enforcement has thus been a matter of long-standing debate. The Posse Comitatus Act (PCA) is often seen as prohibiting military involvement in law enforcement, but by its terms, the PCA only applies to the Army and Air Force.[319] To be sure, courts have consistently upheld the PCA's non-applicability to the Navy.[320] Still, pursuant to 10 U.S.C. § 275[321] and in recognition of "the historic tradition of limiting direct military involvement in civilian law enforcement activities," Navy policy restricts "*direct participation* . . . in a search, seizure, arrest, or similar activity [emphasis added]."[322]

Congress has, however, enacted a variety of exceptions to the limitation on direct participation. One broad exception permits military forces to "suppress . . . any insurrection, domestic violence, unlawful combination, or conspiracy" that opposes or obstructs U.S. law.[323] Additionally, DoD policy allows the Navy to directly participate in law enforcement activities upon prior approval by the Secretary of Defense, where the criminal activity poses a serious threat to national interests and civilian agencies cannot adequately respond.[324] Direct participation is also authorized in investigations and other actions related to

[319] 18 U.S.C. § 1385 (The PCA states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.").

[320] *See, e.g.*, United States v. Walden, 490 F.2d 372, 373–74 (4th Cir. 1974) (noting that the PCA does not control the Navy or Marines, although the Navy adopted self-imposed restrictive regulations); United States v. Yunis, 924 F.2d 1086, 1093–94 (D.C. Cir. 1991) (noting that the PCA "places no restrictions on naval participation in law enforcement operations" and that inclusion of the Navy in the PCA was considered and rejected by Congress); United States v. Roberts, 779 F.2d 565, 567 (9th Cir. 1986) (declining to "defy" the PCA's "plain language" by extending it to the Navy); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1477–78 (11th Cir. 1992) (holding that the PCA is not applicable to naval operations, but if it were, passive participation of Navy in arrest of crew for drug offense did not implicate the PCA, where Coast Guard did actual boarding, arrest, interrogation and ensuing investigation). *But see* United States v. Chae Wan Chon, 210 F.3d 990, 993–94 (9th Cir. 2000) (refusing to "construe this omission [of the Navy in the PCA] as congressional approval for Navy involvement in enforcing civilian laws" including civil enforcement activities by civilian agents of the Naval Criminal Investigative Service).

[321] 10 U.S.C. § 275 ("The Secretary of Defense shall prescribe such regulations as necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.").

[322] DEPARTMENT OF DEFENSE DIRECTIVE 5525.5, *Cooperation with Civilian Law Enforcement Officials*, art. 4 (Dec. 20, 1989).

[323] 10 U.S.C. § 333.

[324] DEPARTMENT OF DEFENSE DIRECTIVE 5525.5, *Cooperation with Civilian Law Enforcement Officials*, art. E4.3.

"enforcement of the Uniform Code of Military Justice . . . and the Commander's inherent authority to maintain law and order."[325] Finally, direct participation is allowed where "the primary purpose" of the activity is "furthering a military or foreign affairs function of the United States, regardless of incidental benefit to civilian authorities."[326]

Limitations on direct participation are purely a construction of domestic law, primarily endemic to the Executive Branch. International law recognizes no distinction between the Navy and Coast Guard.[327] Likewise, the international law of MIO is unaffected by underlying domestic law and policy. On the domestic front, direct participation has had little effect on criminal prosecution. Indeed, Navy involvement in MIO has been raised in criminal trials,[328] and on various occasions Navy personnel have testified as witnesses,[329] but courts have yet to exclude evidence, let alone bar prosecution based on direct participation.[330] Nevertheless, it is Coast Guard personnel who are experts in law enforcement, statutorily empowered[331] and trained to deal with the complexities of law

[325] *Id.*; SECRETARY OF THE NAVY INSTRUCTION 5820.7C, *Cooperation with Civilian Law Enforcement Officials* (Jan. 26, 2006), at para. 8.
[326] *Id.*
[327] As military services, both the Coast Guard and the Navy, their vessels, and personnel may conduct MIO under international law.
[328] *See, e.g.*, United States v. Del Prado-Montero, 740 F.2d 113, 114–16 (1st Cir. 1984) (affirming the authority of the Navy to assist the Coast Guard during a counter-narcotics interdiction); United States v. Rasheed, 802 F. Supp. 312, 324–25 (D. Haw. 1992) (holding that actions of Navy personnel were legitimate where they provided "logistical support and backup security" to the Coast Guard boarding team in the case of a joint Coast Guard-Navy boarding of a drug smuggling vessel).
[329] Somali nationals Ahmed Muse Salad, Abukar Osman Beyle, and Shani Nurani Shiekh Abrar were found guilty of piracy, murder within the Special Maritime Jurisdiction, violence against maritime navigation, conspiracy to commit violence against maritime navigation resulting in death, kidnapping resulting in death, conspiracy to commit kidnapping, hostage taking resulting in death, conspiracy to commit hostage taking resulting in death and multiple firearms offenses, were sentenced this week. All were sentenced to 21 life sentences, 19 consecutive life sentences and two concurrent life sentences, and 30 years consecutive, for their role in the February 22, 2011, murder of four Americans aboard the sailing vessel, *Quest*. Navy SEALs who participated in the rescue attempt testified at trial. The identities of the Navy witnesses and the content of their testimony was protected from public disclosure pursuant to the Classified Information Procedures Act, Title 18, U.S.C. App III. *See* United States v. Beyle, 782 F.3d 159 (4th Cir. 2015); *see also* U.S. ATT'Y'S OFF. OF THE E. DIST. OF VA, *Somali Pirates Sentenced to Multiple Life Sentences in Murder of Four Americans Aboard SV QUEST* (2013), https://bit.ly/3ALprLi.
[330] Some courts have hinted that the exclusionary rule may become necessary to put an end to "widespread and repeated violations" of the prohibition on military enforcement of civilian laws. *See, e.g.*, United States v. Walden, 490 F.2d 372, 373–74 (4th Cir. 1974) (declining to impose the exclusionary rule "at this time" on the grounds that the court was unaware of any "widespread or repeated violations"); United States v. Roberts, 779 F.2d 565, 567 (9th Cir. 1986) (adopting the *Walden* approach and withholding the application of any exclusionary rule until such time as military actions constitute "widespread and repeated" violations, thereby creating a need to deter military involvement in civilian law enforcement).
[331] *See* 14 U.S.C. § 522 (delegating law enforcement authority to Coast Guard commissioned, warrant, and petty officers).

enforcement at sea. These complexities include not just the technical aspects of law enforcement, but a host of unsettled law regarding the scope of the Fourth Amendment's[332] applicability to foreign nationals and property in international waters.[333] To be sure, the jurisdictional reach of U.S. criminal law is wide and the Coast Guard's plenary power to conduct documentary and safety inspections is unquestioned,[334] but searches and seizures are not necessarily unbound by the Constitution, even if they are otherwise valid under international law.[335] The extent to which a master may consent to searches of crew members (including biometrics collection)[336] is a particularly thorny issue.[337] Different courts have adopted different standards on this and other Fourth Amendment issues stemming from MIO.[338] Given the evolutionary state of the law in this regard, it follows that to the extent possible, the Coast Guard's law enforcement experts should remain at the forefront in confronting Fourth Amendment challenges as they arise in MIO. Notwithstanding the limitations and exceptions to direct participation in law enforcement, the Navy is empowered by statute to provide *indirect* support to law enforcement, including equipment (i.e., ships) and personnel.[339] Additionally, the

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[332] *See* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[333] For a more comprehensive treatment of Fourth Amendment issues in MIO, see generally Sandra L. Hodkinson et al, *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AM. U. INT'L L. REV. 583 (2007); Thomas Brown, *For the Round and Top of Sovereignty: Boarding Vessels at Sea on Terror-Related Intelligence Tips*, 59 NAVAL L. REV. 63 (2010).

[334] *See, e.g.*, United States v. Warren, 578 F.2d 1058 (5th Cir. 1978); United States v. Liles, 670 F.2d 989 (11th Cir. 1982); United States v. Arra, 630 F.2d 836 (1st Cir. 1980); United States v. Odneal, 565 F.2d 598 (9th Cir. 1977) (holding that the Coast Guard's authority to conduct documentary and safety inspections exists over U.S.-flagged vessels worldwide, and over foreign-flagged vessels in the Special Maritime Jurisdiction).

[335] *See, e.g.*, United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) (holding that boarding consent given by flag State was not an effective third-party consent for Fourth amendment purposes).

[336] Biometrics is the automated capture of a person's unique biological data that distinguishes him or her from another individual. *See* Lynn Shotwell, *Return to the Virtual Border: Update from the Department of State and the Department of Homeland Security*, 1566 P.L.I./Corp. 91, 93 (2006).

[337] *See* Sandra L. Hodkinson et al, *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AM. U. INT'L L. REV. 583 (2007), ("assuming a vessel has been lawfully boarded, the collection of biometric data [based on master's consent] that does not include bodily invasions—for example, taking note of eye and hair color, and facial scans—would likely pass muster under the U.S. Constitution.").

[338] *See, e.g.*, United States v. Davis, 905 F.2d 245, 251 (9th Cir. 1990) (holding that the Fourth Amendment does not apply to searches and seizures of nonresident aliens on the high seas); United States v. Williams, 617 F.2d 1063, 1088 (5th Cir. 1980) (requiring only a demonstration of "reasonable suspicion" of criminal conduct to execute search and seizure on high seas); *but see* United States v. Streifel, 655 F.2d 414 (2d Cir. 1981) (applying Fourth Amendment "Terry stop" analysis to foreign ship seized by the Coast Guard); *see also* Mincy v. Arizona, 437 U.S. 385, 392–93 (1978) ("The Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.").

[339] 10 U.S.C. § 275.

Navy is statutorily authorized to support law enforcement via detection and monitoring of criminal threats, transportation of law enforcement personnel, and the "interception of vessels."[340] Indeed, although direct participation is limited, the Navy's authority to support law enforcement is substantial and explicit in the U.S. Code.

Ultimately, the lines between military and law enforcement functions are not always bright and the unpredictable nature of maritime threats may mean that MIO conceived for a law enforcement end quickly evolves into a matter best suited to a military response. Likewise, a routine Navy-led approach and assist visit initiated to accomplish a military objective might uncover unforeseen violations of U.S. criminal law. Sometimes both law enforcement and military equities are implicated, such as in cases of maritime terrorism.[341]

Fortunately, MIO within the Special Maritime Jurisdiction does not require an advance determination of law enforcement or military primacy, nor does it depend on suspicion of a particular crime. Rather, the Special Maritime Jurisdiction's broad statutory mandate enables the Executive Branch to flexibly address such threats with the appropriate tools of national power while keeping the door open for criminal prosecution. Given the wide jurisdiction conferred in the Special Maritime Jurisdiction, the unpredictable nature of maritime threats, and the often-blurry line between military and law enforcement functions, it behooves the Navy and Coast Guard to interoperate across the spectrum of MIO to the maximum extent feasible.[342]

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[340] 10 U.S.C. § 274.

[341] *See generally* 18 U.S.C. Ch. 113b (terrorism).

[342] This section did not address the law of civil forfeiture at sea, but recent events highlight the need for additional scholarship on this subject. Of note, on July 2, 2020, a U.S. District Court warrant authorized seizure of gasoline aboard four Greek-owned/Liberian-flagged tankers in international waters. A Department of Justice (DoJ) complaint characterized the gasoline as a "source of influence" for the Iranian Revolutionary Guards Corps, a designated foreign terrorist organization under 8 U.S.C § 1189 whose assets are subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(g)(i). In order to execute the warrant, the U.S. orchestrated ship-to-ship (STS) transfers of the illicit gasoline to two tankers (also Greek-owned/Liberian-flagged) contracted to transport it to the U.S. for disposition by the District Court. Although DoJ's complaint cited 14 U.S.C. § 522 (Coast Guard Law Enforcement) as a basis for the District Court's jurisdiction in international waters, the nature of the Coast Guard's involvement—if any—has not been publicized. Regardless, the U.S. seized the gasoline with the apparent consent of the Greek ship owners. In this respect, the STS transfers were a novel application of state power, aimed at achieving national security and law enforcement objectives by leveraging contracted foreign-flagged vessels and the cooperation of private ship owners, as opposed to more traditional MIO carried out by warships. This matter remains in litigation as this Article goes to publication. The DoJ's complaint is available at https://bit.ly/3gHLnjh. *See also* Press Release, Dep't of Justice, Largest U.S. Seizure of Iranian Fuel from Four Tankers (Aug. 14, 2020), https://bit.ly/385h6Go.

V. Conclusion

This article examined foreign relations law in MIO by surveying relevant features of constitutional law and criminal law. As a function of the "interactive dynamic," constitutional powers are influenced by international law. When the international law justification for MIO is strong, so too is presidential power to direct MIO. Although presidential power alone is sufficient authority to conduct MIO in many circumstances, congressional authorizations enhance presidential power under *Youngstown*[343] and offset vulnerabilities when they exist in the international law context.

UNSCR-mandated MIO is a manifestation of the UN Charter, supported domestically by the UN Participation Act. The preeminence of the UN Charter coupled with the UN Participation Act means that naval forces execute UNSCR-mandated MIO at the apex of presidential power. Like UNSCRs, the Vienna Drug Convention and the SUA Convention are a constitutional equivalent to federal law on the international plane, reinforced by domestic implementing legislation. Woven into the fabric of U.S. treaty law is a voluminous portfolio of bilateral ship boarding agreements and a political commitment to the PSI's SIP. Together, treaties, bilateral ship boarding agreements, the PSI, and associated implementing legislation underlie broad presidential power to direct naval forces in MIO execution.

The law of the sea is well-settled within the "constitution" of the world's oceans.[344] It is a ubiquitous foundation for MIO in international waters that lacks geographic and temporal limitations inherent in other international law regimes. It can be applied cumulatively with other MIO justifications to add strength in the international law context while augmenting presidential power. Naval forces execute the law of the sea on behalf of the Executive Branch to advocate for standards that align with national interests. Accordingly, naval forces operate on solid constitutional footing when executing MIO based on a customary law of the sea principle, especially when a nexus to a national policy objective is clearly established. Moreover, the law of the sea is implicitly incorporated into the congressionally authorized Special Maritime Jurisdiction, providing a measure of legislative weight to MIO grounded in the law of the sea.

U.S policy explicitly recognizes the inherent right of self-defense as a basis for MIO, and nothing in any other body of law impairs that right. MIO in self-defense is carried out in accordance with the SROE and mission-specific authorizations. Under both international and domestic law, defense of U.S.

[343] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[344] *See* Kraska, *supra* note 8, at 10.

nationals is considered a core national interest justifying MIO. MIO in collective self-defense is also supportable under international and domestic law, but may be subject to political scrutiny if force is to be used against actors not covered under an AUMF or if the persons to be defended are part of a non-State partner group. The LOAC provides greater flexibility to conduct MIO than exists under peacetime regimes. In IAC, MIO is authorized pursuant to the laws of targeting and the belligerent right of visit and search. Not all IACs are congressionally authorized, but for those that are, the extent of presidential power to direct MIO may depend on the content of a war declaration or AUMF. Congressional authorizations do not, however, determine the *lex specialis* in international law. IAC rules may be applied absent congressional authorization if otherwise within the purview of presidential power. IACs occur in degrees of magnitude, and recent history suggests that the edge between peace and war is thinly veiled, especially in the maritime domain. Indeed, the rise of Iran's proxy smuggling networks portends a complex battlespace in which State actors toe fine lines in the peace-war continuum. Distinguishing between IAC and peacetime legal constructs is therefore both a compulsory and complicated step in planning and execution of MIO.

As IAC considerations predominate national defense strategy, the United States remains engaged in a transnational NIAC with al Qaeda and associated forces. The law of naval warfare in NIAC is distinctive from IAC and peacetime regimes in several key ways. Notably, in NIAC, interdicted enemy combatants and their property may be subject to domestic criminal jurisdiction; use of non-warships to conduct MIO is allowable, even when hostilities are anticipated; and MIO within territorial waters may be authorized if the coastal State is unwilling or unable to address the threat. EMIO is a domestic authority based in NIAC and supported by the 2001 AUMF, which allows for visit and search of vessels moving persons or materiel belonging to al Qaeda and associated forces. State practice suggests that the right of visit and search can be applied in NIAC-based authorities such as EMIO when vital security interests are at stake; there are reasonable grounds for believing that the foreign vessels are engaged in activities jeopardizing those security interests; and the MIO is undertaken in close proximity to a conflict area.

Under domestic criminal law, the Special Maritime Jurisdiction establishes U.S. criminal jurisdiction on the high seas over lawfully interdicted foreign flagged vessels and stateless vessels, as well as foreign persons and property found on board such vessels. MIO within the Special Maritime Jurisdiction does not require an advance determination of law enforcement or military primacy, nor does it depend on suspicion of a particular crime. Rather, the Special Maritime Jurisdiction's broad statutory mandate allows for prosecution

of crimes not envisioned at the outset of a MIO, while also accounting for unconventional maritime threats at the crossroads of law enforcement and military authorities.

Despite the long reach of the Special Maritime Jurisdiction, not every crime defined in U.S. Code is transferable to international waters. But there are several criminal statutes with express applicability. For example, 46 U.S.C. Chapter 705 (maritime drug law enforcement) and 18 U.S.C. § 2332 (terrorism) frequently underpin domestic prosecution of at-sea crimes. The SUA Convention's implementing legislation—including 18 U.S.C. § 2280 (violence against maritime navigation) and 18 U.S.C. § 2280a (maritime transport involving weapons of mass destruction)—is the most sweeping of U.S. criminal statutes with applicability in international waters. It criminalizes, *inter alia*, the unlawful transport of weapons with barrels of more than half-inch in diameter; the unlawful transport of "any explosive;" and knowing communication of false information to the detriment of safe navigation.

The Coast Guard is the executive agency statutorily empowered to enforce criminal law in the Special Maritime Jurisdiction. In practice, the Navy and Coast Guard often conduct MIO jointly, pursuant to distinct yet complementary domestic legal authorities. During such operations, the Coast Guard executes its law enforcement authority under 14 U.S.C. § 522 while the Navy operates pursuant to military directives. Coast Guard and Navy authorities are not mutually exclusive. Thus, Coast Guard elements embedded with the Navy do not sacrifice their distinct authorities. Likewise, Navy forces assigned to the Coast Guard retain the ability to exercise military authorities as circumstances may require.

Navy policy restricts "direct participation" in law enforcement, but the Navy is empowered by statute to indirectly support law enforcement through, *inter alia*, provision of ships and personnel; detection and monitoring of criminal threats; transportation of law enforcement personnel; and the "interception of vessels." Limitations on direct participation exist only under domestic law and are largely endemic to the Executive Branch. To be sure, U.S. courts have yet to exclude evidence or bar prosecution based on direct participation. Nevertheless, there are both legal and practical reasons for Coast Guard primacy in law enforcement matters. Coast Guard personnel are statutorily designated law enforcement officials, better trained and equipped to deal with the technical and constitutional complexities of enforcing U.S. law in international waters.

The international law of MIO is familiar to practitioners, but international law is only part of the legal equation. Indeed, MIO is conducted in accordance

with international law *and* domestic law. Foreign relations law in MIO is the domestic law manifestation of the interactive relationship that exists between international and domestic authorities. It is an overlooked, yet critical aspect of MIO, essential to determining the scope of authority and risk in MIO execution. By examining MIO through the lens of foreign relations law, this article sought to unravel the features of constitutional law and criminal law that inform decisions by policy makers and military commanders. Ultimately, all MIO must be grounded in constitutional law, but not every MIO will result in a criminal law finish. Likewise, the extent of maritime threats to national security far outstrips the enforceability of domestic criminal law in international waters. As such, constitutional law necessarily empowers naval forces to conduct MIO for national security ends, irrespective of a nexus to criminal law. All too often, MIO opportunities are cast at the vanishing point between international law and domestic military and law enforcement authorities. A foreign relations law approach to MIO helps ensure that MIO opportunities are not surrendered to legal obstacles, but instead acted upon to the full extent of legal authority and national power.

THE DANGER OF A PERFECT STRIKE: THE UNINTENDED CONSEQUENCES OF RESTRICTIVE TARGETING REGIMES

Lieutenant Commander Sara Plesser Neugroschel, JAGC, USN*

This paper examines the inherent dangers in a new normative framework proscribing civilian casualties. Driven by political fear of alienating domestic audiences, damaging foreign relations, and media rebuke, States have instituted restrictive targeting regimes. These regimes, while noble, have oft forgotten unintended consequences. The global community aspires to a utopian world of zero civilian casualties. Unfortunately, this is both a dangerous and unrealistic expectation. While targeting restrictions are morally and politically enticing, there are four primary unintended consequences: (1) increased brutality against civilians; (2) amplified civilian endangerment; (3) unrealistic expectations of a perfect war; and (4) the development of a new norm of proportionality under customary international law. States must be cognizant of the inherent dangers of positing a policy doctrine of a perfect strike as a perfect strike, may ultimately be imperfect to a State's ability to protect civilians and defeat an adversary. States comply with international humanitarian law even when their adversaries do not. However, war remains imperfect and civilian casualties are inevitable. States simply cannot restrict targeting to the extent that it further endangers civilian populations around the globe; it is hypocritical at best and devastating at worst.

I. INTRODUCTION

In Libya, seizing on the power vacuum created by the dissolution of the Moaamar Qadaffi regime, the Islamic State of Iraq and the Levant (ISIL or "Islamic State") swiftly gained territorial control. By the summer of 2015, ISIL held a 200-kilometer swath of land stretching from Sabratha in the west to Benghazi in the east.[1] This was their largest stronghold outside of Iraq and Syria and their base for further expansion on the African continent. By taking over all government facilities and functionality, ISIL became the de facto government in

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[1] *See* Issandr El Amrani, *How Much of Libya Does the Islamic State Control?*, FOREIGN POL'Y (Feb. 18, 2016), https://bit.ly/2SPHb82; *Libya Conflict: IS 'Ejected' From Stronghold of Sirte*, BBC NEWS (Dec. 6, 2016), https://bbc.in/2TKRt9K; *"We Feel We Are Cursed" Life Under ISIS in Sirte, Libya*, HUM. RTS. WATCH 7–8 (2016) [hereinafter *We Are Cursed*], https://bit.ly/3A7iTXb.

the area and established mutilations, beatings, and extra-judicial killings as the norm.[2] The Islamic State forcefully recruited Libyans, committed sexual violence against women and children, and brutally executed hundreds of civilians.[3] Libyans starved and faced untold health consequences due to food shortages and limited access to medical supplies. Thousands of Libyans were trapped in ISIL-controlled territory. It was described as "[h]ell on earth."[4]

After nearly a year under ISIL control, Sirte—a city in Libya—entered the international spotlight when Islamic State militants publicly executed 21 men on a beach for refusing to join their ranks.[5] When the newly formed Libyan Government of National Accord (GNA) requested United States military assistance to liberate Sirte from ISIL control, Operation Odyssey Lightning was born.[6] Beginning on August 1, 2016, while GNA-aligned forces conducted block-by-block clearance of the city, the United States assisted with precision airstrikes.[7] In all, the United States carried out over 495 airstrikes.[8] The majority of the strikes were at the request of GNA-aligned ground forces and were defensive in nature—under the use of force principle of collective self-defense—not offensive.[9] Because of the difficulties posed by urbanized asymmetric warfare and ISIL's pervasive use of human shields, an operation expected to last weeks instead took months. Approximately 700 Libyan pro-government fighters, 2000 ISIL members, and anywhere from 11 to 75 civilians died in Sirte between August and December 2016.[10]

Sirte is just one example of the atrocities perpetrated by insurgents against civilian populations.[11] Since their appearance in 2014, ISIL alone is believed to

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[2] Nico Hines, *Hell on Earth: Life Under ISIS in Libya*, DAILY BEAST (May 18, 2016) [hereinafter *Hell on Earth*], https://bit.ly/2THRmvD; Merrit Kennedy, *New Report Details The Horrors of Life Under ISIS in Sirte, Libya*, NPR (May 18, 2016) [hereinafter *Life Under ISIS*], https://n.pr/2THRF9L; *We Are Cursed*, *supra* note 1, at 34.

[3] Francesca Mannocchi, *Libya's Sirte In Rubble After ISIL Battle*, AL JAZEERA (Dec. 6, 2016), https://bit.ly/3cUHOnM.

[4] *Hell on Earth*, *supra* note 2. *See also We Are Cursed*, *supra* note 1, at 2; *Life Under ISIS*, *supra* note 2.

[5] Tom Westcott, *In Libya, a City Once Run by Islamic State Struggles to Start Again*, NEW HUMANITARIAN (Aug. 21, 2018), https://bit.ly/3q9Vn8l.

[6] Tony Bertuca, *Libya Effort Named 'Operation Odyssey Lightning,'* INSIDE DEF. (Aug. 2, 2016), https://bit.ly/3gGIkbp.

[7] Christian Clausen, *Providing Freedom From Terror: RPAs Help Reclaim Sirte*, AIR COMBAT COMMAND (Aug. 1, 2017), https://bit.ly/3iUss6E.

[8] *Id.*

[9] *Id.*

[10] *See* Missy Ryan, *Air War in Post-Revolution Libya Has Left at Least 230 Civilians Dead, Report Finds*, WASH. POST (Jun. 19, 2018), https://wapo.st/2SbXtb8 ("U.S. Africa Command has said its operations have caused no confirmed civilian casualties in Libya during that period, but Airwars and New America assessed they probably resulted in 11 to 75 noncombatant deaths.").

[11] While the terms "insurgent," "terrorist," and "rebel" usually designate different political objectives, ideology, or tactics, in general all three connote non-State actors that seek to overthrow, weaken, or

have inspired or directed over 175 attacks in more than two dozen countries, killing in excess of 2300 innocent civilians.[12] And while the Islamic State's brutality knows no bounds, other insurgents are similarly destructive to the civilian populace, including Boko Haram, al-Shabaab, the Taliban, Liberation Tigers of Tamil Eelam (LTTE), and al Qaeda in the Arabian Peninsula (AQAP), among others.[13]

Although large parts of Sirte remain in rubble, in part due to continuing internal Libyan conflict, Operation Odyssey Lightning is considered a success. It stopped the expansion of ISIL in the Sahel and is assessed to have resulted in very few civilian casualties.[14]

The battle for Sirte indicates that in today's wars, States go to great lengths to avoid killing civilians. States use advanced technology, rely on a multitude of intelligence, and program their munitions to minimize collateral damage. However, just like in Sirte, sometimes civilians are killed. For States complying with international humanitarian law (IHL), civilians are never the direct target of an attack but an unfortunate consequence of the reality of war. Although every loss of an innocent life is devastating, the law of armed conflict (LOAC) expressly permits collateral damage so long as it is not expected to be excessive in relation to the anticipated military advantage.[15] This is the core principle of proportionality.

However, despite IHL's allowance for civilian casualties, society is intolerant of civilian casualties; one civilian death is one too many. This intolerance has led to the development of a new norm of stricter targeting parameters than the law of war dictates. The United States, for instance, has put a premium on avoiding civilian casualties by using artificially imposed targeting

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extract concessions from State actors. For purposes of this paper, the term "insurgent(s)" will be used to denote all three. *See* Daveed Gartenstein-Ross & Jacob Zenn, *Terrorists, Insurgents, Something Else? Clarifying and Classifying the "Generational Challenge,"* LAWFARE (Jan. 15, 2017), https://bit.ly/3zGGgaE.

[12] *See* Pamela Quanrud, *The Global Coalition to Defeat ISIS: A Success Story*, FOREIGN SERV. J., Jan.–Feb. 2018, at 35, 37, https://bit.ly/3lqtPLp.

[13] *See generally* INST. FOR ECON. & PEACE, GLOBAL TERRORISM INDEX 2018: MEASURING THE IMPACT OF TERRORISM 15–17 (2018) [hereinafter GTI 2018], https://bit.ly/3gDyl6G (describing generally the actions taken by the listed terrorist groups between 2016 and 2018).

[14] Peter Bergen & Alyssa Sims, *Seven Years After Obama's 'Worst Mistake,' Libya Killing is Rampant*, CNN (Jun. 20, 2018), https://cnn.it/35D6o8F; *see also* Ryan, *supra* note 10 (noting that while the U.S. reports zero civilian casualties, other entities indicate anywhere from 11 to 75).

[15] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], https://bit.ly/3ypjVgX. The principle of proportionality in attack is codified in Article 51(5)(b) of Additional Protocol I, and repeated in Article 57.

criteria, formally known as non-combatant casualty cutoff values (NCVs).[16] NCVs predetermine the number of civilians—oftentimes zero—that can be considered collateral damage, even if the civilians' death would legally comply with the law of armed conflict.

This paper examines the development of this new normative framework surrounding proportionality and the inherent but unanticipated dangers associated with the continued application of targeting restrictions. This Article does not suggest that the approaches taken by the United States and other States are ethically unsound and morally unimportant. However, this Articl examines the inherent danger in a new normative framework proscribing civilian casualties; what can and will ultimately transpire if State policies become too restrictive. Part II of this Article discusses IHL, focusing on *jus in bello* and modern-day asymmetric warfare. Part III analyzes State policies restricting targeting and the impetus behind their development. Finally, Part IV addresses the unintended consequences of these restrictive regimes.

The dangers of restrictive targeting regimes stem from the modern-day nature of conflict: asymmetric and urbanized. Asymmetric conflicts present unique strategic, tactical, and moral challenges for States as insurgents develop a new combat doctrine enshrining the concept of fighting from within urban areas and using civilians as human shields.[17] Restrictive proportionality regimes immunize areas saturated with civilians from attack, countenancing insurgents to continue brutalizing civilian populations under their control. As Laurie Blank, the director of the International Humanitarian Law Clinic at Emory University School of Law, cautions:

> [I]f the bare fact of civilian casualties were to become the measure of whether the overall use of force in self-defense is lawful, the international legal framework governing the use of force in self-defense would be undermined. Any military operation causing civilian casualties would then be considered unlawful, even if a valid exercise of self-defense, emasculating state options for protecting their own civilians against attack.[18]

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[16] Scott Graham, *The Non-Combatant Casualty Cut-Off Value: Assessment of a Novel Targeting Technique in Operation Inherent Resolve*, 18 INT'L CRIM. L. REV. 655, 679–80 (2018). Although the term is no longer utilized per a policy decision by the U.S. Government, it will be referenced throughout this paper.

[17] Amnon Rubinstein & Yaniv Roznai, *Human Shields in Modern Armed Conflicts: The Need for a Proportionate Proportionality*, 22 STAN. L. & POL'Y REV. 93, 97–98 (2011), https://stanford.io/3fsLZZm; s*ee also* Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT'L L. STUD. 307, 322 (2009), https://bit.ly/2TRreii.

[18] Kenneth Anderson, *Laurie Blank Follow-up on Gaza, Proportionality, and the Law of War*, WASH. POST (Aug. 6, 2014), https://wapo.st/3fuVCGN.

Not only does it emasculate State options for protecting their own civilians, but it also undermines the global community's ability to protect civilians in States with less robust defense mechanisms.

II. International Humanitarian Law and Modern-Day Asymmetric Warfare

A party's decision to use force—*jus ad bellum*—is irrelevant to the requirement to comply with international humanitarian law during armed conflict. Thus, this Article focuses on *jus in bello*, or conduct during war.[19] *Jus in bello* is synonymous with international humanitarian law, the law of armed conflict, and the law of war. IHL is applicable to both international and non-international armed conflicts, without regard to whether those fighting are State military forces or non-state armed groups.[20]

In an ongoing effort to codify the international customs of warfare, Protocols I and II of the 1949 Geneva Conventions were opened for signature in 1977.[21] The Additional Protocols (hereinafter AP I and AP II) further limited parties' choice of means and methods of warfare by focusing on civilian protection.[22] The Protocols codify the four fundamental principles of IHL: the distinction between civilians and combatants, the principle of military necessity, the prohibition against unnecessary suffering, and the principle of

[19] Jenny Martinez & Antoine Bouvier, *Assessing the Relationship Between Jus in Bello and Jus ad Bellum: An "Orthodox" View*, 100 AM. SOC'Y INT'L L. 109, 109–12 (2006).

[20] *Humanitarian Law, International*, Max Planck Encyclopedia of Public International Law (database updated Dec. 2015) [hereinafter MAX PLANCK IHL]. *See also* Prosecutor v. Sam Hinga Norman, No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) ¶ 22, https://bit.ly/3rPZxmJ (Appeals Chamber of the Sierra Leone Special Court June 14, 2004) (holding that "it is well settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties."); *What are Jus ad Bellum and Jus in Bello?*, INT'L COMM. RED CROSS (Jan. 22, 2015), https://bit.ly/3wJZpXx.

[21] *See* Protocol I, *supra* note 15; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Part IV, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II], https://bit.ly/3rZ5sWv.

[22] While AP I focuses on international armed conflicts (IACs) and AP II on non-international armed conflicts (NIACs), according to the International Committee of the Red Cross, gaps in the regulation of the conduct of hostilities in AP II have largely been filled through State practice. This has led to the creation of rules parallel to those in AP I, but applicable as customary law to NIACs vice required by treaty. The IHL Database on Customary IHL catalogues 161 rules of customary international humanitarian law. All citations to AP I in this paper are reflective of customary international law, and thus parties to a conflict (regardless of NIAC or IAC) are bound. *See Customary IHL*, INT'L COMM. OF THE RED CROSS: IHL DATABASE, https://bit.ly/3vCwJhK.

proportionality.[23] Underlying all four of these principles is the admonishment that the conduct of war is not without its limits and that protecting civilians is of the utmost import.[24] States are bound by IHL regardless of the enemy they combat. This is particularly important in today's conflicts, where insurgents are apt to reject the entire premise of IHL. After a short discussion on military necessity, preventing unnecessary suffering (humanity), and distinction, this article will discuss proportionality and the duty to protect civilians under IHL.

The principle of military necessity requires forces to engage in only those acts necessary to accomplish a legitimate military objective, dictating that armed force is only just when required to repel a threat. Part and parcel to military necessity is whether the target of the attack is a valid military objective. Article 52 of AP I describes military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[25] The principle of military necessity legally justifies attacks against targets that are valid military objectives because such attacks are critical to securing the swift submission of the enemy.

The principle of minimizing or eliminating unnecessary suffering, also referred to as humanity, stems from the Hague Convention's restrictions against using weapons to cause suffering or injury manifestly disproportionate to the military advantage realized by the use of a weapon for legitimate military purposes. It was formally codified in AP I, providing, "[i]t is prohibited to employ weapons and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[26] It is a norm aimed at protecting combatants. The International Court of Justice (ICJ), in its Nuclear Weapons Advisory Opinion of 1996, counts this provision among the "intransgressible principles of international customary law."[27]

Distinction and proportionality are the two principles dedicated to protecting civilians. The principle of distinction is the bedrock of the law regulating the conduct of hostilities.[28] It requires parties to a conflict to distinguish at all times between combatants and civilians. Civilians and civilian objects may

[23] *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR, 250–85 (2010).
[24] Protocol I, *supra* note 15, at 21 ("In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.").
[25] *Id.* at 27.
[26] *Id.* at 21.
[27] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95 at 257, ¶ 79 (July 8), https://bit.ly/3Cd4iLN.
[28] MAX PLANCK IHL, *supra* note 20.

not be attacked and operations may only be directed against military objectives.[29] Art. 51 reiterates the premise that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack,"[30] and adds that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are [also] prohibited."[31]

The principle of distinction imposes obligations on both sides of the conflict by prohibiting intentional attacks on civilians. It does not, however, preclude all harm to civilians. Distinction addresses only the deliberate targeting of civilians and not incidental harm. This understanding was made explicit by numerous States in their ratification of AP I.[32] The allowance for incidental harm under IHL stems from the principle of proportionality, which is the principle most relevant to today's restrictive targeting regimes and will be discussed in-depth in this Article.

Pursuant to the principle of proportionality, parties to a conflict have a duty to not only refrain from attacking civilians deliberately, but also must make extensive efforts to minimize the incidental harm on civilian populations. Proportionality therefore requires that combatants use only the minimum amount of force necessary to accomplish their military objectives. As reflected in AP I, the principle prohibits attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[33]

In providing that attacks against valid military targets are permissible so long as civilian deaths are not excessive to the military advantage gained, the principle implies that some collateral damage is inevitable.[34] This means that the mere fact of civilian casualties, even in significant numbers, does not in and of itself establish a violation of international law. While this may sound indelicate, the fact remains that under IHL, civilians can be killed and injured lawfully.

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[29] *Id.* Article 48 in AP I mandates that "[p]arties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Protocol I, *supra* note 15, at 25.

[30] Protocol I, *supra* note 15, at 26.

[31] *Id.*

[32] Australia, Canada, France, Italy, New Zealand, and the United Kingdom all expressly stated upon ratification that Article 52(2) of AP I was neither intended to address, nor did it address, the question of incidental or collateral damage resulting from an attack directed at a military objective. *See* 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 16 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), https://bit.ly/3yt1hok.

[33] Protocol I, *supra* note 15, at 26.

[34] Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT'L L. 431, 462 (2004).

Kenneth Watkin, the Canadian Judge Advocate General explained, "although civilians are not to be directly made the object of an attack, humanitarian law accepts that they may be killed or civilian property may be damaged as a result of an attack on a military objective."[35]

There is, however, an inherent difficulty to assessing proportionality. As Professor Bruce Cronin reminds us, "[p]roportionality is the most difficult of the four principles to assess in practice since it requires balancing two incompatible values, civilian casualties and military advantage, both of which require subjective evaluations."[36] It is the manifestation of the delicate balance between defeating the enemy while mitigating civilian suffering.[37] In their review of the North Atlantic Treaty Organization's (NATO) bombing campaign in the former Yugoslavia, the Committee established by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia to determine the legality of NATO actions, articulated the tensions inherent in proportionality assessments in their final report:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects . . . . Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.[38]

Additionally, while AP I attests that civilian losses may not be "excessive," there is no clear cut guidance for what constitutes excessiveness.[39] As Luis Morena-Ocampo articulated while Chief Prosecutor of the International Criminal Court:

> Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war

[35] Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, 8 Y.B. INT'L HUMANITARIAN L. 3, 9 (2005).
[36] Bruce Cronin, *Reckless Endangerment Warfare: Civilian Casualties and the Collateral Damage Exception in International Humanitarian Law*, 50 J. PEACE RSCH. 175, 176 (2013).
[37] Anderson, *supra* note 18.
[38] COMM. ESTAB. TO REV. THE NATO BOMBING CAMPAIGN AGAINST THE FED. REP. OF YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR ¶ 48, https://bit.ly/3imalWx.
[39] Protocol I, *supra* note 15, at 26.

> crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives when it is known that some civilian deaths or injuries will occur.[40]

Because this balancing is so fundamentally difficult, IHL mandates the need to assess proportionality from the standpoint of a what was known at the time of the strike using the 'reasonable' person standard. Per the International Criminal Tribunal for the Former Yugoslavia, "it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."[41]

The Israeli scholar and Professor Emeritus at Tel Aviv University Yoram Dinstein cautions that society, particularly the media, is apt to misconstrue the presence of civilian casualties as violations of IHL:

> It is frequently glossed over (especially in the media) that LOAC takes some collateral damage to enemy civilians virtually for granted as an inescapable consequence of attacks against lawful targets. Such damage is the case owing to the simple fact that lawful targets cannot be sterilized: some civilians and civilian objects will almost always be in proximity to combatants and military objectives. Hence, a modicum of collateral damage to civilians cannot possibly be avoided unless a battle rages in the middle of the ocean or the desert (where no civilians or civilian objects are within range of the contact zone in which the belligerent parties are conducting attacks against each other). Far from imposing an all-embracing prohibition on collateral damage to enemy civilians and civilian objects, LOAC expressly permits it as long as (in the words of Additional Protocol I) it is not expected to be "excessive," compared to the military advantage anticipated. This is the core of the principle of proportionality (the word "proportionality" itself is not mentioned as such in the Protocol). And "excessive"—we have to keep reminding ourselves—is not synonymous with "extensive." Extensive civilian casualties (and damage to civilian objects), even when plainly expected, may be perfectly

[40] Cronin, *supra* note 36, at 177.
[41] Prosecutor v. Stanilav Galic, IT-98-29-T, Judgment and Opinion, ¶ 59 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), https://bit.ly/3CnH3Pp. *See also* Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Special Tribunal of Lebanon Feb. 16, 2011), ¶ 108, https://bit.ly/2T5qg1E.

> lawful when reasonably determined to be non-excessive (on the basis of the information at hand at the time of action) once weighed against the military advantage anticipated.[42]

His words are an admonishment that civilian casualties, even when extensive, are not automatically indicative of war crimes.

While the principles of distinction and proportionality are both negative obligations of States to protect civilians, they are only part of the full legal regime. Parties to a conflict also have positive obligations to protect civilian populations. These include prohibiting collocation with civilian populations and the use of human shields.[43] Additionally, necessary precautions require parties to take care to spare the civilian population, civilians, and civilian objects.[44]

While the media often treats asymmetric warfare as something novel, this is a misconception; it has been prevalent in recent decades.[45] As the modern battlefield moves to urban areas, the natural consequence is expanded civilian involvement in hostilities. IHL dictates that this places greater obligations on the parties to minimize harm to civilians. But the reality is that today, asymmetric warfare does not necessarily connote the traditional view of war. Instead, asymmetric warfare has evolved into an indication that one party is observant of IHL while the other party is not.[46] In modern conflicts, insurgents murder civilians, collocate with civilian populations, and use civilians as shields with alarming regularity.[47]

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[42] Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, *in* 87 NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES: INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 483, 487 (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011), https://bit.ly/3iSMFcP (citations omitted).

[43] Article 51(7) of AP I is clear in that "[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations." Protocol I, *supra* note 15, at 26.

[44] *Id.* at 29. A requirement of customary international law frequently ignored by insurgents are those of Article 58 of AP I, which "endeavour[s] to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives" and "avoid locating military objectives within or near densely populated areas." These mandates, however, are often ignored during modern day asymmetric warfare.

[45] MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, xiii (5th ed. 2015).

[46] Ami Ayalon, Elad Popovich & Moran Yarchi, *From Warfare to Imagefare: How States Should Manage Asymmetric Conflicts with Extensive Media Coverage*, 28 TERRORISM AND POL. VIOLENCE 254, 257 (2016).

[47] *See* John F. Murphy, *International Law in Crisis: Challenges Posed by the New Terrorism and the Changing Nature of War*, 44 CASE W. RES. J. INT'L L. 59, 74 (2011), https://bit.ly/2TYcDlm.

In addition to the abhorrent practice of directly targeting civilians and using civilians as shields, modern day asymmetric warfare is imbued with the utilization of lawfare. Maj. Gen. Charles Dunlap, Jr., USAF (Ret.) introduced the term "lawfare" to describe the use of law as a weapon of war. In Dunlap's words, lawfare is "the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting" a superior military power.[48] According to the Lawfare Project, it is the "*negative* manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted."[49]

In what became a consistent execution of lawfare, the Taliban systematically inflated civilian casualties to combat the U.S.-led coalition in Afghanistan.[50] A report obtained from the United Kingdom Ministry of Defence indicated that media outlets would report using the inflated casualty numbers, which brought condemnation upon Coalition efforts.[51] The report noted that "'[t]he Taliban is engaged in a deliberate policy of disinformation in an attempt to undermine support for the allied attacks on the Taliban and al-Qaeda.'"[52] *The Telegraph* reported that "Pentagon officials are dismayed by the extent of Taliban disinformation because of its impact on the battle for 'hearts and mind' being fought in the Middle East."[53]

Insurgents are increasingly pursuing campaigns of lawfare to undermine their State adversaries. Professor John Murphy highlights the irony that "[insurgents] such as al-Qaeda have enjoyed considerable success in utilizing 'lawfare' as a strategy against the U.S. and its allies, even as they regularly and unapologetically engage in methods of warfare that clearly violate the law of armed conflict."[54] As Michael Gross reflects in *The Ethics of Insurgency*, the catchphrase "we fight by the rules, but they don't—is nearly axiomatic."[55]

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[48] Charles J. Dunlap Jr, *Lawfare Amid Warfare*, WASH. TIMES (Aug. 3, 2007) [hereinafter Dunlap WASH. TIMES], https://bit.ly/3xqGqAC.

[49] *Lawfare: The Use of the Law as a Weapon of War*, LAWFARE PROJECT (2012), https://bit.ly/2Vk6ccV (emphasis in original).

[50] *See generally* David Zucchino, *In the Taliban's Eyes, Bad News Was Good*, L.A. TIMES (Jun. 3, 2002) https://lat.ms/3AO8n7M. Former Taliban reporters indicate the Taliban routinely altered their reports to inflate civilian casualties and minimize military losses. "If Al Qaeda commanders were killed in a safe house by an American airstrike, they said, it was reported as Afghan families wiped out. If two Afghan civilians were killed by an American bomb, it was reported as a dozen dead. A destroyed Taliban antiaircraft site was reported as a deadly attack on a maternity ward." *Id.*

[51] Macer Hall & David Wastell, *Truth and Lies of Taliban's Death Claims*, TELEGRAPH (Nov. 4, 2001), https://bit.ly/3gcfsab.

[52] *Id.*

[53] *Id.*

[54] Murphy, *supra* note 47, at 78.

[55] MICHAEL L. GROSS, THE ETHICS OF INSURGENCY: A CRITICAL GUIDE TO JUST GUERILLA WARFARE 2 (2015).

III. STATE PROSCRIPTIONS ON THE USE OF FORCE

Civilian deaths, even when considerable, do not automatically violate IHL. In particular, the principles of distinction and proportionality are violated only when civilians are the intended target, or when the harm to civilians is excessive in relation to the anticipated military advantage. However, despite the actual requirement under IHL, society has become increasingly intolerant of civilian casualties. As Professor Samuel Moyn underscores, for some the "ultimate worry is not exactly that the number of civilians who die in America's wars is too high; it is that any civilians die at all."[56] This has led States to institute policies restricting targeting, thereby creating a new norm of proportionality, stricter than the law of war dictates. First, this Article provides an overview of these policies, and then assesses the impetus behind their creation.

A. The United States

In the United States, there are substantial policy controls for the conduct of military operations to minimize civilian casualties.[57] In the last two decades, the Bush, Obama, and Trump Administrations have all put a premium on avoiding civilian casualties, instituting policies to minimize collateral damage via prescriptive battlefield rules of engagement. Per Professor Nathan Canestaro, President Bush imposed targeting restrictions "to assuage concerns in the Muslim world about the conduct of the war and combat the perception that the campaign was directed against Islam as a whole."[58] The process to nominate and approve targets was extremely labor intensive and required vetting by Department of Defense lawyers.[59] It was also during the Bush era that reliance on precision guided munitions became the norm.[60]

In the early days of the Obama presidency, the Tactical Directives for operations in Afghanistan articulated a goal of zero civilian casualties even if it resulted in a hindrance to U.S. operations.[61] As the head of U.S. forces in Afghanistan in 2010, General John Allen messaged that his intent was to "eliminate [insurgent caused] civilian casualties . . . and minimize civilian casualties throughout the area of operations by reducing their exposure to insurgent

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[56] Samuel Moyn, *A War Without Civilian Deaths?*, NEW REPUBLIC (Oct. 23, 2018), https://bit.ly/37hTopN.
[57] Canestaro, *supra* note 34, at 479.
[58] *Id.* at 477.
[59] *Id.* at 477–79.
[60] *Id.*
[61] Russel Spivak, *ISIL's Human Shields in Mosul and the U.S. Response*, LAWFARE (Jan. 12, 2017), https://bit.ly/3ijGM82.

operations."[62] President Obama went even a step further, issuing restrictions on the use of force outside of areas of active hostilities, such as Somalia and Yemen.[63] The Presidential Policy Guidance (PPG) limited civilian casualties by setting the threshold at zero.[64] The day after issuing the PPG, President Obama spoke at the National Defense University on May 23, 2013, publicly stating that "before any strike is taken, there must be near-certainty that no civilian will be killed or injured—the highest standard we can set."[65] Contemporaneously to the issuance of the PPG, President Obama issued an executive order prioritizing civilian protection and documenting best practices to reduce their likelihood.[66] Even after the transition from the Obama to Trump Administration, the policy of "near certainty" that no civilians would be injured or killed remained.[67]

Senior U.S. officials continue to administer policies that underscore the protection of civilians.[68] The Non-Combatant Casualty Cut-Off Value (NCV) is the most recent, and current, policy imposing targeting restrictions. While instituted during the Obama years, it remained a policy of the Trump Administration.[69] The NCV is a predetermined restriction on proportionality, limiting the acceptable number of civilian casualties by imposing an artificial ceiling on how many civilians can be killed as collateral damage.[70] If a strike is expected to yield civilian casualties greater than the NCV, it must be aborted.[71] NCVs are tailored for specific high value targets and areas of operation. They can even be tied to the requirement to use particular munitions and weapons systems.[72]

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[62] Neta C. Crawford, *Death Toll: Will the U.S. Tolerate More Civilian Casualties in Its Bid to Vanquish ISIS?*, WBUR (Jan. 21, 2016), https://wbur.fm/37hUxh5.

[63] Cora Currier, *White House Finally Releases Its "Playbook" for Killing and Capturing Terror Suspects*, INTERCEPT (Aug. 6, 2016), https://bit.ly/3jkwBzf.

[64] *President's Policy Guidance: Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostility* (May 22, 2013) [hereinafter PPG], https://bit.ly/3lsHx0p (publicly released in redacted form Aug. 5, 2015). The PPG "establishes the standard operating procedures for when the United States takes direct action, which refers to lethal and non-lethal uses of force, including capture operations against terrorist targets outside the United States and areas of active hostilities." *Id.* at 1. The PPG required a number of "conditions precedent for any operation," including "near certainty that non-combatants will not be injured or killed," amongst others. *Id.* at 3. *See also* Crawford*, supra* note 62.

[65] President Barack Obama, Remarks at the National Defense University (May 23, 2013), https://bit.ly/2TSUEfX.

[66] *See* Charlie Savage & Scott Shane, *U.S. Reveals Death Toll from Airstrikes Outside War Zones*, N.Y. TIMES (July 1, 2016), https://nyti.ms/3A835n3.

[67] Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 22, 2017), https://nyti.ms/2Vx5pF5.

[68] Michael A. Cohen, *The Myth of a Kinder, Gentler War*, 27 WORLD POL. J. 75, 84 (2010), https://bit.ly/2Vponhf. *See also* Crawford, *supra* note 62.

[69] Graham, *supra* note 16, at 679–80.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 656 n.1.

A policy of zero civilian casualties was in place for much of the ISIL campaign from approximately 2015 to 2018.[73] This ultimately resulted in over 75 percent of strikes being called off due to insupportable risks to civilians.[74] Even when the NCV was increased, meaning targeting restrictions were relaxed, for various phases of the campaign, the Trump Administration's executive order emphasized that U.S. policies regarding civilians populations were "more protective than the requirements of the law of armed conflict."[75] General Joseph Votel, the then-Commander of U.S. Central Command, also testified before congress that the United States has "not relaxed the rules of engagement" in Iraq and Syria.[76] According to Professor Sam Moyn, "it's clear that the U.S. has the most robust CIVCAS [civilian casualty] avoidance policy and process in the world (and in history)."[77] The Biden Administration is still developing their policy, but all accounts indicate that it will be even more restrictive than previous administrations, especially given that the Department of Defense is drafting a directive "laying out stricter guidelines or limiting civilian casualties in overseas attacks and setting new and higher thresholds for future U.S. attacks."[78]

B. Other States

While, as Moyn notes, the United States' policy may be the most robust, other States also have adopted policies restricting proportionality. In Israel there are policies requiring zero civilian casualties. These targeting restrictions, similar to the U.S., are very much operation and geography specific.[79] During all combat

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[73] *See Timeline: The Rise, Spread, and Fall of the Islamic State*, WILSON CTR. (Oct. 28, 2019), https://bit.ly/3lxEhkn (A U.S.-led coalition began airstrikes against ISIS in Iraq on August 7, 2014, and expanded the campaign to Syria the following month. On October 15, the United States named the campaign "Operation Inherent Resolve."). *See also*, Frank Wolfe, *Pentagon Removed Non-Combatant Casualty Cut-Off Value from Doctrine in 2018*, DEF. DAILY (Jun. 11, 2021), https://bit.ly/3xrEhVf.

[74] Kristina Wong, *ISIS Fight Shifts to French Rules of Engagement*, HILL (Nov. 19, 2015), https://bit.ly/3xnupfh.

[75] Spivak, *supra* note 61.

[76] Carlos Muñoz, *Gen. Joseph Votel: Rigorous Rules of Engagement Remain Unchanged for U.S. Forces in Iraq, Syria*, WASH. TIMES (Mar. 29, 2017), https://bit.ly/2TTzu1p.

[77] Moyn, *supra* note 55. The Biden Administration's policy is still in development. Of note, "it remains to be seen whether DoD will re-institute Non-Combatant Casualty Cut-Off Values (NCVs), or an alternative non-numerical level of gauging the possibility of civilian casualties before U.S. airstrikes and other actions that may cause such casualties. Pentagon officials and advocates for civilian harm mitigation have discussed the future of NCV, which the Pentagon removed from its doctrine in 2018 in a move that has not gained wide attention." Wolfe, *supra* note 73.

[78] Michael Hirsh, *Why U.S. Drone Strikes Are at an All-Time Low*, FOREIGN POL'Y (July 1, 2015), https://bit.ly/3C7sxuV ("The president imposed a partial moratorium as his team conducts an intensive review of every aspect of America's global counterterrorism efforts, which have spread over two decades from Afghanistan post-9/11 to 'Iraq, Yemen, Syria, Libya, Somalia, and parts of the Maghreb, Southeast Asia and West and Central Africa'.").

[79] Eli Baron, How the IDF Implements LOAC, Lecture at Harvard Law School (Feb. 20, 2019) (notes available with author).

operations, the Israeli Defense Force (IDF) takes extensive steps to weigh the risk of civilian harm. In the Ministry of Foreign Affairs release of *The Operation in Gaza: Factual and Legal Aspects*, they underscore that on numerous occasions, the IDF called off strikes against valid military objectives to avoid the possibility of civilian harm, even when the attacks would have been proportionate and complied with IHL.[80]

Australia also operates under strict rules of engagement with the goal of preventing civilian casualties. While Australia was unwilling to release publicly the rules of engagement for operations in both Afghanistan and Iraq, Australian officials maintained that their rules of engagement were more stringent than those of the United States.[81] Publicly stating that "[o]ur members operate under strict Rules of Engagement which are specifically designed to avoid civilian casualties and damage to civilian infrastructure . . . ."[82] Supporting this are the accounts of Australian F/A 18 pilots who refused to execute strikes on over 40 missions, despite Coalition approval, because of national caveats to the Coalition's rules of engagement and concerns about resulting civilian casualties.[83]

Germany, as a member of the International Security Assistance Forces (ISAF) in Afghanistan, also had "insanely restrictive rules of engagement."[84] They operated in an entirely defensive manner and were unable to offensively engage targets. "Deadly force, for example, was only to be used if the soldiers were being attacked or about to be attacked."[85] Germans operated under much stricter rules of engagement than other NATO-led forces.

Denmark, as one of a handful of States participating in airstrikes against ISIL, mandated precautions to keep civilian casualties to a minimum. They did this by placing targeting restrictions in their Tactical Directive.[86] These policies

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[80] *The 2014 Gaza Conflict: Factual and Legal Aspects, Chapter V. The Use of Force—The Legal Framework*, ISR. MINISTRY OF FOREIGN AFF. ¶¶ 110, 329 (May 2015) [hereinafter *2014 Gaza Conflict*], https://bit.ly/3ikZOL2. For example, Israeli forces identified a rocket launcher between two school buildings on 18 January 2009, but refrained from attacking because of its proximity to the schools. The IDF also refrained from attacking Shifa Hospital in Gaza City, despite Hamas' use of an entire ground floor wing as its headquarters during the Gaza Operation out of concern for the inevitable harm to the civilians also present in the hospital. *Id.*

[81] *Rules of Engagement—Afghanistan and Iraq*, NAUTILUS INST. FOR SEC. & SUSTAINABILITY, https://bit.ly/37gx28f (last updated 45 Dec. 2014).

[82] *Id.*

[83] Frank Walker, *Our Pilots Refused to Bomb 40 Times*, SYDNEY MORNING HERALD (Mar. 14, 2004), https://bit.ly/3foxuWr.

[84] Max Boot, *German Rules of Engagement?*, COMMENT. MAG. (July 29, 2009), https://bit.ly/2TWxFki.

[85] *How the Rules of Afghanistan Have Changed for the Bundeswehr*, DEUTSCHE WELLE (Dec. 16, 2009), https://bit.ly/2WTKQ6E.

[86] Steen Kjaergaard & Major Karsten Marrup, *The Use of Kinetic Airpower and the Problem of Civilian Casualties*, ROYAL DANISH DEF. COLL. 15 (Apr. 2017).

ultimately constrained the flexibility inherent in the principle of proportionality, leading to target execution being more restrictive than required by IHL.[87]

In addition to individual national caveats restricting proportionality, Coalitions as a whole also proscribe civilian casualties. NATO restricted targeting in Afghanistan in an attempt to limit civilian deaths by prohibiting the use of certain munitions.[88] The Counter-ISIL Coalition also frequently exercised restraint from strikes likely to result in civilian casualties.[89] A Coalition spokesman noted "our goal has always been for zero civilian casualties . . . ."[90]

C. Politics

The selection of States discussed above are the restrictive targeting regimes found in open-source outlets. Most State-specific rules of engagement are classified and therefore not releasable to the public. While the paper mentions only a small subset of States and Coalitions engaged in military action around the world, they are indicative of the increasing normalcy of policies aimed at reducing civilian casualties via restrictive targeting regimes. Under such regimes, the classic proportionality assessment of IHL is no longer required. These new policies mandate a ceiling on civilian casualties authorizing target engagement only if the collateral damage is equal to or less than the prescribed limit. While proponents of NCVs or other restrictive proportionality regimes argue they are a strategically sound measure to control target engagement and mitigate civilian casualties, others assess that these policies restrict warfighters' ability to effectively engage the enemy.[91] Under restrictive targeting regimes, even when engagement is perfectly legal under IHL, policy constraints may preclude the strike.

What is driving the normalization of restrictive targeting regimes and why are they becoming increasingly prevalent? It is simple really: politics. Or more elegantly articulated, these restrictions are driven by political fear of the society's reaction to civilian casualties.[92] As concerns about civilian casualties proliferate, State-imposed targeting restrictions assuage some of the concerns by mollifying citizenry and preventing media censure.

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[87] *See id.* at 21.
[88] Richard Norton-Taylor & Julian Borger, *NATO Tightens Rules of Engagement to Limit Further Civilian Casualties in Aghanistan [sic]*, GUARDIAN (Sept. 8 2008), https://bit.ly/3C5ZLuu.
[89] Graham, *supra* note 16, at 668.
[90] Renee Westra, *Syria: Australian Military Operations*, PARLIAMENT OF AUSTL., at 8 (Sept. 20, 2017), https://bit.ly/2VnQVrb.
[91] Wong, *supra* note 72.
[92] Canestaro, *supra* note 34, at 433, 476 ("One of the factors most commonly underscoring policy involvement in military planning since Vietnam has been sensitivity to friendly casualties or collateral damage. Known derisively as 'Vietnam Syndrome,' or 'the Mogadishu Effect,' policymakers fear that U.S. casualties will spur a public outcry to end military operations.").

As Winston Churchill once said, "[a] politician needs the ability to foretell what is going to happen tomorrow, next week, next month, and next year. And have the ability afterwards to explain why it didn't happen."[93] Today civilian casualties are seen as evidence of military failure. Restrictive targeting policies allow States to undercut the eventual condemnation that arises when strikes unintentionally result in collateral damage.[94]

If war is an instrument of policy, then so too are battlefield rules of engagement.[95] And the current political tool of choice are the required use of NCVs and other restrictive targeting directives for the conduct of war. These new regimes reflect political reality just as much as they do legal requirements. It is clear that political fear drives restrictive targeting regimes, but to truly understand this phenomenon it is critical to examine what influences that fear. Political fear has three main drivers: (1) domestic public opinion; (2) concerns about diplomatic relations; and (3) the CNN effect.

1. Domestic Public Opinion

Politicians are driven to respond to their constituencies' opinions in order to maintain their political seat come election day. Therefore, domestic public opinion on the relative success or failure of an operation can influence policy. While the commencement of hostilities typically enjoys domestic support, this support decays over time.[96] To politicians, gaining and maintaining domestic support is critical. Denmark for instance, during the campaign against ISIL, created policies ensuring that everything feasible would be done in order to keep civilian casualties to a minimum. A study of these policies concluded that "the protection of civilians objective was a sub-objective amended for political legitimizing purposes,"[97] and that a restrictive targeting regime was incorporated for "political and strategic reasons to secure Danish political imperatives."[98] This was particularly prudent of Danish politicians since studies indicate a relationship between domestic support for the use of force and collateral damage, with public support decreasing as the collateral consequences of war rise.[99]

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[93] John Plumpton, *The Study of History and the Practice of Politics*, WINSTON CHURCHILL ORG. (Nov. 2002), https://bit.ly/3CbI50H.
[94] *See* Canestaro, *supra* note 34, at 476; *see also* ERIC V. LARSON & BOGDAN SAVYCH, MISFORTUNES OF WAR: PRESS AND PUBLICATION REACTION TO CIVILIAN DEATHS IN WARTIME 205 (2007), https://bit.ly/3jdegny.
[95] *See* Canestaro, *supra* note 34, at 467.
[96] Spivak, *supra* note 61.
[97] Kjaergaard & Marrup, *supra* note 86, at 15.
[98] *Id.* at 19.
[99] *See* Ayalon, *supra* note 46, at 260; Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 102 (2005).

Paul Bernstein's study on the impact of public opinion on domestic policy indicates that, "[t]he more salient an issue is to the public, the stronger the relationship between public opinion and policy."[100] Civilian casualties are a particularly salient issue in contemporary society as indicated by its extensive media coverage. In the United States, attacks that risk killing civilians are opposed by more than 52% of the public.[101] Another study found that across both the U.S. and the United Kingdom, the support for military action was lower when "the civilian death toll—projected or actual—was higher."[102] Even during NATO's involvement in Kosovo, a Post-ABC News Poll found that "disapproval of the air war increased by 21 percentage points . . . among Americans highly concerned about civilians being hurt or killed by the NATO attacks."[103]

Another reason for increased public censure on military action resulting in civilian casualties can be credited to Human Rights Organizations (HROs). HROs have become major players in the political arena, exercising their influence through political advocacy and public discourse.[104] Their extensive resources provide placement of and access to senior politicians allowing them to shape narratives and drive policy.[105] As conflicts are inevitable, HROs will continue to take a critical eye to State military action and influence policies related to military action.

2. Concerns About Diplomatic Relations

Killing civilians, even if legally justified, can also erode international support and affect foreign policy.[106] In a letter sent to then Secretary of Defense James Mattis, national security experts highlighted that "[e]ven small numbers of unintentional civilian deaths or injuries . . . can cause partners and allies to reduce operational collaboration, withdraw consent, and limit intelligence-sharing; increasing violence from militant groups; and foster distrust among local

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[100] Ayalon, *supra* note 46, at 260.
[101] Peter Moore, *American Support Drone Attacks—But Only Without Civilian Casualties*, YOUGOV (Oct. 28, 2013), https://bit.ly/37g8L20.
[102] *Id*. *See also* Robert Johns & Graeme A. M. Davies, *Civilian Casualties and Public Support for Military Action: Experimental Evidence*, 63 J. OF CONFLICT RESOL. 251, 270 (2017).
[103] Richard Morin, *Americans Grow Weary of War in Kosovo*, WASH. POST (May 24, 1999), https://wapo.st/3jjwjZq.
[104] LARSON & SAVYCH, *supra* note 94, at 205 ("One reason for the growing attention to civilian casualties in the press and the public may be the role that NGOs have played in bringing attention to the issue: Since 1990, NGOs increasingly have been mentioned in news reporting on wars and military operations.").
[105] Gerald M. Steinberg, *The Politics of NGOs, Human Rights and the Arab-Israel Conflict*, 14 ISR. STUD. 24, 27, 44 (2011) (discussing the increased power of NGOs in the realm of policy creations).
[106] Spivak, *supra* note 61; *see also* Canestaro, *supra* note 34, at 468.

populations that are crucial to accomplishing the mission."[107] This is particularly true in asymmetric conflicts that have a natural political element built in—winning the hearts and minds of the local populace.

Destroying the lives and property of civilians is self-defeating when their protection is the ultimate priority.[108] Even when unintentional collateral, civilian casualties present a strategic problem potentially driving the local populace to support the insurgents. Targeting restrictions are aimed not only at reducing civilian casualties but also fomenting local support.[109] The United States' use of NCVs in Afghanistan is demonstrative of this very issue. Since civilian casualties were considered a liability to strategic efforts, a NCV of zero was imposed.[110] The 2010 Tactical Directive admonished that "[e]very Afghani civilian death diminishes our cause." [111] Even at United States Central Command's Headquarters, officials were allegedly "deathly afraid" of collateral damage because of the political ramifications to the entire campaign.[112] As civilian casualties have increased, animosity from the local populace and consternation from international partners have shaped State targeting policies.

3. The CNN Effect

Related to domestic public opinion and foreign policy, the advent of persistent global news coverage also influences policy. This is commonly referred to as the CNN Effect, a term first used during the Gulf War.[113] The CNN Effect is seen as policy forcing; the media does not create policies, instead they direct their creation.[114] As Colin Powell observed, ''[l]ive television coverage does not change the policy, but it does create the environment in which the policy is made.''[115] News agencies accomplish this through focused broadcasting. In recent years, news agencies have focused on civilian deaths and other collateral damage around the world.[116] Civilian casualties are particularly newsworthy, because violence and terror glue people to the television.[117]

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[107] Benjamin Haas, *The Pragmatic Reasons for Strict Rules of Engagement*, JUST SEC. (Apr. 20, 2017), https://bit.ly/3jqOnkC.
[108] WALZER, *supra* note 45, at xix.
[109] *Civilian Casualties & Collateral Damage*, LAWFARE, https://bit.ly/3Abg4Er.
[110] Nick McDonell, *Civilian Casualties Are Not Inevitable. The Military Sets an Acceptable Number in Advance*, L.A. TIMES (Mar. 31, 2017), https://lat.ms/3imjyOr
[111] Spivak, *supra* note 61.
[112] Canestaro, *supra* note 34, at 479.
[113] Etyan Gilboa, *Global Television News and Foreign Policy: Debating the CNN Effect*, 6 INT'L STUD. PERSP. 325, 328 (2005).
[114] *Id.* at 328.
[115] *Id.* at 330.
[116] Canestaro, *supra* note 34, at 433.
[117] Ayalon, *supra* note 46, at 259.

Instantaneous news coverage means immediate public awareness and scrutiny of military operations, making the media an important policy influencer in conflicts around the globe.[118] As President Barack Obama stated, "[i]n our digital age, a single image from the battlefield of troops falling short of their standards can go viral and endanger our forces and undermine our efforts to achieve security and peace.[119] U.S. Ambassador to the United Nations Madeline Albright similarly offered, "[a]ggression and atrocities are beamed into our living rooms and cars with astonishing immediacy. No civilized human being can learn of these horrid acts occurring on a daily basis and stand aloof from them."[120] It therefore makes sense that the advancement of restrictive targeting regimes is in part due to the CNN Effect and the media's penchant for broadcasting civilian casualties.[121]

Insurgents also use the media to their strategic advantage in the conduct of information operations as part of their lawfare campaigns. Now the adversaries' use of media can similarly influence policies. Even when distorted facts are clarified, the damage is already done. After the Goldstone Report[122] was revealed to have been based on false information, Jeffrey Goldberg, the Editor-in-Chief of *The Atlantic* commented, "[w]ell, I'm glad he's cleared that up. Unfortunately, it is somewhat difficult to retract a blood libel, once it has been broadcast across the world."[123] The media's coverage of lawfare is becoming ubiquitous, adding an additional level of pressure for politicians.[124]

While noble and driven in part by ethical considerations, it is clear that targeting restrictions are not entirely altruistic. Political concerns are the predominate factor and the commitment to minimize collateral damage has been shaped by political fear. It is a fear of alienating constituencies, the international community, and media censure. This fear has led States to adopt restrictive targeting regimes. Given the importance that society ascribes to minimizing civilian casualties, it is no wonder that States make efforts to avoid collateral

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[118] Kenneth Payne, *The Media as an Instrument of War*, 35 (1) PARAMETERS 81, 92 (Spring 2005), https://bit.ly/3st4WAh.
[119] Michel D. Shear, *Obama Calls for 'Moral Courage' at Naval Academy Graduation*, N.Y. TIMES (May 25, 2013), https://nyti.ms/3AObwEs.
[120] Gilboa, *supra* note 113, at 330.
[121] *See* Canestaro, *supra* note 34, at 433.
[122] The Goldstone Report was the Report issued by Judge Richard Goldstone who headed the fact-finding committee into allegations of war crimes by the United Nations Human Rights Council (UNHRC). The report accused both Hamas and Israel of war crimes and deliberately targeting civilians. *See* Conal Urquhart, *Judge Goldstone Expresses Regrets About His Report into Gaza War*, GUARDIAN (Apr. 3, 2011), https://bit.ly/3ySvRbb.
[123] Jeffrey Goldberg, *Judge Richard Goldstone: Never Mind*, ATLANTIC (Apr. 2, 2011), https://bit.ly/3y1DISl.
[124] Nidra Poller, *The Muhammad al-Dura Hoax and Other Myths Revived*, MIDDLE EAST Q. 72, 76 (Fall 2011), https://bit.ly/37Pl4mi.

damage. But while these policies may be ethically and morally sound, there are oft forgotten unintended consequences.

IV. Unintended Consequences

The global community aspires to a utopian world of zero civilian casualties. Unfortunately, this is both a dangerous and unrealistic expectation. While targeting restrictions are morally and politically enticing, there are four primary unintended consequences. They are: (1) increased brutality against civilians; (2) amplified civilian endangerment; (3) unrealistic expectations of a perfect war; and (4) the development of a new norm of proportionality under customary international law (CIL).

A. Increased Brutality Against Civilians

It is a strange logic to limit lethal force against insurgents while allowing them to continue endangering civilian populations. Yet, that is exactly what happens with restrictive targeting regimes. Due to the political ramifications of civilian casualties, insurgents are rarely engaged with a State's full military power.[125] While States fight by the rules of IHL, insurgents do not, and violence against civilians is one of many tactics used as a means of altering the strategic landscape.[126] Proscriptions on State action provide insurgents with increased freedom of maneuver to carry out brutal attacks on civilian populations. Thus, State imposed targeting restrictions unintentionally result in continued harm to civilians.[127]

In the last few decades, insurgents have become prodigious killers, perpetrating suicide attacks and car bombings; killing thousands of civilians.[128] As Professor Benjamin Valentino explains, "[c]ivilians are not merely bystanders to armed conflict; they play a central, if often involuntary, role as the underwriters of war's material, financial, and human requisites. Sometimes they become the object of war itself."[129] Violence against civilians has become a common part of asymmetric warfare. Timothy Wickham-Crowley observed, "terror against

[125] Canestaro, *supra* note 34, at 433.
[126] Reynolds, *supra* note 96, at 79.
[127] Kjaergaard & Marrup, *supra* note 86, *at* 24.
[128] *See* Patricia Gossman, *Attacks Targeting Afghan Civilians Spread Terror*, HUM. RTS. WATCH (Feb. 23, 2021), https://bit.ly/3ASdW5a (explaining that in 2020, "[t]he Taliban's increased use of improvised explosive devices (IEDs), including pressure-plate IEDs that act like antipersonnel mines, killed 727 people and injured 1569")*; see also At Least 132 Civilians Killed in Burkina Faso's Worst Attack in Years*, REUTERS (June 6, 2021), https://reut.rs/3jYN3FI ("The latest attack pushes the number killed by armed Islamists in the Sahel region to over 500 since January, according to Human Rights Watch's West Africa director, Corinne Dufka.").
[129] Benjamin A. Valentino, *Why We Kill: The Political Science of Political Violence Against Civilians*, ANN. REV. POL. SCI. 89, 94 (Mar. 14, 2014), https://bit.ly/3CXlAgk.

civilians is apparently a far more regular, even 'natural,' concomitant of modern guerilla warfare than of modern conventional warfare."[130]

The Islamic State alone has killed thousands of innocents.[131] Their malicious actions against civilians are universally condemned. The UN Security Council in Resolution 2249 (2015) "unequivocally condemn[ed]" the gross, systematic, and widespread abuse of human rights and violations of humanitarian law perpetuated by ISIL, calling their actions against civilians and civilian infrastructure "barbaric."[132] The international community became regrettably familiar with an individual known as Jihadi John who between 2014 and 2015 gained notoriety with the release of various videos depicting western hostages in ISIL custody.[133] In the videos that reverberated around the world and caused international condemnation, Jihadi John joined by other members of the Islamic State, violently executed innocent civilians. These included humanitarian aid workers, journalists, and other innocent members of society.[134]

In response to the Islamic State's brutality, the Jordanian representative to the 7565th meeting of the United Nations Security Council stated that ISIL "wreak[s] havoc and evil across the globe" and is unfaltering in "their odious intentions towards humankind in targeting civilians."[135] In 2017 alone, ISIL intentionally killed more than 2080 civilians.[136] Of these, 1572 civilian deaths and 254 attacks perpetrated against civilians occurred inside the then-ISIL-controlled city of Mosul.[137] In 2019, ISIL remained one of the deadliest terrorist

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[130] Timothy P. Wickham-Crowley, *Terror and Guerilla Warfare in Latin American, 1956–1970*, 32 (2) COMP. STUD. SOC. HIST. 201, 225 (1990).
[131] *ISIS Fast Facts*, CNN, https://cnn.it/3yWEh1m (last updated Sept. 6, 2020).
[132] S.C. Res. 2249, ¶ 1, U.N. Doc. S/RES 2249 (Nov. 20, 2015).
[133] Dominic Casciani, *Islamic State: Profile of Mohammed Emwazi aka 'Jihadi John*,*'* BBC (Nov. 13, 2015), https://bbc.in/3mis7fP.
[134] *See* Victoria Ward, *Jihadi John's Victims: Who Were They?*, TELEGRAPH (Nov. 13, 2015), https://bit.ly/3szYTdq. David Haines and Alex Henning, both British aid workers, were killed by the Islamic State. Haines was abducted in March 2014 in Syria. A video of the lead-up and aftermath of David Haines' beheading, entitled *"A Message to the Allies of America*,*"* was released by ISIL on September 13, 2014. Henning was captured in Al-Dana Syria in December 2013. A video of Henning's beheading was released by ISIL on October 3, 2014. Also killed was Peter Kassis, a former U.S. Special Forces soldier. James Foley and Steven Sotloff, two American journalists, were killed by the Islamic State. Foley was abducted on November 22, 2012 in northwestern Syria, and executed. Sotloff was kidnapped in Aleppo, Syria in 2013. On September 2014, a video was released purporting to show Jihadi John beheading Sotloff.
[135] U.N. SCOR 70th Sess., 7565th mtg. at 26, U.N. Doc S/PV.7565 (Nov. 20, 2015) (Statement by Mrs. Kawar, Jordanian representative to the United Nations Security Council), https://undocs.org/S/PV.7565.
[136] *How Islamic Extremists Target Civilians*, TONY BLAIR INST. FOR GLOB. CHANGE 10 (Sept. 13, 2018) [hereinafter INST. FOR GLOB. CHANGE], https://bit.ly/3D0fqfA.
[137] GTI 2018, *supra* note 13, at 16.

organizations, causing 942 civilian deaths.[138] Although the Islamic States' brutality is of a level rarely seen, they are not alone in the intentional targeting of civilians. In 2019, the four organizations responsible for the most civilian deaths included not only the Islamic State, but also the Taliban, al-Shabaab, and Boko Haram.[139]

The Taliban has a long history of perpetrating crimes against civilians.[140] They have increasingly focused their attacks in urban areas, killing thousands of innocent civilians.[141] According to Human Rights Watch, "suicide attacks, including car and truck bombings, caused at least one-third of these casualties. Hundreds of civilians are going about ordinary activities—walking down the street, working in a shop, preparing food at home, or worshipping in a mosque—have experienced sudden and terrifying violence."[142] In January of 2018, the Taliban conducted two egregious attacks against the civilian population in Kabul resulting in the deaths of well over a hundred individuals. The first on 20 January was an attack at the Intercontinental Hotel. The attack lasted almost 24 hours and resulted in the death of 21 civilians.[143] A week later, an ambulance bomb killed more than 103 people and injured another 200 when it detonated at a busy Kabul intersection.[144] In 2019 alone, Taliban attacks against civilians increased by 24 percent from the previous year.[145] In the first half of 2021 alone, there were 2044 civilian casualties attributed to the Taliban.[146]

In Nigeria and other areas of Northwest Africa, Boko Haram, with alarming regularity, have perpetrated attacks against civilian populations.[147] In 2015, they executed a multi-day massacre in the town of Baga and its surrounding villages, killing upwards of 2000 civilians.[148] In 2017, over 71 percent of their

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[138] *See Global Terrorism Index 2020: Measuring the Impact of Terrorism*, INST. FOR ECON. & PEACE (2020) [hereinafter GTI 2020], https://bit.ly/3iYJ8JW.
[139] *Id.*
[140] *Taliban*, COUNTER EXTREMISM PROJECT, https://bit.ly/309eBlH.
[141] *See* Susannah George & Aziz Tassal, *The Taliban is Targeting Areas Around Key Provincial Capitals, Looking For Weak Spots as Foreign Troops Withdraw*, WASH. POST (May 8, 2021), https://wapo.st/3gbZygd.
[142] *"No Safe Place" Insurgent Attacks on Civilians in Afghanistan*, HUM. RTS. WATCH (May 8, 2018), https://bit.ly/2W537gY.
[143] *Id.* at 18.
[144] *Id.* at 14.
[145] U.N. Assistance Mission in Afghanistan, Afghanistan Protection of Civilians in Armed Conflict, Annual Rep. 2018, at 2 (Feb. 2019), https://bit.ly/3CZ8VcD.
[146] U.N. Assistance Mission in Afghanistan, Afghanistan 2021 Midyear Update on Protection of Civilians in Armed Conflict at 4, n.6 (July 2021), https://bit.ly/3mqqooP.
[147] *Boko Haram*, COUNTER EXTREMISM PROJECT, https://bit.ly/3k7xtb3.
[148] Samer Muscati, *Anatomy of a Boko Haram Massacre*, HUM. RTS. WATCH (June 10, 2015), https://bit.ly/3CQkxih ("[O]ngoing investigations by Human Rights Watch, which began in January, among others, indicate that Baga may have been the most deadly single massacre in Boko Haram's six-year insurgency. The attackers slaughtered hundreds of civilians—possibly as many as 2,000—burned homes to the ground, and abducted hundreds.").

attacks were targeted against civilians.[149] One of these was an attack against a refugee camp in Nigeria killing over 150 innocents.[150] In March of 2018, they attacked another displacement camp killing at least three Nigerian aid workers and abducting three others. The three International Committee of the Red Cross (ICRC) aid workers abducted in the attack were later executed.[151] Since 2009, Boko Haram has killed approximately 20,000 civilians, and their violence against civilians is on the rise.[152]

In Somalia and Kenya, al-Shabaab also commonly perpetrates violence against civilian populations, assassinating journalists, international aid workers, and other civilians.[153] In 2013, al-Shabaab killed 67 civilians in the attack on the Westgate Mall in Nairobi, Kenya.[154] Two years later in 2015, militants stormed the Garissa University College in Garissa, Kenya, holding over 700 civilians hostage and eventually murdering 148.[155] Al-Shabaab perpetrated the deadliest attack in all of 2017 when a truck bomb detonated in central Mogadishu, killing almost 600 civilians and injuring an additional 300.[156] In 2019, al-Shabaab perpetrated "Kenya's deadliest attack in four years" when a suicide bomber attacked the DusitD2 hotel in Nairobi, killing at least 21 civilians.[157] In total, more than 578 civilians were killed by al-Shabaab in 2019.[158]

Together, the Islamic State, the Taliban, Boko Haram, and al-Shabaab slaughtered 7578 civilians in 2019 alone.[159] They are not alone; groups such as the Lord's Resistance Army in Uganda, Liberation Tigers of Tamil Eelam (LTTE), Tehrik-i-Taliban Pakistan (TTP), and Lashkar-E-Taiba (Let), all kill civilians with disturbing frequency.[160] "Ninety countries experienced at least one terrorist incident in 2019, and 89 terrorist groups carried out an attack that led to at least one death."[161]

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[149] INST. FOR GLOB. CHANGE, *supra* note 137, at 7.
[150] *Id*.
[151] *Boko Haram Fast Facts*, CNN, https://cnn.it/3syuHzd (last updated Feb. 7, 2021).
[152] U.S. Dept. of State, *Country Reports on Terrorism 2017*, ch. 5 Foreign Terrorist Organizations [hereinafter DoS Report on Terrorism 2017], https://bit.ly/38FK0Np; *see also Annex of Statistical Information Country Reports on Terrorism 2017*, NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (START) (Sept. 2018) [hereinafter START Report on Terrorism 2017].
[153] *Al-Shabab*, COUNTER EXTREMISM PROJECT, https://bit.ly/3CZreOO.
[154] *Al-Shabab 2004–2020*, COUNCIL ON FOREIGN RELATIONS, https://on.cfr.org/3maH8Qu.
[155] *Id.*
[156] DoS Report on Terrorism 2017, *supra* note 144; *see also* GTI 2018, *supra* note 13, at 24.
[157] GTI 2020, *supra* note 139, at 17.
[158] *Id.* at 17.
[159] *Id.* at 14.
[160] Reed M. Wood & Jacob D. Kathman, *Debating the Benefits of Rebel Brutality*, WASH. POST (Sept. 3, 2014), https://wapo.st/3CWd80F; *see also* GTI 2018, *supra* note 13 (describing frequency with which organizations targeted civilians between 2016 and 2018).
[161] GTI 2020, *supra* note 139, at 52.

Children, in particular, suffer unspeakable atrocities in armed conflicts. In the past decade, according to one estimate, one out of every six children is affected by conflict.[162] Children are murdered, tortured, and raped, oftentimes simply for entertainment. Thousands of children have also been kidnapped. In 2014, Boko Haram infamously kidnapped 276 female students in Nigeria, highlighting their deliberate targeting of children.[163] The group continues to abduct children on a regular basis, with verified cases of abduction increasing by 90 percent in 2020.[164] These children are forced to become child brides, subjected to domestic servitude, and with alarming frequency, used to carry out suicide attacks in civilian communities.[165] Children are also conscripted into military service. Al-Shabaab alone recruited 1716 children in 2020, using threats to tribal elders and parents as a forcing mechanism.[166]

Sexual violence is another ruthless weapon employed by insurgents. Sexual violence is used to intimidate and terrorize the civilian population.[167] There have been instances where women and children were forced to trade sexual favors for food, shelter, or physical protection.[168] In one case, a 15-year-old boy was raped over three consecutive nights by an ISIL commander.[169] In another, a 17-year-old Yazidi girl was sexually abused by multiple ISIL members before being forced to manufacture bombs.[170] Boko Haram alone abducted, raped, or forcibly married 116 girls and nine boys in 2017.[171] Unfortunately, these are common accounts since the UN has verified more than 20,000 cases of conflict-related sexual violence against children since 2006.[172] The UN's most recent report on Children and Armed Conflict included 749 confirmed cases of sexual violence against children in 2019 alone.[173]

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[162] *One in Six Children "Affected by Conflict"—Save the Children*, BBC (Feb. 15, 2018) https://bbc.in/3z3w9ME.
[163] *Boko Haram Fast Facts*, CNN, https://cnn.it/3syuHzd (last updated Feb. 7, 2021)
[164] U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 5, *Delivered to the Security Council and the General Assembly*, U.N. Doc. S/2021/437, A/75/873 (May 6, 2021) [hereinafter UN Children & Armed Conflict Report 2020], https://bit.ly/3g8tRnF.
[165] *Id.*
[166] *Id.* at ¶ 136.
[167] U.N. Secretary-General, *Report of the Secretary-General on Conflict Related Sexual Violence*, ¶¶ 2–3, 8–9, *delivered to the Security Council*, U.N. Doc. S/2017/249 (Apr. 15, 2017), https://undocs.org/en/S/2017/249.
[168] *Id.* ¶ 9.
[169] U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 79, *Delivered to the Security Council and the General Assembly*, U.N. Doc. S/2018/465, A/72/865 (May 16, 2018) [hereinafter UN Children & Armed Conflict Report 2018], https://bit.ly/3D6hH95.
[170] *Id.*
[171] *Id.* ¶ 227.
[172] *Weapon of War: Sexual Violence Against Children in Conflict*, SAVE THE CHILD. 6, https://bit.ly/3ATP4ts.
[173] *Id.* at 6, 13.

As the numbers and accounts demonstrate, insurgents commit brutal acts of violence against civilians. Targeting restrictions only make is easier for insurgents to continue their carnage.[174] When insurgents' freedom of maneuver goes unchecked, it allows them to continue inflicting egregious harm against civilian populations.[175] Retired Lt. Gen. Dave Deptula, former deputy chief of staff for intelligence, surveillance, and reconnaissance, notes that during Operation Inherent Resolve, the Obama Administration placed "too much emphasis on avoiding collateral damage . . . to an extent that well exceeds the requirements of the laws of armed conflicts. In the meantime, ISIS is busy murdering innocent civilians."[176] Focusing on the Islamic State, Lt. Gen. Deptula asks "[w]hat is the logic of a policy that limits the application of force to get rid of the evil that is the Islamic State while allowing them to kill innocent men, women[,] and children?"[177]

Maj. Gen. Dunlap refers to this as the "moral hazard of inaction."[178] He cautions that "these more-than-what-the-law requires policies are getting civilians killed."[179] States impose targeting restrictions in order to save civilian lives. Meanwhile, the insurgents that were spared live on to terrorize innocent civilians. Left unrestricted, innocent civilians will continue to be aggressed. Imagine if the U.S./Libyan coalition had not liberated Sirte from ISIL control—residents would have continued to be conscripted, slaughtered, and used as sex slaves, and the local populace would still be living in "hell." Dunlap is correct that policies restricting the use of force against insurgents are "self-defeating at best, and counterproductive at worst."[180] As French Foreign Minister Laurent Fabius said, the cost of inaction against ISIL "would be to say to these butchers, 'Go ahead, you have a free pass.' We won't accept that."[181] The unfortunate consequence of restricted targeting regimes is that when insurgents are not killed, civilians face even greater harm.

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[174] Kjaergaard & Marrup, *supra* note 86, at 24.
[175] Graham, *supra* note 16, at 668.
[176] Laura Seligman, *Fighting ISIS: Is Pentagon Using Air Power's Full Potential?*, DEF. NEWS (Oct. 11, 2015), https://bit.ly/3jWM6Oc.
[177] *Id.*
[178] Charles J. Dunlap, Jr., *A Squarable Circle?: The Revised DoD Law of War Manual and the Challenge of Human Shields*, JUST SEC. (Dec. 15, 2016) [hereinafter Dunlap JUST SEC.], https://bit.ly/3yYUW47.
[179] *Id.*
[180] Charles J. Dunlap, Jr., *Sadly, We Have to Expect More Civilian Casualties if ISIS is to be Defeated*, LAWFIRE (Mar. 26, 2017) [hereinafter Dunlap LAWFIRE], https://bit.ly/3ASqyJi.
[181] Laura Westcott, *What Countries are Fighting ISIS, and Who Is Sitting on the Sidelines*, NEWSWEEK (Sept. 16, 2014), https://bit.ly/2XCn67t.

B. Amplified Civilian Endangerment

In addition to the outright physical harm perpetrated by insurgents, restrictive targeting regimes unintentionally increase civilian endangerment. These regimes encourage insurgents to commingle with civilian populations, use humans as shields, and utilize lawfare to combat State military superiority. How this develops can be seen in the narrative of the al-Amiriyah Bunker strike during the First Gulf War. On 13 February 1991, the United States executed an attack against an assessed military command and control (C2) center located in Baghdad.[182] According to military intelligence, the bunker was camouflaged, surrounded by barbed wire, and protected by armed guards. Unbeknownst to the U.S. at the time of the attack, civilians—potentially family of senior military and intelligence officials—had been admitted to the top floor the night prior.[183] The results of the strike were catastrophic, with over 400 innocent civilians killed.[184]

Whether the United States' intelligence was flawed or whether the Iraqis were purposefully commingling military assets with civilians, or some combination of the two, is irrelevant for purposes of this Article. What matters is the result. Per the White House:

> The Iraqis quickly realized that placing military assets—including tanks, missiles, and command-and-control facilities—close to civilians and civilian infrastructure could yield substantial benefits. By shielding military assets with civilians and civilian infrastructure, Saddam understood that coalition forces would either avoid attacking targets close to civilians or risk severe political damage from unintended civilian deaths at what would have appeared to be a purely military site.[185]

The unintentional devastation of the al-Amiriyah attack demonstrated to Saddam Hussein that collocation of military assets and the use of human shields was a winning combination. When the U.S. killed civilians, it allowed Saddam to paint the U.S. as the murderer of innocents. The United States was so scarred by

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[182] Tim Arango, *After 25 Years of U.S. Role in Iraq, Scars are Too Stubborn to Fade*, N.Y. TIMES (Feb. 16, 2016), https://nyti.ms/3ss3yho.

[183] Nora Boustany, *Bombs Killed Victims as They Slept*, WASH. POST (Feb. 14, 1991), https://wapo.st/2VWiYyL; *The Battle for Hearts and Minds*, WASH. POST (1998), https://wapo.st/3gdnpMf.

[184] Arango, *supra* note 183 ("The destruction of the Amiriya bomb shelter, in a middle-class Baghdad neighborhood, on Feb. 13, 1991, at the outset of the Persian Gulf war, killed some 408 civilians in the worst way possible: Most were burned alive.").

[185] *Apparatus of Lies: Saddam's Disinformation and Propaganda 1990–2003*, WHITE HOUSE (Jan. 2003), https://bit.ly/3CWzPSB.

the images "of the charred bodies of children being pulled out of the ruins of the bunker," that all future proposed strikes in Baghdad had to be approved by the Chairman of the Joint Chiefs of Staff.[186]

Since the First Gulf War, warfare is even more urbanized. Insurgents, similar to Saddam Hussein, understand the strategic benefits of ignoring the requirements of IHL and commingling military assets and civilian populations. Concealment warfare has become commonplace, offering insurgents unique tactical and strategic advantages. Tactically, collocating with civilian populations makes it difficult for States to distinguish insurgents from civilians, increasing insurgents' freedom of maneuver. As States become more technologically advanced, concealment warfare provides a significant military advantage at little to no cost. Thus, insurgents are frequently utilizing concealment warfare to level the playing field.[187] In recent conflicts, Insurgents operationalized commingling with civilian populations. It is now normal to see ISIL, al-Shabaab, Hamas, and others camouflaging themselves as part of civil society.

While in no way meant to minimize the violence perpetrated by both sides during the Gaza Wars, the fact remains that Hamas deliberately launched rockets from within urban areas, oftentimes located near schools and other protected facilities such as mosques and hospitals.[188] As the Israeli Ministry of Defense learned during their lengthy review of the Gaza Operation:

> Many of the civilian deaths and injuries, and a significant amount of the damage to property during the Gaza Operation, was attributable to Hamas' tactic of blending in with the civilian population and its use of, or operations near, protected facilities and civilian property. . . .
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> . . . .
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> . . . [Hamas] operatives admitted, for example, that they frequently carried out rocket fire from schools (such as the Sakhnin school in the area of Abu Halima, and another school in the al-Amal neighbourhood), precisely because they *knew* that Israeli jets would not fire on the schools.[189]

Hamas' actions, though clear violations of IHL, were and continue to be a standardized practice.

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[186] Canestaro, *supra* note 34, at 482.
[187] *See* Canestaro, *supra* note 34, at 480.
[188] WALZER, *supra* note 45, at xviii.
[189] *2014 Gaza Conflict*, *supra* note 80, ¶¶ 7, 119 (emphasis in original).

Similarly, the use of human shields has become an increasingly prevalent tactic for insurgents despite its prohibition under IHL. By broadcasting the presence of civilians, insurgents aim to prevent attacks against them; an effective tool against adversaries concerned with the public perception of civilian casualties. The tactic allows for a technologically weaker party to change the strategic landscape. Michael Gross explains, "[b]ound by international law and their own military ethos, state armies find themselves hamstrung when confronting [insurgents] willing to draw their own civilians into battle."[190]

As highlighted by Saddam's actions in the wake of the al-Amiriyah attack and the more recent 2014 discovery of a Hamas handbook, insurgents now recognize that States are discouraged from executing attacks when there is a potential for collateral damage.[191] When specific targeting restrictions become public, it simply incentives insurgents to forcefully use as many civilians as necessary to shield themselves. Insurgents are more strategic than once assumed, for they indubitably pay attention to State policies and exploit them.[192] Maj. Gen. Dunlap calls it "polifare," "[w]hen a warfighting entity is able to use (or exploit) policies or political directives that exceed what the law would dictate as effective substitutes for traditional military means."[193]

When the Obama Administration declassified the Presidential Policy Guidance, insurgents responded by modifying their tactics.[194] Adversaries everywhere gained a tactical advantage by simply ensuring collocation with noncombatants due to the requirement of 'near certainty' that no civilians would be injured or killed. And while State policies and rules of engagement are often meant to remain classified, WikiLeaks has taught us that is seldom the case. For instance, when asked about NCVs, a senior U.S. military official responded "we don't put those numbers out" because of the possibility of exploitation by insurgents.[195] However, shortly thereafter, the Associated Press reported that operations against the Islamic State "may authorize strikes where up to 10 civilians may be killed."[196]

When States' policies are telegraphed to the enemy, it provides incentive to exploit these policies. According to Maj. Gen. Dunlap, this explains why ISIL's use of human shields has "proliferated to such an unprecedented degree."[197] In the battle to liberate Mosul, ISIL "encircled by Iraqi forces, herded civilians deeper

[190] GROSS, *supra* note 55, at 128.
[191] Canestaro, *supra* note 34, at 480.
[192] Reynolds, *supra* note 96, at 79.
[193] Dunlap JUST SEC., *supra* note 179.
[194] Dunlap LAWFIRE, *supra* note 180.
[195] McDonell, *supra* note 110.
[196] *Id.*
[197] Dunlap LAWFIRE, *supra* note 179.

into the heart of the historic city to use as human shields as it made its last stand."[198] It is clear that State policies unintentionally increased the use of civilians as shields. And while their use by ISIL reached unprecedented proportions, it is a tool frequently employed by other insurgent groups.[199] Imposing targeting restrictions effectively "rewards (rather than condemn[s]) the enemy" for their illegal actions.[200]

Related to the use of human shields is the advent of lawfare. As briefly discussed *supra*, lawfare is the use of law as a weapon of war.[201] Restricted targeting regimes result in an intensified resort to lawfare by insurgents in order to shift the strategic narrative. This becomes a necessity when insurgents can no longer exclusively rely on a magnitude of civilian casualties caused purely by State military action. While the prototypical use of human shields was deterring attacks, insurgents have now turned their use into an even more sordid affair; a weapon of lawfare to disrepute State action. Human shields are now being used with the expectation that civilians will be killed, bringing condemnation down on the States executing the attack.[202] Instead of publicizing civilian presence to avoid attack, insurgents surreptitiously hide them within military facilities and discredit State operations once civilian casualties are revealed.

Urban warfare is ideal for this, as the concentration of civilians and military objectives naturally increases the likelihood of civilian casualties.[203] ISIL, for instance, clandestinely placed civilians inside military facilities. When these civilians were inadvertently killed, Dabiq[204] used their deaths in an attempt to discredit the coalition, characterizing the strikes as murder.[205] A Pentagon official noted that "

> [w]hat you see now is not the use of civilians as human shields. . . . Now, it's something much more sinister. ISIS is smuggling civilians into buildings so we won't see them, trying to bait the

[198] Jane Arraf, *More Civilians Than ISIS Fighters are Believed Killed in Mosul Battle*, NPR (Dec. 19, 2017), https://n.pr/3D75bpM.
[199] Rubinstein & Roznai, *supra* note 17, at 96–98 (describing how Hamas, Hezbollah, and the Taliban, among others, have incorporated the use of human shields into their tactical plans).
[200] Dunlap JUST SEC., *supra* note 179.
[201] Dunlap WASH. TIMES, *supra* note 48.
[202] GROSS, *supra* note 55, at 144.
[203] Canestaro, *supra* note 34, at 480.
[204] Dabiq is the ISIS propaganda publication printed in several languages aimed at recruiting members. *See generally Overview of Daesh's Online Recruitment Propaganda Magazine, Dabiq*, CARTER CTR. (Dec. 2015), https://bit.ly/2XBvpjT.
[205] Graham, *supra* note 15, at 680.

> coalition to attack, to take advantage of the public outcry and deter action in the future.[206]

This new approach has become a premeditated attempt to cause harm to civilian populations, an outright violation of the requirements under IHL.

Insurgents utilize these casualties to change the strategic narrative and shift the blame entirely to the States executing the attack, oftentimes with success.[207] As General Votel acknowledged, "the enemy . . . has little regard for human life and does attempt to use civilian casualty allegations as a tool to hinder our operations." [208] The heightened risk of collateral damage can offset technological superiority, thus insurgents will increasingly exploit civilian casualties for their own strategic gain. As Hays Parks said, the "defender has accomplished his mission if he makes the attacker miss the target."[209]

Lawfare also has an overt face and involves more than just the secretive placement of civilians in military facilities. Overt tactics employed include fighting from protected facilities including hospitals, mosques, and schools. Israel's Ministry of Defense assessed that:

> Hamas launched rockets from near schools, used hospitals as bases of operation, stored weapons in mosques, and booby-trapped entire neighbourhoods, all in contravention of clear and specific prohibitions of international law. Hamas' strategy was two-fold: (1) to take advantage of the sensitivity of the IDF to civilian casualties on the Palestinian side, in an attempt to deter the IDF from attacking legitimate military targets; and (2) where the IDF did attack, to wield an excellent propaganda weapon against Israel, featuring civilian casualties as well as damage to homes and public institutions. In other words, Hamas chose to base its operations in civilian areas not in spite of, but because of, the likelihood of substantial harm to civilians.[210]

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[206] Terri Moon Cronk, *ISIS Hostage-Taking Caught on Video; Mosul Deaths Go to Formal Investigation*, DEP'T OF DEF. NEWS (Mar. 30, 2017), https://bit.ly/3iUj9Da.
[207] GROSS, *supra* note 55, at 145.
[208] Jim Garamone, *Votel Details Mosul Strike Investigation to Congressional Committee*, DEP'T OF DEF. NEWS (Mar. 29, 2017), https://bit.ly/37P8h3j.
[209] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 191 (1990).
[210] *The Operation in Gaza (27 December 2008–18 January 2009): Factual and Legal Aspects*, ISR. MINISTRY OF FOREIGN AFF., ¶¶ 154, 329 (July 29, 2009) [hereinafter *2009 Operation in Gaza*], https://bit.ly/3jYy3HU .

Other insurgents employ similar tactics, purposefully endangering civilian populations.[211]

Media manipulation also plays an enormous role in the execution of lawfare. Insurgents are eminently media savvy and are able to manipulate the narrative, highlighting State 'brutality' directly to the international community using print, the internet, and social media platforms.[212] Insurgents broadcast false messaging that State and Coalition forces intentionally kill innocent civilians. By fabricating war crimes and exploiting the narrative created by unintentional civilian casualties, insurgents seek to undermine international support and change the strategic landscape.[213] According to Graham, it was the Islamic State's use of lawfare that eroded Canadian public support and resulted in the Canadian government withdrawing strike assets from Iraq in 2016.[214]

Danish Karokhel, the Director of the first internationally recognized independent news agency in Afghanistan, indicated:

> 90 percent of the information that the Taliban provide to the media is false: when only one Afghan soldier gets killed in an attack, the insurgents call the media and claim that 10 foreign soldiers are killed. They are not responsible to anyone for their false claims and misinformation while, on the other side, the government and the international forces have many responsibilities and obligations and can't give false information.[215]

To insurgents, any suggestion that propaganda enhances deterrence or promotes political volatility is an express benefit.

If the primary purpose of lawfare is to place the onus of indiscriminate warfare on States, then the unfortunate truth is that it is an effective technique. Orde F. Kittrie, in his book *Lawfare*, wrote:

> Hamas's battlefield lawfare against Israel has proven to be one of the most valuable weapons in its arsenal, heavily influencing the behavior of Israel, other state actors, and the

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[211] *See* Chirine Mouchantaf, *ISIS Tactics That Have Left Iraqi Special Forces Weakened*, DEF. NEWS (May 8, 2018), https://bit.ly/3ATWNaW (describing how ISIS would take control of civilian homes and target Coalition forces from the upper floors keeping the civilians in the residence).
[212] GROSS, *supra* note 55, at 213.
[213] Graham, *supra* note 15, at 665.
[214] *Id.*
[215] Abdulhadi Hairan, *A Profile of the Taliban's Propaganda Tactics*, HUFFINGTON POST (May 5, 2011), https://bit.ly/3iZq9PP.

> international community as a whole. It has led to Israel being condemned by much of the international community (including traditionally allied states) and being pressured to make concessions to Hamas. On the battlefield, it has required Israel to sacrifice the benefit of surprise and otherwise fight Hamas with one hand tied behind its back, including by deterring Israeli attacks against Hamas's headquarters in Shifa Hospital and, on many occasions, against Hamas fighters and weapons elsewhere.[216]

As the examples above reflect, modern wars fought in urban areas offer insurgents tremendous opportunities to use lawfare and exploit State military efforts.[217] Meanwhile, States get no exemptions from IHL; they are expected to maintain the distinction between combatants and civilians even when insurgents deliberately blur the difference.[218] As Kenneth Anderson so eloquently summarized, facilitating the insurgents' "exploitation of the law for [their] own defensive and propaganda purposes in this way gravely endangers the very persons the law of war seeks to protect—the civilians caught up in the combat zone—and thus undermines the essential fabric of the law of war."[219]

While it is clear that States fight by rules and insurgents do not, the dedication of States to reduce civilian casualties continues.[220] However, these self-imposed restrictions above and beyond the requirements of IHL continue to incentivize the practice of commingling with civilian populations, using human shields, and utilizing lawfare to combat State military dominance. With restrictive targeting regimes, insurgents have no incentive to comply with IHL, for doing so would be a repudiation of their entire strategy. As Walzer said, "[i]t cannot be the case that guerillas can hug the civilian population and make themselves invulnerable.[221]

C. Unrealistic Expectations of a Perfect War

In addition to the increased civilian endangerment stemming from restricted targeting regimes, these regimes also create an impractical standard of victory—one of no civilian casualties. Never in history has there been a perfect war. This is because war is imperfect. War is also chaotic. While certain consequences of war are revealed immediately, others take longer to be exposed. The immediate effects of war are the casualties and destruction of urban areas. No

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[216] ORDE F. KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 330 (2016).
[217] WALZER, *supra* note 45, at xviii.
[218] *Id.* at xiv.
[219] Anderson, *supra* note 18.
[220] Canestaro, *supra* note 34, at 479; Reynolds, *supra* note 96, at 79.
[221] WALZER, *supra* note 45, at 195.

less devastating are the long-term effects of war, the displacement of millions, starvation, and resulting psychological issues. Restrictive targeting regimes set an unrealistic expectation for warfighters, and the global community writ large, that wars can be won without civilian casualties. The reality is that war is dangerous and deadly. There will always be some risk to civilians, but it is up to States to mitigate that risk as much as possible.

This mitigation has occurred with the advent of precision guided munitions ("PGMs"). The U.S. Department of Defense defines PGMs as a "guided weapon intended to destroy a point target and minimize collateral damage. Also called PGM, smart weapon, smart munition."[222] Undoubtedly, the introduction of precision weapons systems has been one of the most important developments in the history of warfare. Aerial bombing campaigns—the days of Dresden and the Blitz—are no longer the norm. PGMs are more effectively delivered on target, reducing the likelihood of civilian casualties.[223] However, the ability of PGMs to minimize collateral damage has resulted in the erroneous belief that civilian casualties can be eliminated altogether.

While eliminating civilian casualties entirely is a commendable aspiration, it is unattainable. Precision weapons systems are fallible. Even the most advanced weapon system can go off course and result in unanticipated civilian casualties. Additionally, as Reynolds points out, "[r]elying too heavily on precision technology may result in overestimation that it cannot be rendered errant by guidance system jamming or other countermeasures employed be an adaptive adversary."[224] Technologically advanced weapons systems are imperfect.[225] Yet, States have created an expectation that PGMs will hit their intended target every time. Canestaro noted this risk as early as 2004, underscoring:

> Ironically, precision warfare might be a victim of its own success in this regard. The relatively bloodless U.S. victories in Iraq, Afghanistan, and Kosovo have created an unrealistic public expectation of swift and low-casualty military campaigns. With a "no casualty campaign" arguably now the de facto standard for any U.S. military operation, air power has come to be judged by a nearly impossible standard. Every instance of unintended collateral damage, no matter how

[222] OFF. OF THE CHAIR. OF THE JOINT CHIEFS OF STAFF, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 170 (2021), https://bit.ly/3xy3FsX (emphasis omitted).
[223] Seligman, *supra* note 177.
[224] Reynolds, *supra* note 96, at 101 (citation omitted).
[225] *See* Max Boot, *The Paradox of Military Technology: On American Power and Vulnerability*, NEW ATLANTIS (Fall 2006), https://bit.ly/3jdqSLC.

> reasonable or unavoidable, is interpreted by some as evidence of a military failure.[226]

States now insist on a level of perfection that cannot reliably be delivered even with technologically advanced weapons. Charles Kels cautions that "[t]he stark reality is that any time combat power is employed innocents are likely to be harmed, no matter how cutting-edge the technology, prescriptive the policy framework, or conscientious the warfighters."[227] While the goal of minimizing civilian casualties is laudable, the expectation that they can be eliminated altogether is unrealistic.

Even if precision munitions could prevent civilian casualties, indirect harms from conflict, including death or injury, often occur weeks or months after combat operations cease.[228] According to Professor Neta Crawford, "[i]ndirect harm occurs when wars' destruction leads to long term, 'indirect,' consequences for people's health in war zones, for example because of loss of access to food, water, health facilities, electricity or other infrastructure."[229] Indirect deaths are the eventual result of State action, and while not considered civilian casualties for purposes of State execution of a strike, these victims of war are certainly civilian casualties nonetheless.

Although the indirect death toll is difficult to estimate, research indicates that "between three and 15 times as many people die indirectly for every person who dies violently [during a combat operation]."[230] Deaths caused by a fractured health care system, malnutrition, and psychological trauma likely far outnumber deaths from combat.[231] According to the United Nation's 2018 Report on the Protection of Civilians, conflicts result in "reverberating effects on water and electricity systems that increase the risk and spread of disease and food insecurity. Civilians are displaced and may lack access to lifesaving and other assistance and remain exposed to further violence."[232]

Widespread trauma is another legacy of conflicts. Columbia University's Michael Wessells found that:

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[226] Canestaro, *supra* note 34, at 479.
[227] Charles Kels, *Civilian Casualties and the Law-Policy Conundrum*, OPINIOJURIS (July 6, 2017), https://bit.ly/2SOjY6n.
[228] *Costs of War Project: Human Costs*, BROWN UNIV.: WATSON INST. OF INT'L & PUB. AFF. [hereinafter *Costs of War Project*], https://bit.ly/3iOtLUC.
[229] Neta C. Crawford, *Human Costs of the Post-9/11 Wars: Lethality and the Need for Transparency*, BROWN UNIV.: WATSON INST. INT'L & PUB. AFF. 2 (Nov. 2018), https://bit.ly/3j2jIeu.
[230] GENEVA DECLARATION SECRETARIAT, GLOBAL BURDEN ON ARMED VIOLENCE 20 (2008), https://bit.ly/3gLkwC3.
[231] *Costs of War Project*, *supra* note 229.
[232] U.N. Secretary-General, *Protection of Civilians in Armed Conflict*, ¶ 42, U.N. Doc. S/2018/462 (May 14, 2018), https://undocs.org/en/S/2018/462.

> Conflicts create extensive emotional and psychosocial stress associated with attack, loss of loved ones, separation from parents[,] and destruction of home and community. Many children develop problems, such as flashbacks, nightmares, social isolation, heightened aggression, depression[,] and diminished future orientation. These problems of mental health and psychosocial functioning persist long after the fighting has ceased and make it difficult for children, who may comprise half the population, to benefit fully from education or to participate in post-conflict reconstruction.[233]

But war trauma extends to a population greater than just children. Research indicates that "[a]mong the consequences of war, the impact on the mental health of the civilian population is one of the most significant . . . . Women are affected more than men. Other vulnerable groups are children, the elderly[,] and the disabled."[234] Additionally, to further compound the devastating effects of combat, a recent study indicates that individuals indirectly exposed to terror may develop psychological issues.[235] Accordingly, due to the large number of individuals that may be indirectly exposed to terrorism, even a low risk of post-traumatic stress disorder (PTSD) may result in high numbers of individuals with substantial posttraumatic stress.

Displacement is also an ongoing reality for those affected by conflicts. According to the United Nations High Commissioner for Refugees (UNHCR), the global community is witnessing the highest levels of displacement on record, with 82.4 million people around the world forced from their homes.[236] The United Nations reports that:

> Refugees and internally displaced persons were exposed to serious protection risks, including killings, sexual and gender-based violence, torture, forced recruitment, trafficking in persons, early and forced marriage and arbitrary arrest and detention. Children, especially unaccompanied or separated children, are particularly vulnerable. Several attacks on camps or sites for internally displaced persons were reported,

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[233] Michael G. Wessells, *Children, Armed Conflict, and Peace*, 35 J. PEACE RSCH. 635, 638 (1998).
[234] R. Srinivasa Murthy & Rashmi Lakshminarayana, *Mental Health Consequences of War: A Brief Review of Research Findings*, 5(1) WORLD PSYCHIATRY 25, 25 (2006), https://bit.ly/3gFCJlu.
[235] Marianne Bang Hansen, Marianne Skogbrott Birkeland, Alexander Nissen, Ines Blix, Øivind Solberg & Trond Heir, *Prevalence and Course of Symptom-Defined PTSD in Individuals Directly or Indirectly Exposed to Terror: A Longitudinal Study*, 80 PSYCHIATRY 171 (2017) (finding that individuals indirectly exposed to terrorism may develop symptoms of PTSD).
[236] *Figures at a Glance*, U.N. HIGH COMM'R FOR REFUGEES, https://bit.ly/35FR7Ee.

> including in Iraq, Myanmar, Nigeria, South Sudan and the Syrian Arab Republic.[237]

These refugees and internally displaced persons face a lack of health care, food and water scarcity, homelessness, no access to sanitation, as well as a host of other concerns. These issues affect the millions impacted by conflict. By the end of 2017, there were 12.6 million forcibly displaced Syrians; other large displaced populations included Iraq (3.3 million), Somalia (3.2 million), and Nigeria (2.0 million).[238]

The Guardian estimates that more than 34,000 displaced persons, many of them fleeing from conflict zones, have died.[239] These deaths occur in detention centers and during the daunting journey both on land and at sea. Aylan Kurdi, a toddler from Kobani, Syria, is one of the most well-known examples of these dangers. Having fled the fighting between the Islamic State and Kurdish forces, Alan, his mother, and his brother, all died when their dinghy sank off the coast of Turkey. A grim photograph captured Alan, floating face down in the surf, drowned while trying to reach safety.[240] Alan is just one story of the thousands. The perils and tribulations facing displaced persons can never be overemphasized.

Restricted targeting regimes create an expectation of bloodless and deathless wars. When combat operations are over, civilian populations are left to deal with the remnants of war. While anything more than zero civilian casualties has become unpalatable, wounds from war are not confined to the battlefield. As Sandro Galea, Dean of Boston University's School of Public Health, recognizes:

> It is in the nature of war to degrade the fabric of the societies it affects. The destruction is comprehensive—it wears away at a country's economy, its environment, its infrastructure, and the physical and mental health of its population. The plight of those displaced by wars, who become refugees for years and decades, is heart-breaking.[241]

No matter how much society wishes it were not so, modern day wars cannot be won without civilian casualties. Even with remarkable advancements in

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[237] U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 65, U.N. Doc. S/2017/414 (May 10, 2017), https://bit.ly/3zHLkMb.
[238] U.N. High Comm'r for Refugees (UNHCR), *Global Trends: Forced Displacement in 2017*, 6 (June 25, 2018), https://bit.ly/3gM21xg.
[239] Holly Watt, Diane Taylor & Mark Rice-Oxley, *Drowned, Restrained, Shot: How These Migrants Died for a Better Life*, GUARDIAN (June 20, 2018), https://bit.ly/3qcSl2X.
[240] *Id*.
[241] Sandro Galea, *The Population Health Consequences of War*, B.U. SCH. OF PUB. HEALTH (Apr. 10, 2016), https://bit.ly/3cX74K1.

technology, a State cannot win a war without inflicting both direct and indirect collateral harm. The only way to avoid civilian casualties is to stop going to war.

D. The Development of a New Norm of Proportionality Under CIL

A final unintentional consequence of restrictive targeting regimes is the development of a new standard of proportionality under CIL. The theory of CIL defines custom as "a practice that emerges outside of legal constraints and which individuals, organizations, and states follow in the course of their interactions, out of a sense of legal obligation."[242] CIL is capable of creating universally binding rules, resting on the implied consent of States expressed via action and practice.[243] Although CIL results from a general and consistent practice of States, it can be developed rapidly in quickly evolving areas of the law.[244]

Article 38(1)(b) of the International Court of Justice Statute applies CIL as "evidence of a general practice accepted as law."[245] The Restatement (Third) of Foreign Relations Law states that "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[246] Both definitions mandate two formative elements for the creation of CIL: the quantitative element and the qualitative element.[247] The quantitative element focuses on the general and consistent practice of States. This is the element that is more objective and readily discernible. The qualitative element focuses on the sense of legal obligation or in Latin *opinio juris sive necessitatis*. This is the element that is more subjective. When both the quantitative (objective) and qualitative (subjective) elements are present, the international practice gains the status of international customary law, and States are considered bound by the resulting custom.[248]

As to the first formative element of State practice, a "general" vice universal practice suffices to generate customary rules binding on all States.[249] Meanwhile, the ICJ has indicated that one of the most important practice is that of "States whose interests are specially affected."[250] The existence of CIL is thus

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[242] Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law*, 17 SUP. CT. ECON. REV. 279, 281–82 (2009), https://bit.ly/3xArNeF.
[243] *Id.* at 279–80.
[244] TULLIO TREVES, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW PIN (2006).
[245] Statute of the Court, 2007 I.C.J. Acts & Docs. 6, at 75, https://bit.ly/3xxwAgQ.
[246] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. L. INST. 1987) [hereinafter RESTATEMENT].
[247] Fon & Parisi, *supra* note 243, at 282.
[248] *Id.* at 282–83.
[249] Introduction to the Rules, *Customary IHL*, INT'L COMM. OF THE RED CROSS: IHL DATABASE, https://bit.ly/3vCwJhK.
[250] North Sea Continental Shelf (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 20), https://bit.ly/3q9IGKI.

"not merely a numbers game . . . . [I]t may be enough that the practice be representative, so long as it includes States whose interests are specially affected."[251] Law of the Sea Tribunal Judge and Arbitrator, Tullio Treves argues, "the practice relevant for establishing the existence of a customary international rule must neither necessarily include all States nor must it be completely uniform."[252] This allows for emerging norms within State clusters of multilateral practice "that are expected to become widespread over time."[253]

The second, qualitative element generally requires that State actions are carried out because of a legal obligation. States act in compliance with norms not merely for ethical reasons, convenience, or habit, but rather out of a sense of legal obligation. This subjective element has been described as "the philosophers' stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules."[254] However, what qualifies as *opinio juris*—and even if it is truly required—is a debate that continues amongst legal scholars.

The spectrum of opinions on the origin and application of *opinio juris* is vast. Karl Wolfke takes a traditional approach, arguing that "the essence of customary law lies in the legalization, mainly by means of acquiesce, of certain factual uniformity in international relations."[255] In Wolfke's estimation, CIL is not intentionally created; instead, "[a]n international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law."[256] Professor Frederic Kirgis takes a more nuanced approach, suggesting that there is a "sliding scale" relationship between the amount of State practice and *opinio juris* needed to produce CIL.[257] The greater the quantity of States that concur in the practice, the less the need for evidence of *opinio juris*.[258]

George Norman and Joel Trachtman "postulate that instead of a 'sense of legal obligation,' the Restatement Third formulation . . . refers to an 'intent to

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[251] Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMP. L. 305, 315 [hereinafter Scharf CIL], https://bit.ly/3qdG1j3.
[252] TREVES, *supra* note 245; *see also* North Sea Continental Shelf, 1969 I.C.J. at 231 (Lachs, J., dissenting) (arguing that generality must include States representing the main legal, economic, and political orientations and geographical areas).
[253] Fon & Parisi, *supra* note 243, at 282–83.
[254] TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 76 (1998), https://bit.ly/3cSjJ0H.
[255] KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 164 (2nd ed. 1993).
[256] *Id.* at 53.
[257] Frederic. L. Kirgis, Jr., *Custom on a Sliding Scal*e, 81 AM. J. INT'L L. 146, 149 (1987), https://bit.ly/3cUyjoL; *see also* John Tasioulas, *In Defense of Relative Normativity: Communitarian Values and the* Nicaragua *Case*, 16 OXFORD J. OF LEGAL STUD. 85, 109 (1996), https://bit.ly/3qcQz1M (applying Kirgis's "sliding scale" to better explain the *Nicaragua* case).
[258] Kirgis, *supra* note 247, at 149.

create or accept a rule of law.'"[259] Vincy Fon and Francesco Parisi concur, stating that "[p]rior to the solidification of a practice into binding custom, States engage in actions on a purely voluntary basis, taking into account costs and benefits of the actions and their interest in establishing a customary rule that will bind for the future."[260] These positions are further supported by Article 38(1)(b) of the ICJ Statute which refers to a "sense of incipient legal obligation."[261] The Restatement language can therefore be interpreted as not referring to a fully formed legal obligation, but rather a perception that a new rule would be beneficial to society. As Judge Lachs wrote in *North Sea Continental Shelf*:

> [T]he motives which have prompted States to accept it [the conviction that something is law] have varied from case to case. It could not be otherwise. At all events, to postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction—and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated . . . .[262]

Thus, CIL in essence is the normalization of conduct, or the realization of social conduct, through multilateral action.

While traditionally only State conduct and *opinio juris* have been considered, there is arguably an overlooked third factor used to define whether an emergent norm has attained CIL status. This third factor is "a context of fundamental change—that can serve as an accelerating agent" enabling CIL to develop rapidly.[263] Matthew Scharf argues, in part relying on the International Court of Justice's *North Sea Continental Shelf Case*,[264] that seismic shifts in the

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[259] George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 570 (2005).
[260] Fon & Parisi, *supra* note 243, at 286–87 (citation omitted).
[261] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, ¶ 207 (June 27), https://bit.ly/3iTTdrE ("Reliance by a State on a novel right, or an unprecedented exception to the principle, might if shared in principle by other States, tend towards a modification of customary international law.").
[262] North Sea Continental Shelf (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), 1969 I.C.J. 3, 232 (Feb. 20) (Lachs, J., dissenting), https://bit.ly/3k3rMux.
[263] Scharf CIL, *supra* note 252, at 306.
[264] North Sea Continental Shelf (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), 1969 I.C.J. 3, 42–43, ¶¶ 71, 73–74 (Feb. 20), https://bit.ly/3k3rMux. The *North Sea Continental Shelf Case* involved the delimitation of the continental shelf areas in the North Sea between Germany and Denmark and Germany and Netherlands beyond the partial boundaries previously agreed upon by these States but now in dispute. The parties requested the Court decide the applicable principles and rules of international law. The *North Sea Continental Self Case* dispelled the myth that duration of the practice (that is, the number of years) was an essential factor in forming customary international law. The Court

international system can lead to the rapid development of international law, challenging the once held notion of its protracted formation.[265] New principles of CIL can thus arise with "exceptional velocity."[266]

Scharf calls these "Grotian Moments" and explains them as "a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance."[267] Per Scharf, a Grotian Moment:

> [C]onstitutes of an acceleration of the custom-formation process due to states' widespread and unequivocal response to a paradigm-changing event in international law, such as the unprecedented human suffering from the atrocities of World War II and the related recognition that there could be international criminal responsibility for violations of international law.[268]

Grotian Moments can and do respond to technological, economic, or societal change. Treves concurs with Scharf, observing that "recent developments show that customary rules may come into existence rapidly . . . . [t]his can be due to the urgency of coping with new developments of technology . . . or it may be due to the urgency of coping with widespread sentiments of moral outrage."[269]

A Grotian Moment may be occurring now, as there is no greater moral outrage in today's wars than the killing of innocent civilians. Additionally, that only a handful of States have restricted targeting regimes is irrelevant, because it is enough that formative elements of a custom are present in a multilateral setting for "specially affected" States.[270] Furthermore, rapidly formed CIL does not have to be "fully fleshed out or rigidly fashioned."[271] Grotian Moments merely require "some underpinning of State practice."[272]

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held that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule." *Id.* at 43, ¶ 74.

[265] *See generally* Scharf CIL, *supra* note 252.

[266] *Id.* at 332.

[267] *Id.* at 308. Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439, 440 (2010) [hereinafter Scharf Grotian Moment], https://bit.ly/3qcwuc0.

[268] Scharf Grotian Moment, *supra* note 268, at 446.

[269] TREVES, *supra* note 245.

[270] North Sea Continental Shelf (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), 1969 I.C.J. 3, 43, ¶¶ 73–74 (Feb. 20), https://bit.ly/3k3rMux.

[271] Scharf CIL, *supra* note 252, at 339.

[272] *Id.* at 340.

States must heed the warning of the possibility of rapidly formed customary international law resulting from the morale outrage of civilian casualties. Public release of State rationale for targeting restrictions may be used to claim persistent objector status or rebut *opinio juris*. However, without the acknowledgement of States' moral imperative driving these policies, the global community may mistakenly believe that a new legal obligation is being formulated. If the U.S. and other States want to ensure that targeting restrictions remain a voluntary practice, they must continue to express—both in words and in deeds—that any prescriptive policies are an attempt to hold themselves to stricter standards than the law of war dictates, and not changes to the law of war.

A new definition of proportionality under CIL would forever change war. States would be hamstrung in their ability to defeat an adversary if even the unintentional death of one civilian was seen as a violation of international law. Warfare would be prolonged due to State fear of miscalculation, and the world would watch as civilian populations were brutally massacred by insurgents. These bespoke norms may eventually develop into a new form of customary international law, forever undermining the intrinsic right of States to defeat an adversary and hindering their ability to protect civilian populations.

V. Conclusion

It is a year in the not-too-distant future. A bloody civil war in Libya—or Yemen, or really any State—has just abated, leaving the country in chaos. The successor to the Islamic State—whomever they may be—has used the power vacuum created by the civil war to take control of a vast swath of territory. The world watches as this new organization slaughters innocent civilians. The international community is pummeled with videos, social media posts, and news articles of beheadings, mutilations, rapes, and mass executions. The world response is overwhelmingly supportive of liberating the civilian population. The United Nations Security Council even issues an Article VII Resolution[273] calling for 'any and all means necessary,' authorizing military action.

Strike assets are in the air and special forces are on the ground, where they wait. Reconnaissance footage shows insurgents taking over schools, hospitals, mosques, power plants, and civilian homes—creating military communications nodes and weapons depots in each location. These insurgents are tactically and strategically savvy; they surround themselves with civilians knowing

[273] United Nations Security Council, Actions with Respect to Threats to the Peace, Breaches of Peace, and Acts of Aggression, https://bit.ly/3vDgT6B ("Chapter VII of the Charter of the United Nations provides the framework within which the Security Council may take enforcement action. It allows the Council to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to make recommendations or to resort to non-military and military action to 'maintain or restore international peace and security.'").

that the Coalition's precision guided munitions are accurate within meters. Society mandates a conflict without civilian casualties and now the Coalition's hands are tied, they cannot possibly liberate the city without inflicting civilian casualties. The urbanized nature of the fight, and the tactics of the adversary, will not allow it.

This narrative unfortunately sounds all too familiar and all too realistic. In today's wars, States take extreme measures to avoid harm to civilian populations. They use precision weaponry, heed the advice of military lawyers, and have introduced proscriptions on targeting. Professor Gabby Blum reminds us that States today are "more restrained, and more constrained" in their methods of warfare and they are "more concerned . . . with the wellbeing of the civilians they affect."[274] However, State measures will never be enough to eradicate war's harms to civilians; they are inherent in the nature of war.

In the words of Yoram Dinstein, "war is hell. [IHL] has not undertaken a mission impossible of purporting to eliminate the hellish consequences of war. What [IHL] basically strives to do is reduce these consequences."[275] Today, States have placed themselves in an untenable position, promising society they will do more, while simultaneously hamstringing their own ability to protect civilian populations; a dangerous position for everyone concerned, except the insurgents and those who seek to do others harm.

To recap, there are four inherent dangers of targeting proscriptions: (1) increased brutality against civilians; (2) amplified civilian endangerment; (3) unrealistic expectations of a perfect war; and (4) the development of a new norm of proportionality under customary international law. States must be cognizant of the inherent dangers of positing a policy doctrine of a perfect strike, because a perfect strike may ultimately be imperfect to a State's ability to protect civilians and defeat an adversary. States comply with IHL even when their adversaries do not; but war remains imperfect and civilian casualties are inevitable. Civilians are subject to the perils of war so long as wars exist. Given the United Nations' mandate of a responsibility to protect,[276] States simply cannot restrict targeting to the extent that it further endangers civilian populations around the globe; it is hypocritical at best and devastating at worst.

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[274] Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 HOUSTON L. REV. 745, 782 (2019), https://bit.ly/3cXCQGN.

[275] Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, *in* 87 NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES: INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 483, 487 (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011), https://bit.ly/3iSMFcP.

[276] G.A. Res. 60/1, ¶ 139 (Oct. 25, 2005), https://bit.ly/2SFE0jz (stating that the international community has the responsibility "to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." *Id.*)

THE CASE FOR STANDING COURTS-MARTIAL

Major Celidon H. Pitt, USMC*

The need to formally convene courts-martial is a historical relic that no longer serves the purposes of military law. Ad hoc courts-martial might have been necessary and useful at one time, but that time has passed, and commanders should be permitted to shed some of the unnecessary administrative burdens associated with the legacy system. Congress should therefore establish a standing courts-martial system to which commanders may refer charges for adjudication instead of having to individually convene and disband each tribunal. After exploring the historical origins and constitutional basis for courts-martial, this Article proposes specific modifications to the Uniform Code of Military Justice and Rules for Court-Martial that would implement standing courts-martial. It then offers an example of how one service, the Marine Corps, could implement the proposal, and concludes by demonstrating the new system's utility in deployed environments. Courts-martial have become permanent fixtures in the military justice landscape—it is time they have the statutory and procedural status to match.

> "We must divest of legacy capabilities that do not meet our future requirements, regardless of their past operational efficacy."[1]

I. Introduction

Military law has a distinct purpose: "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the

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[1] 38TH COMMANDANT OF THE MARINE CORPS, COMMANDANT'S PLANNING GUIDANCE 2 (2019).

national security of the United States."[2] Any aspect of the military justice system that burdens commanders, harms servicemember rights, or impedes the administration of good order and discipline should be reformed. The need to formally convene courts-martial fits all three categories. In light of the level of expertise needed to comply with the elaborate system of rules that now govern courts-martial,[3] recent debate has centered on whether Congress should curtail commander discretion over how to dispose of criminal cases.[4] This Article addresses the much narrower question of whether the military justice system has evolved away from the need for a commander to formally convene a court-martial in the first place.

At best, ad hoc tribunals are a vestige from a bygone era when courts-martial were primarily disciplinary tools rather than judicial procedures, before the Uniform Code of Military Justice (UCMJ) standardized and professionalized the practice of military justice. At worst, convening individual courts invites inefficient processes and inconsistent outcomes while undermining the credibility of the military justice system. Ad hoc courts-martial might have been necessary and useful at one time, but that time has passed. While commanders must remain at the heart of the disciplinary process, they should also be permitted to shed some of the unnecessary administrative burdens associated with the "legacy" system. Congress should therefore establish a standing military court system that commanders may refer charges to for adjudication, instead of individually convening and disbanding each tribunal.

Part II of this Article explores the historical origins for the court-martial convening authority, placing that authority within the broader context of the commander-driven military justice system. It will also examine the constitutional basis for U.S. courts-martial and assess their federal counterparts under Article III of the Constitution. Part III proposes specific modifications to the Manual for Courts-Martial that will create standing military courts, define their authority, and govern their implementation. Discussion will focus on the UCMJ and the Rules

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 3 (2019) [hereinafter MCM].

[3] One expert recently described the military justice system as a "Rube Goldberg machine" because it has "many moving parts of various types, maniacally designed to achieve some simple goal." Eugene Fidell, *Rube Goldberg and Military Justice*, JUST SEC. (Apr. 6, 2020), https://bit.ly/3j7mH5B.

[4] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540F, 133 Stat. 1198, 1367 (2019) (requiring the Secretary of Defense to evaluate "the feasibility and advisability of an alternative military justice system," in which charging decisions are made by judge advocates, not commanders); I Am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong. § 2 (2020) (proposing the establishment of an Office of the Chief Prosecutor within each military department to make charging decisions for sex-related offenses); Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014) (calling for military lawyers to decide how to dispose of offenses). *But see* Michel Paradis, *Is a Major Change to Military Justice in the Works?*, LAWFARE (May 4, 2020, 11:30 AM), https://bit.ly/35K8cwC (arguing that Congress might not have the constitutional authority to grant prosecutorial discretion to judge advocates rather than commanders).

for Court-Martial, highlighting how each modification will benefit the stakeholders in the military justice system by improving its efficacy and efficiency. Finally, Part IV demonstrates how one service, the Marine Corps, could staff a standing court-martial office with relatively minor adjustments to current force structure, as well as how standing courts could be applied in current and foreseeable operating environments. Courts-martial have become permanent fixtures in the military justice landscape—it is time they have the statutory and procedural status to match.

II. Background

The commander has played a central role in the U.S. military justice system since its inception.[5] In fact, "[i]t would be inconsistent with our doctrine, and the needs of our globally deployable military, to organize our justice system in any other way."[6] This is because command authority derives, at least in part, from disciplinary authority.[7] The doctrine of command responsibility also requires commanders to retain the authority to discipline their troops.[8] But a commander-driven system also leads to an inherent tension between the military justice system's dual functions: it is both a tool for enforcing discipline and an arbiter of criminal liability.[9] This tension has led to a gradual but steady progression of courts-martial from low-level, informal hearings to trials more procedurally and substantively in line with the civilian criminal justice system. Part II of this Article provides a brief history of the military justice system, concluding that the authority to refer charges to a standing court-martial preserves the traditional role of the

[5] *See generally* Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1 (1968) (tracing the exercise of judicial functions by military commanders throughout British and U.S. history).
[6] Lindsay L. Rodman, *Unity of Command: Authority and Responsibility Over Military Justice*, 93 JOINT FORCES Q. 71, 72 (2019).
[7] *See id.* at 74–75 (contextualizing the role of military justice within joint and service command and control doctrines); Kyle G. Phillips, *Military Justice and the Role of the Convening Authority*, U.S. NAVAL INST. PROC., May 2020 ("The authority to discipline and hold people accountable under the law is the backbone of command authority."); William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 76 (1980) ("[A] commander cannot be held responsible for mission accomplishment unless he is given the necessary resources and authority.").
[8] Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, *in* MILITARY JUSTICE IN THE MODERN AGE 106, 115 (Alison Duxbury & Matthew Groves eds., 2016).
[9] *See* Hansen, *supra* note 5, at 2–3 (identifying this theme in the congressional hearings that led to the adoption of the UCMJ); Memorandum from Sec'y of Def. to the Secretaries of the Military Dep'ts et al., Subject: Discipline and Lethality (Aug. 13, 2018) ("The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members."). *But see* William C. Westmoreland, *Military Justice–A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971) ("A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.").

commander and is not substantively different from the authority to convene a court-martial itself.

A. Origins of the Convening Authority

Military law is "considerably older than our Constitution."[10] The ancient Greeks and Romans, for example, criminalized desertion, mutiny, and cowardice among their militaries, with punishments ranging from death and maiming to extra duties and dishonorable discharge from the service.[11] Throughout the Middle Ages, European military commanders exercised summary jurisdiction over their troops, primarily for military-specific offenses, while operating far from the civil court constructs that would ordinarily oversee the process.[12] By the sixteenth century, rudimentary "codes" in Sweden and the Netherlands implemented frameworks for the first courts-martial, then known as courts or councils of war.[13] The Swedish code, promulgated by Gustavus Adolphus,[14] inspired the British to adopt the first Articles of War in 1639 and, fifty years later, the Mutiny Act.[15] Both provisions recognized court-martial jurisdiction over servicemembers only "abroad or in time of war," and only for the offenses of mutiny, sedition, and desertion.[16] All of these systems, from the Romans to the British, were designed to be commander-driven and expeditionary, enforceable only under narrow circumstances and carrying almost no administrative overhead or protections for the accused.[17] The tribunals operated outside the civilian criminal court construct, and each one existed only for the lifespan of a single case, freshly convened and disbanded as required by military commanders.

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[10] 1 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 15 (2d ed. 1920).
[11] *Id.* at 17.
[12] *See* JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE 3–4 (1974).
[13] *Id.* at 4–5.
[14] Adolphus's "articles for the maintenance of order" established two tiers of court-martial: regimental, which handled lower-level offenses and was convened on a case-by-case basis, and standing, which was presided over by the commanding general and heard more egregious allegations, like treason. David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 132–34 (1980). No subsequent systems seem to have adopted this "standing" feature until the early 2000s, when the United Kingdom implemented permanent trial-level military courts. *See* Ann Lyon & Geoffrey Farmiloe, *The New British System of Courts Martial*, *in* MILITARY JUSTICE IN THE MODERN AGE, *supra* note 8, at 168.
[15] WINTHROP, *supra* note 10, at 18–19.
[16] BISHOP, *supra* note 12, at 7. Updates to the Mutiny Act in 1718 expanded its jurisdiction to apply domestically so that servicemembers could be tried "within and without the realm, in peace and war." *Id.* at 8. Parliament similarly expanded the Articles of War in 1803. *See* WINTHROP, *supra* note 10, at 20.
[17] *See* WINTHROP, *supra* note 10, at 45–47.

The U.S. military justice system is derived primarily from the British model.[18] In 1775, on the same day that the Continental Congress resolved to "immediately raise" a military force, it also appointed George Washington to lead a committee "to prepare rules and regulations for the government of the Army."[19] A month later, the committee adopted provisions mostly from the British Articles of War in place at the time, which the colonists were already familiar with from fighting alongside British forces in North America.[20] The system established three tiers of court-martial, depending on the severity of the offense and the rank of the accused,[21] and most offenses were military-specific.[22] To initiate a court-martial, a commissioned officer signed a formal "preferral" of charges against the accused, which was then forwarded to the accused's commander for "referral" to trial if, in the commander's discretion, a court-martial was appropriate.[23] The authority to "convene" a court-martial also rested with the commander of the accused, who simply "published an order announcing the place and time of the trial, the name of the person or persons to be tried, and the appointment of all court-martial personnel, which included the persons to serve as court members (judge and jury) and as the judge advocate (prosecutor)."[24] From the beginning, therefore, the "convening authority," which focused on the technical assembly of the court, was more administrative than the "referral authority," which centered on the decision of whether to bring charges. This basic structure remained in place through the nineteenth century[25] and continues to inform the current system.[26]

Several key features have changed, however, with direct bearing on the establishment of standing courts-martial. In the foundational treatise on U.S. military justice, first published in 1886, William Winthrop described a court-martial as "a temporary summary tribunal—not a court of record."[27] He based this observation on fundamental aspects of the courts-martial then in place: "no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, [a] judgment [that] is simply a recommendation, not operative till

[18] *See* Schlueter, *supra* note 14, at 136, 144. The most significant difference is that the U.S. system was "wholly statutory, having been, from the beginning, enacted by Congress as the legislative power," rather than decreed by the monarch. WINTHROP, *supra* note 10, at 21.
[19] WINTHROP, *supra* note 10, at 21.
[20] MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 41–42 (2015) [hereinafter MJRG]. The committee also relied on the Articles of War enacted by the Massachusetts Bay colony, but that system was in turn heavily dependent on the British Articles. Schlueter, *supra* note 14, at 147.
[21] *See* Schlueter, *supra* note 14, at 148–49.
[22] MJRG, *supra* note 20, at 43. Common offenses included desertion, absence without leave, and contemptuous words toward the government or military commander. *Id.*
[23] *Id.* at 45. The commander also had the authority to dispose of the charges at a lower forum or dismiss them altogether. *Id.*
[24] *Id.* at 46; *see also* WINTHROP, *supra* note 10, at 158–61 (summarizing the contents of a historical convening order).
[25] MJRG, *supra* note 20, at 43.
[26] United States v. Ortiz, 138 S. Ct. 2165, 2175 (2018).
[27] WINTHROP, *supra* note 10, at 49.

approved by a revisory commander[,] . . . . and not only the highest but the only court by which a case of a military offence can be heard and determined."[28] After various statutory and policy updates, each of these points is no longer accurate to some degree. Winthrop also noted that a court-martial traditionally "has no fixed place of session [and] no permanent office or clerk."[29] This too is no longer accurate in practice, but the regulations have not caught up to reflect the reality.

B. U.S. Military Courts

Article III of the U.S. Constitution vests "the judicial Power of the United States . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[30] The phrase "judicial power" is generally understood to mean the authority to "act upon core private rights to person and property,"[31] and the express grant of it in Article III would seem to preclude its exercise beyond those parameters.[32] Yet military courts, even though they exercise a form of judicial power, are not Article III courts.[33] In fact, courts-martial and other military tribunals "are conspicuously absent from the Constitution."[34] Instead, Congress enacted the UCMJ[35] and its predecessor legislation under Article I's grant of authority "[t]o make Rules for the Government and Regulation of the [armed forces]."[36]

The Supreme Court initially sanctioned this authority in 1858, stating that Congress's "power to provide for the trial and punishment of military and naval offenses . . . is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States."[37] In addition to the "make rules" clause, the Court relied on Congress's authority "to provide and

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[28] *Id.* at 50.
[29] *Id.*
[30] U.S. CONST. art. III, § 1.
[31] Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 576 (2007).
[32] *See id.* at 575 ("Throughout the nineteenth century, jurists agreed that 'Congress cannot vest any portion of the judicial power of the United States' in entities other than the courts it has 'ordained and established' in conformity with Article III.").
[33] *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 656–657 (2004) (identifying courts-martial as exceptions to Article III's mandate); *see also* WINTHROP, *supra* note 10, at 49 ("[A court-martial] has no common law powers whatever, but only such powers as are vested in it by express statute or may be derived from military usage.").
[34] Paradis, *supra* note 4; *see also* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (exploring the Framers' experience with and understanding of military tribunals).
[35] 10 U.S.C. §§ 801–946 (2019).
[36] U.S. CONST. art. I, § 8, cl. 14; *see also* WINTHROP, *supra* note 10, at 48–49 (addressing the "authorization" of courts-martial in the Constitution).
[37] Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858); *see also* Pfander, *supra* note 33, at 648 ("[T]he boundary lines between Article I tribunals and Article III courts have been marked neither by logic nor by constitutional text, but by history, custom, and expediency.").

maintain a Navy"[38] and the President's authority as commander in chief of the armed forces[39] to conclude that courts-martial may exist "entirely independent" of Article III courts.[40] Yet this authority has limits. For example, it does not permit court-martial jurisdiction over ex-servicemembers because they no longer have a relationship with the armed forces (and presumably the armed forces no longer have an interest in their good order and discipline).[41] This rule accords with the broader principle that the jurisdiction of military courts may not "encroach[] on the jurisdiction of federal courts set up under Article III of the Constitution, where persons on trial are surrounded with more constitutional safeguards than in military tribunals."[42] These safeguards include a broader, more diverse federal jury composition than the typical panel of servicemembers, as well as the guaranteed salary and lifetime tenure "during good behavior"[43] offered to Article III judges to incentivize their independence.[44] The Supreme Court has nevertheless expressed confidence that the military justice system offers a fair forum for the adjudication of criminal behavior,[45] and, as recently as 2018, the Court upheld the constitutionality of the non-Article III court-martial system[46] while observing that "[t]he military justice system's essential character [is,] in a word, judicial."[47]

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[38] U.S. CONST. art. I, § 8, cl. 13.
[39] U.S. CONST. art. II, § 2.
[40] *Dynes*, 61 U.S. at 78–79. The Court also cited the 5th Amendment's exclusion of "cases arising in the land or naval forces" from its grand jury requirements. *See id.* at 79 (1858). *But see* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 n.5 (1950) (stating that this provision of the 5th Amendment "does not grant court-martial power to Congress").
[41] *Quarles*, 350 U.S. at 15 ("[T]he power granted Congress 'To make Rules' and regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."). The regular use of uniformed trial counsel as Special Assistant United States Attorneys (SAUSAs) slightly blurs this distinction. SAUSAs work with their affiliated U.S. Attorney's Office to prosecute civilians in federal court for felony and misdemeanor offenses that occurred within the physical jurisdiction of military installations. U.S. DEP'T OF THE NAVY, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY'S UNIFORMED LEGAL COMMUNITIES 89 n.188 (2019) [hereinafter COMPREHENSIVE REVIEW].
[42] *Quarles*, 350 U.S. at 15. *But see* United States v. Ortiz, 138 S. Ct. 2165, 2174 (2018) ("The procedural protections afforded to a servicemember are virtually the same as those given in a civilian criminal proceeding, whether state or federal."). This contrast is mostly an anachronism: by the time of the *Ortiz* decision, the military justice system afforded more substantial protections to the accused than it did at the time of the *Quarles* decision.
[43] U.S. CONST. art. III, § 1.
[44] *Quarles*, 350 U.S. at 17–19; *see also* Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL L. REV. 49, 57–61 (2009) (placing the debate over judicial tenure for military judges in the context of judicial independence).
[45] *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[T]he military court system generally is adequate to and responsibly will perform its assigned task . . . [and] vindicate servicemen's constitutional rights.").
[46] *Ortiz*, 138 S. Ct. at 2178.
[47] *Id.* at 2174. *Contra id.* at 2199 (Alito, J., dissenting) (arguing that courts-martial "have always been understood to be an arm of military command exercising executive power, as opposed to independent courts of law exercising judicial power").

Article I tribunals remain inferior to Article III courts through several structural features. Direct appellate review,[48] the codification of various common law writs,[49] and the grant of federal jurisdiction over common law proceedings challenging inferior tribunal rulings,[50] for example, have maintained Article III federal court oversight of Article I tribunals. Courts-martial are no exception. They operate beyond the "traditional boundaries" of Article III courts by exercising jurisdiction over servicemembers being disciplined by the military chain of command,[51] but their outcomes are still subject to federal court oversight.[52] In *Schlesinger v. Councilman*, for example, the Supreme Court recognized the authority of federal district courts to grant collateral relief from "void" judgments of courts-martial that had exceeded their jurisdiction.[53] Other potential avenues of oversight include federal court review of service discharges, hearing of habeas corpus claims, and enjoinder of courts-martial through common law tort claims.[54] The status of courts-martial as "inferior tribunals" means "they do not exercise the [Article III] judicial power, but remain subject to it."[55]

Finally, not all military courts are courts-martial. Under Article 66 of the UCMJ, each service's Judge Advocate General has established a Court of Criminal Appeals (CCA) staffed by uniformed attorneys with jurisdiction to review judgments of courts-martial.[56] CCA decisions are in turn reviewed by the Court of Appeals for the Armed Forces (CAAF), which consists of five civilian judges who are appointed by the president and serve fifteen-year terms.[57] The UCMJ explicitly states that CAAF "is established under Article I of the Constitution," and that it is "located for administrative purposes only in the Department of Defense."[58] CAAF decisions, other than denials of petitions for review, are then

[48] *See* Pfander, *supra* note 33, at 721–24.
[49] *See id.* at 724–27.
[50] *See id.* at 727–31.
[51] *See id.* at 715–17.
[52] *See id.* at 731 (identifying examples of "midstream [federal] judicial intervention in cases involving clear-cut violations of federal rights"); *see also* WINTHROP, *supra* note 10, at 52 (discussing federal court authority to conduct habeas review of courts-martial); Eric Freyfogle, *Post-Conviction Review in the Federal Courts for the Servicemember Not in Custody*, 73 MICH. L. REV. 886 (1975) (discussing non-habeas review of court-martial convictions).
[53] Schlesinger v. Councilman, 420 U.S. 738, 748 (1975).
[54] *See* Pfander, *supra* note 33, at 754; s*ee also* MJRG, *supra* note 20, at 84 (discussing the "collateral review" of courts-martial by Article III courts).
[55] *See* Pfander, *supra* note 33, at 757.
[56] Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2019). *But cf.* WINTHROP, *supra* note 10, at 54 ("Not being subject to being reversed or appealed from, the judgment of a court-martial of the United States is, within its scope, absolutely final and conclusive."); MJRG, *supra* note 20, at 55 ("the primary responsibility for review [in the eighteenth and nineteenth centuries] rested with the commander who convened the court-martial").
[57] Article 142, UCMJ, 10 U.S.C. § 942 (2019); *see also* MJRG, *supra* note 20, at 1019–20 (comparing CAAF judges with their Article III counterparts).
[58] Article 141, UCMJ, 10 U.S.C. § 941 (2019). An early proposal to move the highest military appellate court into the Article III system does not seem to have gained much traction. *See* Daniel P. O'Hanlon,

subject to review by the U.S. Supreme Court via writ of certiorari.[59] The Supreme Court recently evaluated this scheme and concluded that the standing military appellate courts are indeed constitutional.[60]

Based on the above, the constitutionality of courts-martial does not rest on their ad hoc nature. As the Supreme Court noted in *McClaughry v. Deming*, "[a] court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction."[61] In other words, as long as the composition and procedure of a court-martial comply with the UCMJ, and the UCMJ complies with the Constitution, the court-martial will be constitutional.[62] With the changes proposed to the UCMJ below, standing courts-martial would be as constitutional as their ad hoc counterparts currently are.

III. Proposal

The establishment of standing courts-martial offers benefits to all stakeholders in the military justice system: the commander, the accused, the alleged victim, and the institution. Part III of this Article makes specific proposals for the necessary modifications to the UCMJ and Rules for Court-Martial to implement standing courts and highlights the ways each change will improve the current system. Congress should incorporate these modifications to the UCMJ via the National Defense Authorization Act after conducting substantive hearings on their scope and impact. The president should then implement the subsequent changes to the Rules for Court-Martial via Executive Order.[63] These proposals are narrowly tailored, changing no more than is necessary to better align means (the administration of military justice) with ends (military readiness and good order and discipline). This analysis will demonstrate that, rather than being another

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The Military Judicial System: Should It be Brought Under Article III?, 2 L. & SOC. ORD. 329 (1972) (arguing that Congress had the authority to declare CAAF's predecessor court "be vested with Article III status and power," staffed with lifetime judges and given expanded authority to review writs of habeas corpus).

[59] *See* 28 U.S.C. § 1259; Article 67a, UCMJ, 10 U.S.C. § 867a (2019).

[60] "CAAF is a permanent court of record created by Congress; it stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction in accordance with established rules and procedures; and its own decisions are final (except if we review and reverse them)." Ortiz v. United States, 138 S. Ct. 2165, 2180 (2018).

[61] McClaughrey v. Deming, 186 U.S. 49, 62 (1902). The Court went on to observe that a "court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved." *Id.* at 63. This observation is descriptive, though, not prescriptive, and it does not bar the creation of standing courts-martial.

[62] *See* WINTHROP, *supra* note 10, at 33–35 (noting that military justice provisions may not contravene existing law).

[63] Article 36, UCMJ, 10 U.S.C. § 836 (2019) (granting the President the authority to implement pretrial, trial, and post-trial court-martial procedures).

example of the "civilianization" of military justice, the call for standing courts-martial is the rare procedural change that offers a range of benefits without altering the fundamental nature of military justice itself. These changes represent a subtle but fundamental shift in the design of the military justice system. The overall concept of replacing temporary courts-martial with permanent ones is simple. Making the new system legally and procedurally sound, though, requires updates to various statutory and rules-based provisions.

A. Framework

The following analysis addresses the advantages of permanent courts along three primary lines of effort: efficacy, efficiency, and credibility.[64] If the military justice system is a tool for strengthening national security, then its structure should enable the accomplishment of that mission. Instead, the current system of ad hoc tribunals, which was designed to afford commanders maximum discretion over the military justice process, increases commanders' administrative burdens and exposure to risk at the appellate level without offering corollary benefits. According to one former Army Chief of Staff, "[m]ilitary justice should be efficient, speedy, and fair."[65] Yet a general decline in contested trials over the last twenty-five years has led to a lack of familiarity with the administrative requirements of courts-martial among both commanders and staffs.[66] Unfamiliarity, in turn, breeds inefficiency, a cycle that becomes self-perpetuating[67] as fewer commanders turn to courts-martial to resolve disciplinary issues because the process is cumbersome and riddled with delays.[68] The military legal

[64] A line of effort "links multiple tasks and missions using the logic of purpose." It describes and connects the major efforts/actions of the campaign. JOINT CHIEFS OF STAFF, JOINT PUB. 5-0: JOINT PLANNING IV-30 (2020). These lines of effort are similar to the categories that guided the MJRG's work, which included "improv[ing] the functionality" and "strengthen[ing] the structure of the military justice system," "increas[ing] transparency," "enhanc[ing] fairness and efficiency," and "streamlin[ing]" and "moderniz[ing]" the practice. MJRG, *supra* note 20, at 6–8.

[65] Westmoreland, *supra* note 9, at 8.

[66] *See, e.g.*, STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, COMMANDERS' PHILOSOPHY ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE MARINE CORPS 2 (2012) [hereinafter COMMANDERS SURVEY] (observing that the rate of decline in the use of special courts-martial "accelerated at a seemingly unnatural pace" between 1997 and 2011); COMPREHENSIVE REVIEW, *supra* note 41, at 81 (visually depicting the decline in frequency of Navy general and special courts-martial between 2000 and 2019). The majority of Marine Corps Special Court-Martial Convening Authorities between 2001 and 2011 referred between one and five cases to special court-martial during their time in command, and less than 17% referred more than ten cases. COMMANDERS SURVEY, *supra,* app. B at 3.

[67] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 79–80 (observing the trend of fewer courts-martial leading to less familiarity with them, which in turn leads to fewer courts-martial).

[68] *See, e.g.*, Memorandum, *supra* note 9 ("Administrative actions should not be the default method to address illicit conduct simply because it is less burdensome than the military justice system."); COMPREHENSIVE REVIEW, *supra* note 41, at 81, 92 (finding that extended case-processing times have a negative effect on good order and discipline); COMMANDERS SURVEY, *supra* note 66, at 1 ("The number one reported reason by commanders for the reduced use of [special courts-martial] was a lack of timely processing."); Westmoreland, *supra* note 9, at 6–7 ("[The military] justice system should

community has become familiar with the need to convene courts-martial, but the current system is opaque to commanders, servicemembers, and victims, none of whom are generally familiar with the construct until they participate in the process (if at all). This creates a perception that the military justice system is unnecessarily antiquated as well as more opaque than its civilian counterpart. The establishment of standing courts-martial, on the other hand, implements a system that most people already recognize from the civilian world, and to some degree probably presume is the system the military already uses. Additionally, professionalization of the system leads to more predictable outcomes, which in turn bolsters credibility.

Various pieces of legislation over the years have sought to improve the military justice system. The Military Justice Act of 2016 ("MJA 16") is the most recent example to have been signed into law.[69] MJA 16 was largely derived from the work of the Military Justice Review Group (MJRG), a panel of military justice experts convened in 2013 by the Department of Defense General Counsel at the direction of the Secretary of Defense.[70] The panel conducted a comprehensive review of the UCMJ, guided by the overall goal of "ensur[ing] that it effectively and efficiently achieves justice consistent with due process and good order and discipline."[71] To achieve this goal, the MJRG began with the then-current UCMJ "as a point of departure" and considered opportunities to more closely align military justice practice with Article III federal criminal practice.[72] Although some critics have expressed concerns about this broader trend toward the "civilianization" of military justice,[73] the federal criminal justice system remains the closest analog to the military justice system.[74] This Article takes the same

operate with reasonable promptness . . . . A military justice system cannot allow a backlog of cases to develop.").

[69] Military Justice Act of 2016, Pub. L. No. 114-328, § 5542, 130 Stat. 2935 (2016).

[70] MJRG, *supra* note 20, at 5.

[71] *Id.*

[72] *Id.* The United Kingdom recently undertook a similar endeavor, culminating in the establishment of standing courts-martial. *See* CLAIRE TAYLOR, HOUSE OF COMMONS LIBRARY, RESEARCH PAPER 05/75, BACKGROUND TO THE FORTHCOMING *ARMED FORCES BILL* 34 (2005) ("[T]he Bill is intended to reflect civilian criminal justice measures already in force or to incorporate changes that are being made, in order to bring the system of Service law more closely into line with civil law, where practical.").

[73] *See, e.g.*, Frederic I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512 (2017) (questioning whether the military justice system remains sufficiently distinct from the civilian criminal justice system).

[74] *See* Article 36(a), UCMJ, 10 U.S.C. § 836(a) (2019) (permitting the President to prescribe "regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States district courts"); MJRG, *supra* note 20, at 79 ("With military rules and procedures modeled on civilian rules and procedures, courts-martial can look to federal court decisions interpreting those rules and procedures as persuasive authority."); *see also* WINTHROP, *supra* note 10, at 54–55 (identifying parallels between courts-martial and civilian criminal courts in the historical context).

approach the MJRG did, exploring several aspects of the Article III system that bear directly on the proposal to establish standing military courts.

B. Recommendations

The proposed changes to the UCMJ and the Rules for Courts-Martial (R.C.M.)[75] shift administrative responsibility from commanders to supporting institutions like the military judiciary and legal services offices. This continues a trend over the last fifty years toward the professionalization of the military trial administration apparatus.[76] To be clear, these proposals do not strip commanders of investigation, disposition, charging, and post-trial authorities, as some recent proposals would.[77] Nor do they affect commanders' control of the spectrum of disciplinary measures short of court-martial, from informal counseling, to nonjudicial punishment, to summary court-martial. Instead, they favor functionality over obsolete custom by streamlining the military justice system.

The original UCMJ, passed in 1950, is the oldest precedent considered. Previous models of the U.S. military justice system are useful for historical context,[78] but they do not provide a worthwhile template for future modifications because the UCMJ marked such a significant paradigm shift from those previous models.[79] The 2019 UCMJ and R.C.M. serve as the baseline, with the goal of making as few changes as possible to achieve the desired endstate.[80] The primary analytical focus is weighted toward the provisions that are most important to a standing court-martial system. Congress could modify various R.C.M.s, depending on the scope of its interest and mandate,[81] but this proposal aims to be a scalpel, not a hatchet.

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[75] The R.C.M. govern court-martial jurisdiction, court-martial procedure, and post-trial requirements, among other areas. The President promulgates the R.C.M. via executive order based on congressional delegation of this authority in the UCMJ and his Article II authority as Commander in Chief of the Armed Forces. *See* U.S. CONST. art. II, § 2, cl. 1; Article 36, UCMJ, 10 U.S.C. § 836 (2019); *see also* MCM, *supra* note 2, app. 15, intro.

[76] *See* Ku, *supra* note 44, at 52–56 (surveying the evolution of the role of military judges within the U.S. military justice system).

[77] *See supra* note 4 and accompanying text.

[78] *See, e.g.*, Schlueter, *supra* note 14, at 144–60 (tracing the development of the U.S. court-martial system from 1775 to 1950).

[79] *See* MJRG, *supra* note 20, at 41 (categorizing the post-World War II period as a distinct "phase" in the history of military justice).

[80] In addition to the specific provisions outlined below, the text of the R.C.M.s will need to be generally updated throughout to replace "convening authority" with "referral authority."

[81] For instance, preliminary hearings could be brought under the purview of the standing courts, via changes to Article 32, UCMJ, and R.C.M. 405, but this depends on establishing standing courts in the first place.

1. Court-Martial Structure

a. Jurisdiction.

Article 16. "Courts-martial classified." No single UCMJ provision declares that courts-martial are temporary. Rather, their ad hoc nature stems from the lack of a provision establishing their permanence. The most direct way to fix that is by adding a paragraph (e) to the current text of Article 16:

> (e) Standing Courts-Martial. Each Judge Advocate General shall establish a permanent court-martial system to hear general courts-martial, as described in subsection (b), and special courts-martial, as described in subsection (c), for the hearing of cases in accordance with sections 818 and 819 of this title. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed to proceedings under this section.

This modification to Article 16 would establish permanent trial courts in much the same way that Article 66 establishes permanent appellate courts, leaving it up to the Judge Advocates General to implement them in their respective services.[82] It also parallels the idea of the Secretaries establishing military judge detailing procedures from Article 30a, which recently expanded the pre-referral authority of the military judiciary.[83] The establishment of standing courts-martial will eliminate the need to convene individual courts-martial. Under this proposal, commanders will therefore relinquish the traditional "convening authority" while retaining the "referral authority" to send cases to trial at the permanent courts.[84]

R.C.M. 201. "Jurisdiction in general." "Jurisdiction" is the authority to hear a case and render a legally binding decision.[85] Reflecting the military justice system's origins, court-martial jurisdiction is "entirely penal or disciplinary,"[86] and, with limited exceptions, it does not depend on where the offense was committed or where the court-martial itself sits.[87] R.C.M. 201 identifies five

[82] The federal judiciary offers a template for this system, with "chief judges" who "oversee and coordinate the efficient operation of the court." ADMIN. OFFICE OF THE U.S. COURTS, UNDERSTANDING THE FEDERAL COURTS 21 (2018). This job is essentially identical to the military services' circuit military judges, who are responsible for the administration and internal organization of their assigned circuit, including the authority to detail military judges to court-martial proceedings. *See, e.g.*, U.S. DEP'T OF NAVY, JAGINST 5813.4I, NAVY-MARINE CORPS TRIAL JUDICIARY ¶ 4.d (2017).
[83] See *infra* Part III.B.3.a. for further discussion of Article 30a.
[84] See *infra* Part III.B.1.b. for further discussion of the referral authority.
[85] *See* MCM, *supra* note 2, R.C.M. 201(a)(1), Discussion.
[86] *Id.* at R.C.M. 201(a)(1).
[87] *Id.* at R.C.M. 201(a)(2)-(3).

requirements for a court-martial to have jurisdiction: the accused[88] and the offense[89] must be subject to court-martial, the military judge and the members must meet the personnel and qualifications requirements in R.C.M.s 501 through 504,[90] each charge at the court-martial must have been referred by a competent authority,[91] and the court-martial must "be convened by an official empowered to convene it."[92] The implementation of standing courts-martial affects only the final requirement. Under the proposed system, individual courts-martial will no longer need to be convened in accordance with R.C.M. 201(b)(1). Instead, the "referral authority" established in Articles 22 (general courts-martial) and 23 (special courts-martial) of the UCMJ will be the "competent authority" that sends cases to court-martial with continuous jurisdiction by referring charges per R.C.M. 201(b)(3). This proposal requires no other changes to jurisdictional provisions in the Rules for Court-Martial.[93]

b. Referral Authority

Article 22. "Who may convene general courts-martial." General courts-martial (GCMs) are the highest forum for disposing of criminal cases within the military justice system and expose the accused to the statutory maximum punishment for an offense.[94] Since its origin, the UCMJ has consistently limited general court-martial convening authority to a small group of high-level civilian officials and military commanders. Article 22(a) of the 2019 UCMJ, for example, reads almost identically to the original 1950 version, with Congress granting only the Secretary of Defense and combatant commanders additional general court-martial convening authority in the intervening seventy years.[95]

The composition of a GCM, on the other hand, has changed significantly over that time. Under the 1950 UCMJ, a GCM consisted of a "law officer" and no fewer than five panel members.[96] Law officers were attorneys and filled a quasi-judicial role, although Article 26a required only good standing in a federal bar or highest state bar, not training, experience, or certification as a judge.[97] After

[88] *Id.* at R.C.M. 201(b)(4).
[89] *Id.* at R.C.M. 201(b)(5).
[90] *Id.* at R.C.M. 201(b)(2).
[91] *Id.* at R.C.M. 201(b)(3).
[92] *Id.* at R.C.M. 201(b)(1). R.C.M. 504 identifies who may convene general and special courts-martial. *See* MCM, *supra* note 2, app. 15 (proposing slight modifications to R.C.M. 504).
[93] R.C.M. 201 implements Article 17 of the UCMJ, "Jurisdiction of courts-martial in general." *Compare* MCM, *supra* note 2, R.C.M. 201, *with* Article 17, UCMJ, 10 U.S.C. § 817 (2019).
[94] Article 18(a), UCMJ, 10 U.S.C. § 818(a) (2019).
[95] *Compare* Article 22(a), UCMJ, 10 U.S.C. § 822(a) (2019), *with* Article 22(a), UCMJ, 10 U.S.C. § 822(a) (1950).
[96] Article 16, UCMJ, 10 U.S.C. § 816 (1950). See *infra* Part III.B.2.a for the discussion on member qualifications under Article 25.
[97] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. II, ¶ 4(e) (1951) [hereinafter 1951 MCM]. One critic has described law officers as an "awkward hybrid that was part trial judge, part juror, and

various modifications, GCMs now consist of a military judge and eight panel members (twelve members if a capital case) or a military judge alone (upon request by the accused).[98] Military judges, who must be certified by their respective service's Judge Advocate General[99] per the criteria in Article 26 of the UCMJ,[100] assumed authorities and responsibilities similar to their Article III criminal trial-level counterparts.[101] As one service summarizes it, the trial judiciary "has an affirmative duty to ensure that each referred general and special court-martial, and any required post-trial proceeding, is tried in an expeditious manner, consistent with the needs of fundamental fairness and due process."[102]

These provisions reflect the seemingly competing trends of, on the one hand, increased judicial autonomy over individual trials, and, on the other, consolidation of the convening authority itself. The establishment of standing courts-martial would strike a balance between these trends. Congress should modify Article 22 to grant "referral authority" of individual cases to standing general courts-martial, not "convening authority" of individual general courts-martial themselves. With standing courts-martial, each of the people designated by the UCMJ as someone "who may convene general courts-martial"—the president, the secretary of defense, combatant commanders, service secretaries, and commanders of certain-sized units[103]—would instead simply send the charges to a preexisting tribunal.[104] The difference between "convening" a court-martial and "referring" charges to one is likely transparent to commanders, who tend to focus more on whether they can hold a servicemember accountable than on the

insufficiently either to satisfy anyone." LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 135 (2010).

[98] Article 16(b), UCMJ, 10 U.S.C. § 816(b) (2019).

[99] *See, e.g.*, U.S. DEP'T OF NAVY, SECNAVINST 5430.27E, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS FOR SUPERVISION AND PROVISION OF CERTAIN LEGAL SERVICES ¶ 1.b. (2019).

[100] Article 26, UCMJ, 10 U.S.C. § 826 (2019) ("education, training, experience, and judicial temperament"). See *infra* Part III.B.2.b. for further discussion on the role of military judges.

[101] MORRIS, *supra* note 97, at 135.

[102] JAGINST 5813.4I, *supra* note 82, ¶ 3.a.

[103] Article 22(a), UCMJ, 10 U.S.C. § 822(a) (2019).

[104] This approach resolves a lingering issue in the recent report by the Secretary of Defense-appointed Independent Review Commission (IRC) on sexual assault in the military. The IRC recommended that each Service should appoint a Special Victim Prosecutor (SVP) who could refer sex crimes charges to a court-martial convened by a traditional convening authority. According to the IRC, though, the SVP "should not have the authority to direct a convening authority to convene a court" because then the convening authority would be subject to the authority of the SVP. The problem is that the IRC does not address what would happen if the convening authority refuses to convene a court to which the SVP refers charges, a not-unlikely scenario due to competing priorities, resources, and opinions. The establishment of standing courts-martial would avoid this possibility, and streamline the overall process, by enabling the SVP to simply refer charges to an already-convened court. *See* INDEPENDENT REVIEW COMMISSION, HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY app. B at 15 (2021) [hereinafter IRC REPORT].

technical machinations required to get there.[105] No modification is necessary to the current definition of "referral," which is "the order of a convening authority that charges and specifications against an accused be tried by a specified court-martial."[106]

Article 23. "Who may convene special courts-martial." A lower forum than general courts-martial, special courts-martial expose the accused to less severe sentencing jeopardy but provide many of the same procedural and evidentiary protections as general courts-martial.[107] Similar to Article 22, Article 23 has undergone almost no revision since its original adoption,[108] even though the composition of special courts-martial has changed significantly. The 1950 UCMJ required only three panel members[109] and no lawyers unless "it is anticipated that complicated issues of law will be presented."[110] Even if the circumstances called for a lawyer, the lawyer would serve as a member of the court-martial, not in a judicial or quasi-judicial role.[111] Today, a special court-martial consists of a military judge and four panel members, a military judge alone (upon request by the accused), or a military judge alone subject to restrictions on punishment (upon decision by the convening authority).[112] Congress added this last option following the MJRG's recommendation to offer commanders a disposition "similar to the judge-alone forum in civilian proceedings."[113] This was in keeping with the broader mandate to improve military justice by adopting best practices from United States district courts when applicable.[114] The most critical difference between special courts-martial as adopted in 1950 and as they function today is the central role of the military judge, who is subject to the same certifications and protections as a military judge at a general court-martial.[115]

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[105] *See generally* COMMANDERS SURVEY, *supra* note 66. The Marine Corps Center for Lessons Learned conducted a survey on legal service support of almost 500 former O-5-level commanders who had served as Special Court-Martial Convening Authorities between 2001 and 2011. The clearest trend to emerge from the study is the desire among convening authorities to reduce administrative burdens in the military justice system. The authority to formally convene a court-martial did not appear on their list of priorities. *See id.* at 1–3.

[106] MCM, *supra* note 2, R.C.M. 601; *see also* WINTHROP, *supra* note 10, at 154–55 (summarizing the historical practice of "the referring of charges for trial").

[107] Article 19, UCMJ, 10 U.S.C. § 819 (2019).

[108] *Compare* Article 23, UCMJ, 10 U.S.C. § 823 (1950), *with* Article 23, UCMJ, 10 U.S.C. § 823 (2019).

[109] Article 16, UCMJ, 10 U.S.C. § 816 (1950).

[110] 1951 MCM, *supra* note 97, ch. II, ¶ 4(d).

[111] *Id.*

[112] Article 16(c), UCMJ, 10 U.S.C. § 816(c) (2019).

[113] MJRG, *supra* note 20, at 6.

[114] *Id.* at 5–6; *see also* Article 36(a), UCMJ, 10 U.S.C. § 836(a) (2019) (permitting the President to prescribe "regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States district courts").

[115] Article 26, UCMJ, 10 U.S.C. § 826 (2019).

With the implementation of standing courts-martial, Congress should modify Article 23 to grant "referral authority" of individual cases to special courts-martial, not "convening authority" of individual special courts-martial themselves. Just as with Article 22, the proposed Article 23 would grant the authority to refer cases to a standing special court-martial to each of the individuals granted convening authority by the current Article 23. There is no need to modify the composition of the court-martial or the options available to the referral authority and the accused, and military judges retain their independence under Article 26.

Article 24. "Who may convene summary courts-martial." Summary courts-martial differ from general and special courts-martial in several critical ways. For example, summary courts-martial consist of a single commissioned officer, who is not required to be a lawyer, and military judges play no part in the process.[116] Although the Military Rules of Evidence apply at the hearing,[117] the accused does not have the right to representation.[118] The accused also has the right to refuse trial by summary court-martial, and the punishments available are severely curtailed.[119] The convening authority or summary court-martial officer may also act as the accuser.[120] Most importantly, summary courts-martial are not criminal fora,[121] and "[a] finding of guilty at a summary court-martial does not constitute a criminal conviction."[122] These provisions have remained mostly unchanged since 1950.[123]

Summary courts-martial are courts in name only. In practice, they are a throwback to the earlier days of military justice and share few of the safeguards—or exposure to criminal liability—that define modern general and special courts-martial.[124] The implementation of standing courts-martial therefore does not require any changes to Article 24, because summary courts-martial will continue to operate outside the referral construct as non-criminal, ad hoc tribunals for the adjudication of minor offenses.[125] This approach comports with the MJRG's recommendation to "preserv[e] a unique feature of the military justice system that

[116] Article 16(d), UCMJ, 10 U.S.C. § 816(d) (2019).
[117] MCM, *supra* note 2, R.C.M. 1304(b)(2)(E)(i).
[118] *Id.* at R.C.M. 1301(e).
[119] Article 20(a), UCMJ, 10 U.S.C. § 820(a) (2019). At summary court-martial the UCMJ caps confinement at thirty days and does not permit punitive discharges. *See id.*
[120] MCM, *supra* note 2, R.C.M. 1302(b).
[121] *See* Middendorf v. Henry, 425 U.S. 25, 42 (1976) (holding that a summary court-martial is not a "criminal prosecution" entitling the accused to representation under the 6th Amendment); *see also* Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn From This Revolution?*, 16 TUL. J. INT'L & COMP. L. 419, 444–46 (2008) (providing context to the *Middendorf* decision).
[122] Article 20(b), UCMJ, 10 U.S.C. § 820(b) (2019).
[123] *Compare* Article 20, UCMJ, 10 U.S.C. § 820 (2019) *with* Article 20, UCMJ, 10 U.S.C. § 820 (1950).
[124] *See Middendorf*, 425 U.S. at 31–33 (explaining the differences among the four methods of disposing of cases under the UCMJ).
[125] For the definition of "minor offense," see MCM, *supra* note 2, pt. V, ¶ 1(e) (2019).

allows for efficient disposition of relatively minor offenses in an administrative, non-criminal forum."[126] This principle applies equally to commanding officer's non-judicial punishment under Article 15,[127] which fall outside the scope of courts-martial, standing or otherwise.

R.C.M. 401 through R.C.M. 407. The 400 series of the R.C.M.s addresses the forwarding and disposition of charges. Changes here primarily involve replacing "convening authority" with "referral authority" and related substitutions. In R.C.M. 401(1), for example, only persons authorized to "refer charges" to court-martial or to administer non-judicial punishment under Article 15 may dispose of charges. In R.C.M. 402, a commander not authorized to "refer charges" to court-martial may dismiss them or forward them to a superior commander for disposition. No modification is necessary to R.C.M. 405, which governs preliminary hearings under Article 32 that are non-judicial and can be convened on a case-by-case basis. Written pretrial advice from a staff judge advocate will still be required to send a case to general court-martial per R.C.M. 406, just as referral to a special court-martial will still require consultation with a judge advocate per R.C.M. 406A.

R.C.M. 504. "Convening courts-martial." R.C.M. 504 implements Articles 22 and 23 of the UCMJ.[128] Appendix A contains the proposed language for the new R.C.M., which tasks the military judge with issuing a "detailing order" that states the type of court-martial, announces the location and time that it will start, and assigns personnel to sit as members (if requested by the accused). This also eliminates the current practice in the Army, Navy, Marine Corps, and Coast Guard of each convening authority issuing an annual standing convening order and then amending it for individual courts-martial.[129] The new practice will be more similar to the Air Force approach, in which commanders publish a new convening order for each new case referred to trial, except the military judge will issue the detailing order, not the commander.[130]

R.C.M. 601. "Referral." Referral of charges requires three elements: an authorized and qualified convening authority, preferred charges, and a properly convened court-martial.[131] Changing the title of the accused's commander from "convening authority" to "referral authority" does not change that calculus. In fact, the establishment of standing courts-martial automatically satisfies the third element. The remainder of the referral requirements—probable cause that an offense triable by court-martial has been committed and that the accused

[126] MJRG, *supra* note 20, at 250.
[127] Article 15, UCMJ, 10 U.S.C. § 815 (2019).
[128] MJRG, *supra* note 20, at 245, 247.
[129] *Id.* at 253 n.12.
[130] *Id.*
[131] MCM, *supra* note 2, R.C.M. 601(a), Discussion.

committed it, and that the specification alleges an offense—are also not affected.[132] The commander may still personally order the referral of charges to the standing court-martial and join offenses[133] or accused as appropriate.[134] Withdrawal of charges under R.C.M. 604 would remain within the purview of the commander who referred them in the first place.[135]

2. Court-Martial Personnel

a. Panel Members

Article 25. "Who may serve on courts-martial." The UCMJ grants the convening authority broad discretion over the selection of court-martial panel members.[136] This empowerment is a recognition of the commander's central role in maintaining good order and discipline through the military justice system. According to one panel of experts, however, it is also "an invitation to mischief," and "[t]here is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."[137] The establishment of standing courts-martial would address these concerns by shifting member detailing authority from the commander to the court itself. The decision to elect a panel will remain with the accused, and the members will still be drawn from the unit of the "referral authority." But the elimination of member selection by commanders will reduce administrative burdens on the commander, [138] foreclose various member challenges and avenues for appeal, and enhance the credibility of the military justice system with both the accused and the public.[139]

The criteria for convening authorities to consider when detailing the "best qualified" members to a court-martial have not changed since 1950: "age,

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[132] *Id.* at R.C.M. 601(d)(1).
[133] *Id.* at R.C.M. 601(e)(2).
[134] *Id.* at R.C.M. 601(e)(3).
[135] These provisions also do not affect the referral authority's ability to enter or withdraw from plea agreements under R.C.M. 705. *Id.* at R.C.M. 705.
[136] *See* United States v. Bartlett, 66 M.J. 426, 429 (C.A.A.F. 2008) ("Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening authority in the selection process, while maintaining the basic fairness of the military justice system.").
[137] WALTER T. COX III, GUY R. ABBATE, JR., MARY M. CHEH, JOHN S. JENKINS & FRANK J. SPINNER, NAT'L INST. OF MIL. JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF UNIFORM CODE OF MILITARY JUSTICE 7 (2001); *see also* Hansen, *supra* note 8, at 124 ("While there are few reported cases of commanders overtly manipulating the process, the risk is real.").
[138] See *infra* Part IV.A.2 for a discussion on the personnel and administrative structure, separate from the accused servicemember's chain of command, required to implement this proposal.
[139] *See, e.g.*, Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAW., Oct. 2006, at 25–26 (describing the implementation of a random-selection model by V Corps as a "change [that] would benefit Soldiers" and improve their "impressions of the military justice system").

education, training, experience, length of service, and judicial temperament."[140] The only factors that disqualify a member are formal involvement in the case or failure to meet rank/grade requirements.[141] The panel may represent a cross-section of the military community, but it is not required to,[142] and convening authorities may not exclude panel members due to their race,[143] gender,[144] or rank.[145] Convening authorities must personally consider the Article 25 criteria when detailing panel members; they may not delegate this responsibility.[146] Beyond these basic guidelines, convening authorities enjoy wide latitude in decisions about member detailing. As a result, most challenges to panel composition turn on the circumstances of the particular case, as viewed through the lens of unlawful command influence (UCI).[147] The removal of commanders from the member selection process—or at least the reduction of their role in it—helps mitigate the risks posed by UCI, which the Court of Military Appeals once described as "the mortal enemy of military justice."[148]

Article 37 of the UCMJ prohibits convening authorities and commanding officers from "unlawfully influencing" the findings or sentence of a court-martial or other military tribunal.[149] UCI of panel member composition usually takes the form of "court stacking," or selecting members who are more likely to find in favor of the convening authority's desired outcome.[150] The intent of the convening

[140] Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2) (2019); *see generally* Erik C. Coyne, *Influence with Confidence: Enabling Lawful Command Influence by Understanding Unlawful Command Influence—A Guide for Commanders, Judge Advocates, and Subordinates*, 68 A.F. L. REV. 1 (2012); Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261 (1996).
[141] *See Bartlett*, 66 M.J. at 429.
[142] *See* United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial.").
[143] *See* United States v. Crawford, 35 C.M.R. 3, 13 (C.M.A. 1964) (prohibiting the exclusion of Black members from a panel, but not requiring their inclusion).
[144] *See* United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988) ("[A] convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population.").
[145] *See* United States v. Daigle, 1 M.J. 139, 140–41 (C.M.A. 1975) ("Except for the statutory preference for exclusion of persons in a rank lower than the accused, all ranks are eligible to serve on a court-martial."); *see also* United States v. Kunishige, 79 M.J. 693 (N-M Ct. Crim. App. 2019) (finding that convening authorities may not focus on rank at the exclusion of the factors enumerated in Article 25).
[146] *See* United States v. Ryan, 5 M.J. 97, 100–01 (C.M.A. 1978). Subsequent amendments to the UCMJ "did not overturn the prohibition against delegation of the power to detail court-members." United States v. Benedict, 55 M.J. 451, 457 (C.A.A.F. 2001) (Effron, J., dissenting).
[147] *See* United States v. Riesbeck, 77 M.J. 154, 159 (C.A.A.F. 2018) (identifying the improper selection of panel members as a form of unlawful command influence).
[148] United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1988).
[149] Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2019); *see generally* Luther C. West, *A History of Command Influence on the Military Justice System*, 18 U.C.L.A. L. REV. 1 (1970) (tracing the doctrine of UCI throughout American history).
[150] *See* United States v. Upshaw, 49 M.J. 111, 113 (C.A.A.F. 1998).

authority is key. If a "convening authority's motive is benign, systematic inclusion or exclusion [of members] may not be improper."[151] If the accused is able to show evidence of UCI and tie it to the potential for unfair treatment at the court-martial, though, the government must persuade the court beyond a reasonable doubt that either the UCI does not exist or that the UCI will not negatively impact the proceedings.[152] As CAAF has noted, "an accused must be provided both a fair panel and the appearance of a fair panel."[153]

Convening authority control over member detailing, like the authority to convene courts-martial, is a vestige of a bygone era of military justice. Although modification of Article 25 is not necessary to establish a standing military court system, the elimination or reduction of commander input on member selection complements this Article's proposal by enhancing the credibility of courts-martial and streamlining their execution. This provision marks a fundamental change to the military justice system; it is potentially more controversial than the re-designation of the convening authority itself. Yet the shift has been advocated for in the past,[154] and it is consistent with the trend toward impartiality, both actual and implied, in the administration of military justice. Under the current system, commanders attain at best a neutral panel of members that could just as easily have been selected by the administrative apparatus of a standing court. At worst, commanders, whether intentionally or unintentionally, open the member selection process to challenge. At trial, this means extended *voir dire* and potential delays to draft new convening orders and detail new members. Post-trial, a substantiated allegation of UCI over member selection could overturn an otherwise legitimate outcome.[155] If nothing else, this change will liberate convening authorities from the administrative headaches associated with personal review of a list of members according to the Article 25 criteria, which some critics have pointed out is mostly a fiction anyway.[156]

Acknowledging congressional rejection of previous, similar proposals, this Article offers several potential courses of action. Standing courts-martial are

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[151] *Id.*
[152] *See* United States v. Biagese, 50 M.J. 143, 150–51 (C.A.A.F. 1999).
[153] United States v. Ward, 74 M.J. 225, 228 (C.A.A.F. 2015) (citations omitted).
[154] *See, e.g.*, COX ET AL., *supra* note 137, at 6–8; Arthur J. Keefe & Norton Moskin, *Codified Military Injustice: An Analysis of the Defects in the New Uniform Code of Military Justice*, 35 CORNELL L. Q. 151, 158 (1949) (discussing the American Bar Association's recommendation to remove the commander from member selection). *But see* Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 196 (2003) (arguing that the current system effectively "balances the needs of the military institution with the rights of the individual").
[155] *See, e.g.*, United States v. Smith, 27 M.J. 242, 251 (C.M.A. 1988) (reversing a conviction because the convening authority detailed female panel members under the assumption that they would be more likely to vote to convict the accused for assault of a female victim).
[156] *See, e.g.*, James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 138–40 (2010).

a tweak to the military justice system, not an excuse for wholesale change, and the goal is to establish them with as little effect on the rest of the military justice system as possible. Here are some potential modifications:

- Remove altogether Article 25(e)(2) criteria, which focus on the convening authority's "opinion" of who is "best qualified" to serve as a member. It is a fair assumption that all servicemembers possess a core level of competence to sit on a panel. Keep the rules for rank in Article 25(a), (b), and (c).[157]

- Authorize the "referral authority" to identify a large pool of members and submit that roster to the standing court-martial administrative office, which then details members from that pool on a random basis (in accord with applicable rank provisions).[158]

- Authorize the "referral authority" to identify members of the unit who do not comply with Article 25(e)(2)'s criteria and remove them by name from the pool before detailing by the court. A servicemember who is pending criminal or administrative action or a permanent change of station, for example, would likely not be a suitable panel member.

The Court of Military Appeals endorsed a version of the second approach in *United States v. Yager*,[159] affirming the conviction of a soldier by a panel of members seated via a "random jury selection program" implemented by one convening authority as an experiment.[160] The second and third options, which still

[157] The IRC recently renewed the call for random selection of panel members, and the Department of Defense has indicated its intent to make the change. *See* IRC REPORT, *supra* note 104, app. B at 54; C. Todd Lopez, *DOD Takes Phased Approach to Implementing Recommendations on Sexual Assault, Harassment*, DEP'T OF DEF. (July 21, 2021), https://bit.ly/3fsgBu5. Congress previously considered two variations of this proposal in the early 1970s but declined to adopt it. Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 45 (1971) ("The Bayh and Bennett bills provide that the administrative division of the Regional Command will select the members of general and special courts-martial at random from a pool of all the officers and enlisted men who have served on active-duty for at least one year and are permanently stationed within that Regional Command.").

[158] The American Bar Association endorsed this approach in testimony before Congress during hearings on adoption of the original UCMJ. *See* Keefe & Moskin, *supra* note 154, at 158.

[159] 7 M.J. 171 (C.M.A. 1979).

[160] "In accordance with procedures promulgated by a local directive . . . names for a list of prospective jurors were selected from personnel data files and placed on a 'Master Juror List' and thereafter screened by having each individual whose name appeared on the list complete a questionnaire regarding qualifications to serve as a court-martial member. Upon completion of the screening process and the elimination of unqualified and exempt personnel, the remaining persons were considered 'Qualified

acknowledge the importance of members' "age, education, training, experience, length of service, and judicial temperament," are most compatible with the findings of a report by the Joint Service Committee on Military Justice that examined this issue.[161] They are also more in line with the recommendations of the MJRG, which proposed only minor modifications to Article 25.[162] The primary downside of these approaches is an increased logistical burden on the office tasked with identifying members for each court-martial.[163] The larger pool of members requires the collection of more questionnaires, for example, as well as the tracking of more potential excusals.[164] This burden shifts from the commander to the standing court administrative office, though, and should be a welcome reprieve for most staff judge advocates.[165]

Another consideration is that, according to one unit's experience, randomly selected panels are more likely to consist of junior personnel than panels chosen by a commander.[166] Although a more junior panel is potentially more "defense friendly," there is no empirical evidence to support that assertion, and rank is specifically excluded from the Article 25 criteria.[167] Finally, these logistical challenges do not bear on the ultimate question of whether choosing the members of a court-martial facilitates the commander's obligation to maintain good order and discipline. As one expert recently concluded, "[t]here does not appear to be a strong nexus between this power and command responsibilities . . . [and] transferring this power from commanders to independent offices seems justified."[168]

R.C.M. 503. "Detailing members, military judge, and counsel, and designating military magistrates." Under this proposal, the convening authority would no longer be responsible for detailing court-martial members for the reasons just explained. R.C.M. 503 should therefore replace "convening authority" with "military judge" in paragraph (a), giving the military judge authority to detail no fewer "qualified persons" than required by the forum. This change also removes the policy that a military judge may impanel alternate members only if the

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Jurors,' and they were eligible for selection, at random, for court-martial duty." *Id.*; *see also* Huestis, *supra* note 139, at 22 (describing a similar experiment conducted by V Corps in 2005).

[161] DEP'T OF DEF. JOINT SERV. COMM. ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL (1999).

[162] MJRG, *supra* note 20, at 251–58.

[163] *See* Hansen, *supra* note 8, at 124.

[164] *See* Huestis, *supra* note 139, at 30. In 2005, V Corps identified a pool of 100 potential members, drawn from 500 nominations by subordinate commanders, who fit the Article 25 criteria. The SJA then identified the requisite number of members for each trial according to a random basis that satisfied rank requirements. *See id.* at 29–30.

[165] See *infra* Part IV.A.2 for a discussion of staffing and running the permanent court office.

[166] *See* Huestis, *supra* note 139, at 31.

[167] *Compare id.* at 31, *with* Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2) (2019).

[168] Hansen, *supra* note 8, at 124.

convening authority has authorized them.[169] Overall, this update is consistent with civilian practice and makes the military justice system more credible because it removes the appearance of command influence. No changes are required to the detailing instructions for military judges,[170] magistrates,[171] or counsel,[172] none of whom are currently detailed by the convening authority. The contents of the detailing order are outlined in Appendix A, which contains a proposed R.C.M. 504.

R.C.M. 505. "Changes of members, military judge, and counsel." Similarly, R.C.M. 505(c)'s provision that convening authorities may change the members of the court-martial should be removed. If commanders no longer have member-detailing authority, then they also lose the authority to change members detailed by the court regardless of whether it is before or after assembly.

b. Military Judiciary

Article 26. "Military judge of a general or special court-martial." Military judges play a unique role in the administration of military justice. Emerging from the post-World War II effort to professionalize courts-martial,[173] military judges must be certified under Article 26, and in accordance with service-specific regulations, "by reason of [their] education, training, experience, and judicial temperament."[174] In an effort to maintain their neutrality, military judges operate independently of the court-martial convening authority. For example, military judges have mandatory minimum tour lengths,[175] they can be neither assigned to nor removed from a case by a convening authority,[176] and they do not receive performance evaluations from the convening authority or anyone on the convening authority's staff.[177] This judicial independence builds trust among

[169] MCM, *supra* note 2, R.C.M. 503(a)(1)(C).
[170] *Id.* at R.C.M. 503(b).
[171] *Id.* at R.C.M. 503(b)(4).
[172] *Id.* at R.C.M. 503(c).
[173] *See* Ku, *supra* note 44, at 52–56 (summarizing the establishment of the military judiciary); MJRG, *supra* note 20, at 74–77 (detailing the transformation of law officers to military judges).
[174] Article 26(b), UCMJ, 10 U.S.C. § 826(b) (2019).
[175] Article 26(c)(4), UCMJ, 10 U.S.C. § 826(c)(4) (2019); *see* Schlueter, *supra* note 14, at 38–39 (praising the minimum tour length provision).
[176] *See, e.g.*, U.S. DEP'T OF NAVY, SECNAVINST 5430.27E, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS FOR SUPERVISION AND PROVISION OF CERTAIN LEGAL SERVICES ¶ 1.b (2019) (assigning the Judge Advocate General with the sole authority to detail military judges).
[177] Article 26(c)(2), UCMJ, 10 U.S.C. § 826(c)(2) (2019).

commanders,[178] accused servicemembers,[179] and the broader public.[180] The establishment of standing courts-martial does not require modifications to the manner in which military judges are appointed or operate, because they already work outside the purview of the convening authority.[181]

One remaining question is whether trial-level military judges would gain the authority to issue writs under the proposed system. The All Writs Act empowers "all courts established by an Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[182] Appellate military courts, established in Article 66, clearly fit this definition and wield writ authority via R.C.M.s 1203 and 1204, but courts-martial, even post-referral, do not.[183] Although standing courts-martial do not require military judges to have writ authority, granting it to them would be consistent with the overall trend toward bringing military judges' authorities in line with those of their civilian counterparts.[184] The proposed modifications to Article 16 would elevate courts-martial to the status of "courts established by an Act of Congress," but, if desired, Congress could easily restrict this authority in either the All Writs Act (specifically excluding courts-martial) or Article 16 (specifically excluding writ authority).

Article 26a. "Military Magistrates." The position of military magistrate is relatively new, marking "one of the most significant changes to the UCMJ" in MJA 16.[185] The specific duties of military magistrates are determined by the service secretaries, and not all of the services have adopted the military magistrate program.[186] In the Army, magistrates are authorized to issue search, seizure, and

[178] *See* COMMANDERS SURVEY, *supra* note 66, at 2 ("More than 90% of commanders felt that military judges evaluate the facts and make well-reasoned decisions in most, if not all, cases.").
[179] *See* MJRG, *supra* note 20, at 219 (noting the popularity of judge-alone courts-martial since their creation in 1968).
[180] *See, e.g.*, Weiss v. United States, 510 U.S. 163, 179–81 (1994) (praising "the number of safeguards in place to ensure impartiality" among military judges).
[181] *See* Hansen, *supra* note 121, at 446–48 (distinguishing the Supreme Court's approach in the *Weiss* decision from recent decisions in the United Kingdom and Canada that invalidated those systems' attempt to mostly remove the commander from military justice).
[182] 28 U.S.C. § 1651 (2021).
[183] *See* Patrick S. Wood, *A Writ of Habeas Corpus* Ad Prosquendum, ARMY LAW., no. 3, 2019, at 48, 49; *see generally* Thomas M. Rankin, *The All Writs Act and the Military Justice System*, 53 MIL. L. REV. 103 (1971).
[184] *See* BISHOP, *supra* note 12, at 30–33.
[185] Schlueter, *supra* note 14, at 39. The Army previously managed its own internal magistrate program via a service-specific publication, but MJA 16 marked the creation of the role in the UCMJ. *See id.* at 39–40; MJRG, *supra* note 20, at 271–74.
[186] *Compare* U.S. ARMY TRIAL JUDICIARY, MILITARY MAGISTRATE STANDARD OPERATING PROCEDURES (2019) (laying out procedures for Army magistrates), *with* U.S. MARINE CORPS, ORDER 5800.16, LEGAL SUPPORT AND ADMINISTRATION MANUAL 51 (Jun. 19, 2020) [hereinafter 16 LSAM] ("The Secretary of the Navy has not authorized the utilization of military magistrates as defined in Article 26a, UCMJ.").

apprehension authorizations, as well as to review pretrial confinement decisions, but they may not preside over special courts-martial or prereferral proceedings that require a military judge.[187] This distinction is modeled on the authority of civilian magistrate judges, who, although they are judicial officers of the district courts rather than presidentially appointed judges,[188] exercise various quasi-judicial functions.[189] The military magistrate program is compatible with the adoption of standing courts-martial, which could provide a home and other resources for military magistrates, but the initiatives are not interdependent. No modifications are necessary to the current Article 26a—it already provides adequate space for the establishment of standing courts-martial.

c. Support Staff

Article 28. "Detail or employment of reporters and interpreters." Court reporters make audio records and prepare transcripts of each court-martial proceeding for inclusion with the record of trial,[190] much like civilian court reporters, who are supervised by the clerk of court.[191] Since the adoption of the UCMJ, convening authorities have detailed military court reporters to cases, even though they do not otherwise oversee them.[192] This marked a change from previous practice, when the president of the court-martial panel, as a member of the court, appointed the court reporter.[193] With the establishment of standing courts-martial, Article 28 should be modified to remove convening authority detailing power over court reporters, who will instead be assigned to cases by the military clerk of court or equivalent office.[194] This is a natural shift that recognizes the structure and practice already in place, while bringing military court administration more in line with historical and civilian models.

R.C.M. 502. "Qualifications and duties of personnel of courts-martial." In addition to court reporters, the standing court-martial office will be responsible for providing other trial support personnel, such as bailiffs, guards, and escorts.

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[187] U.S. ARMY TRIAL JUDICIARY, *supra* note 186, at 2. The authority to review pretrial confinement decisions is the most intrusive on the commander's authority and has the potential to cause friction. *See, e.g.*, Jack E. Owen, *A Hard Look at the Military Magistrate Pretrial Confinement Hearing:* Gerstein *and* Courtney *Revisited*, 88 MIL. L. REV. 3 (1980).

[188] Pfander, *supra* note 33, at 765 (explaining that magistrates may not be freely substituted for federal judges at the trial stage of a federal proceeding).

[189] 28 U.S.C. § 636 (2009). Civilian magistrates conduct most initial proceedings in criminal cases, including issuing search and arrest warrants, conducting detention and probable cause hearings, and deciding motions. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 82, at 27; MJRG, *supra* note 20, at 306–07.

[190] MCM, *supra* note 2, R.C.M. 502(e)(3)(B).

[191] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 82, at 11.

[192] MJRG, *supra* note 20, at 281.

[193] *Id.*

[194] See *infra* Part IV.A.2. for a discussion of how the Services could implement a military clerk of court position.

R.C.M. 502 lists five disqualifying criteria for people serving in these roles. In a given case, they may not be the accuser, a witness, an investigating or preliminary hearing officer, counsel for any party, or a panel member of the court-martial or any previously related courts-martial.[195] The provision of personnel from within the court office, rather than the unit of the accused, comports with this rule and avoids any potential conflicts of interest between the accused and members of his unit filling quasi-administrative functions.

3. Court-Martial Mechanics

a. Pretrial

Article 30a. "Certain proceedings conducted before referral." Another significant change made by MJA 16 was the grant of pre-referral powers to military judges and magistrates.[196] This change represented an acknowledgment that certain pretrial matters disproportionately affect case outcomes and deserve heightened attention, and it marked a substantial departure from the principle that a court-martial does not exist until convened by a commander. Under the old system, the only person authorized to make decisions on a case before referral of charges was the convening authority, even if the decisions involved technical legal issues.[197] Now, Congress has authorized military judges to issue investigative subpoenas, issue warrants or orders for electronic communications, address matters referred by an appellate court, and consider designations of victim representatives and certain victim-filed writs, all before referral.[198] If approved by the respective service secretary, military judges may also designate military magistrates to preside over these proceedings, an even further delegation of authority.[199] Pre-referral hearings bear a direct relationship with federal civilian practice, which regularly entertains pre-arraignment motions.[200] Article 30a is the best example to date of the increasingly blurry distinction between standing federal courts and ad hoc courts-martial, vesting military judges with authority that has traditionally only belonged to their civilian counterparts.[201]

R.C.M. 309. "Pre-referral judicial proceedings." R.C.M. 309 codifies the pre-referral authorities contained in Article 30a. It grants military judges the

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[195] MCM, *supra* note 2, R.C.M. 502(e)(2).
[196] Article 30a, UCMJ, 10 U.S.C. § 830a (2019); *see* MJRG, *supra* note 20, at 303-10 (providing background to the adoption of Article 30a).
[197] MJRG, *supra* note 20, at 304.
[198] Article 30a(a)(1), UCMJ, 10 U.S.C. § 830a(a)(1) (2019).
[199] Article 30a(c), UCMJ, 10 U.S.C. § 830a(c) (2019). Military magistrates may not issue warrants for electronic communications. *Id.*
[200] Federal magistrates preside over preliminary proceedings on issues such as search and arrest warrants, summonses, initial appearances, evidentiary matters, detention hearings, and guilty pleas. *See* MJRG, *supra* note 20, at 306.
[201] *See* Schlueter, *supra* note 14, at 47–49.

authority to issue investigative subpoenas and orders for electronic communications, as well as the authority to hear requests for relief from people who receive such subpoenas or orders, all before the referral of charges to a formally convened court-martial.[202] A proposed Executive Order will expand the scope of these authorities to include the victim-based provisions in Article 30a, as well as reviews of an accused's mental state under R.C.M. 706 and pretrial confinement under R.C.M. 305.[203] All of these trends nest comfortably within a standing court-martial system; no change is required to R.C.M. 305, which in fact lays much of the groundwork for at least a standing military judiciary.

R.C.M. 702. "Depositions." A deposition is "the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded.[204] Before referral, R.C.M. 702(b) permits only a convening authority to order a deposition. After referral, either the convening authority or the military judge may order a deposition. Extending the military judge's authority to pre-referral is consistent with the other provisions in this proposal, and it does not necessarily have to come at the expense of convening authorities, who may still order depositions during the disposition phase for their own purposes. This change simply means that both military judges and referral authorities will be able to order pre-referral depositions. R.C.M. 702(d)(1) should also be updated to grant pre-referral authority to the military judge to review a convening authority's decision to deny a deposition request.

R.C.M. 703. "Production of witnesses and evidence." Control of court-martial funding is a controversial topic that mostly falls outside the scope of this Article. The establishment of standing courts-martial would lend support to arguments in favor of removing commander authority over expert and lay witness requests, but such a change is not necessary to implement the new system. Under the current approach, costs come out of the convening authority's Title 10 Operations and Maintenance budget,[205] which detracts from readiness and training while potentially injecting cost as a charging consideration for commanders.[206]

[202] MCM, *supra* note 2, R.C.M. 309(b).
[203] Interview with Lieutenant Colonel Adam M. King, U.S. Marine Corps, Military Justice Branch Head, Judge Advocate Division, Headquarters Marine Corps (Mar. 27, 2021). There is no projected date for signature, but the military justice community is confident that the Executive Order will be signed. *Id.* The IRC report includes the recommendation that DOD "expedite processing of proposed executive orders regarding military justice." *See* IRC REPORT, *supra* note 104, app. B at 50.
[204] MCM, *supra* note 2, R.C.M. 702(a), Discussion.
[205] *See, e.g.*, U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL ¶¶ 0145–46 (2020).
[206] *See* COMPREHENSIVE REVIEW, supra note 41, at 113 ("Commanders and trial counsel are inappropriately evaluating defense counsel requests solely on the basis of financial expense, and not upon their importance to a fair and impartial trial."). *But see* COMMANDERS SURVEY, *supra* note 66, at 4 ("Commanders were not as concerned with the manpower and financial costs associated with a trial. Less than 3% of commanders rated 'costs' as very important factors to consider when making a disposition decision.").

Defense offices do not have their own budget, so, for defense counsel to request Government assistance in witness production, defense counsel must submit to trial counsel a written list of the witnesses, with justifications for their presence.[207] This has led to concerns over the defense potentially being forced to reveal their case strategy to the Government by having to explain the relevance of each witness in enough detail to convince the convening authority to pay for the witness to attend the court-martial.[208]

A related concern is the employment of expert witnesses and consultants, who are compensated by the convening authority only if they are determined to be "necessary" to the case, and again only after defense explains how the experts fit into their overall case.[209] Military judges do not have the authority to review funding decisions until after referral, even though expert input is often valuable earlier in the case.[210] Courts-martial then spend excessive time settling disputes over expert funding, even as trial approaches.[211] This is not an efficient system and is markedly different from civilian practice, in which courts and defense offices have their own budgets to spend as they see fit.[212]

A standing court-martial system helps address these issues in several ways. If funding for witnesses and experts remains with the referral authority, R.C.M. 703(d)(2) could be modified to allow a military judge to review the funding decision pre-referral, giving counsel more certitude as they prepare for trial. This does not change authorities; it only shifts them to earlier in the court-martial process. A more radical approach involves moving the funds from the start from the commander to either the military judge or the defense office, which then could dispense money more in line with federal civilian practice.[213] None of these changes are required by the establishment of standing courts-martial, but they would be logical features of permanent courts.

b. Trial

Article 29. "Assembly and impaneling of members; detail of new members and military judges." In addition to the Article 25 authority to identify panel members, convening authorities may appoint alternate members in case not enough members are seated to meet the statutory requirements for the type of

[207] MCM, *supra* note 2, R.C.M. 703(c)(2).
[208] *See, e.g.*, COMPREHENSIVE REVIEW, *supra* note 41, at 204–06 (arguing for an independent defense budget).
[209] MCM, *supra* note 2, R.C.M. 703(d)(1).
[210] *Id.* at R.C.M. 703(d)(2).
[211] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 205-06.
[212] *See* David E. Patton, *The Structure of Federal Public Defense*, 102 CORNELL L. REV. 335, 348–53 (2017).
[213] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 204–06. The IRC recently endorsed this approach. *See* IRC REPORT, *supra* note 104, app. B at 55.

court-martial.[214] Seating of the panel proceeds in two phases: "assembly," which is pre-challenge and excusal, and "impaneling," which is post-challenge and excusal.[215] Once the panel is assembled, the convening authority's only function is to detail new members in case seated members are removed.[216] The adoption of standing courts-martial, which would potentially move member identification from the convening authority to the court, would simplify assembly and impaneling by giving the military judge sole control over the identification of alternates and detailing of new members. Article 29 should be modified to remove the convening authority's role in the excusal and seating of members, consistent with the changes proposed to Article 25 above. This would bring the panel member selection process more in line with the seating of federal civilian juries and further eliminate any perceptions of court-stacking by keeping the process solely within the purview of the military judge.[217] R.C.M.s 912A and 912B implement these rules.

c. Post-Trial

R.C.M. 1101 through R.C.M. 1117. The 1100 series of the R.C.M.s addresses post-trial procedure. The military judge and court reporter bear the bulk of the administrative responsibility in this realm, while the commander exercises dwindling discretion over the outcome of the trial.[218] A court-martial sentence is executed and takes effect when the military judge enters the court's judgement into the record of trial.[219] The court reporter prepares and certifies that the record of trial contains all required information,[220] providing copies to the accused and victim once all sealed exhibits and transcripts/recordings of closed sessions have been removed.[221] Standing courts-martial would obviate the need for R.C.M. 1112(e)(3)(A), which makes the convening authority responsible for removing all classified information from the accused's copy of the record of trial, because there is no need to reinject the commander with a risky administrative requirement that late in the process when the military judge is better positioned to handle it.

One natural role for a permanent military judiciary is conducting hearings on the vacation of suspended sentences under R.C.M. 1108. Although this is not required, it would bring a degree of regularity and familiarity with legal processes

[214] Article 29(c), UCMJ, 10 U.S.C. § 829(c) (2019).
[215] Article 29(a)-(b), UCMJ, 10 U.S.C. § 829(a)-(b) (2019).
[216] Article 29(d), UCMJ, 10 U.S.C. § 829(d) (2019).
[217] MJRG, *supra* note 20, at 284; Schlueter, *supra* note 14, at 42–43.
[218] *See* MJRG, *supra* note 20, at 80–81. *But see* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 473 (2014) (arguing that commanders should retain robust discretion over court-martial findings and sentences as part of their mission to ensure good order and discipline).
[219] MCM, *supra* note 2, R.C.M. 1102(a)(1), 1111(a)(1).
[220] *Id.* at 1112(c).
[221] *Id.* at 1112(e)(1), 1112 (e)(3)(B).

to the job, which is currently done on an ad hoc basis by the offender's special court-martial convening authority or a judge advocate appointed by him.[222] The most critical aspect of the post-trial process is that the commander retains the authority to impose the punishment itself, rather than fully transitioning to the civilian model in which the court acts on behalf of the government. If the court were to exercise final judicial power, without review or approval by the commander, then it would potentially exceed its authority under Article I of the Constitution.[223]

IV. Implementation

So far, this Article has provided the historical and constitutional framework for establishing a system of standing courts-martial, as well as the statutory and procedural modifications required to implement it. If the proposal is adopted, it will require fundamental changes in the administration of military justice, and any proposal that is not functionally practical is unlikely to be implemented. Assuming a resource-constrained environment, in both personnel and funding, each Service will have to determine for itself how to best administer permanent courts. The following section addresses how one Service, the Marine Corps, could adapt its current legal services structure to support standing courts-martial with relatively minor adjustments. It will conclude by addressing the feasibility of standing courts-martial in deployed environments, which present unique challenges and distinguish military courts from civilian courts.

A. Proof of Concept: A Standing Court System in the Marine Corps

The Marine Corps recognizes two forms of legal support: command legal advice and legal services.[224] The first category, command legal advice, is "independent legal advice to commanders" provided by Marine judge advocates "assigned or attached to, or performing duty with, military units."[225] This is the role of staff judge advocates (SJAs), who inform the commander's decision-making process on military justice, operational law, administrative law, claims, and ethics, among other issues.[226] The second category, legal services, are "those recurring legal support tasks that are executed to implement a commander's decision, sustain the force, and support servicemembers, retirees, and their families."[227] These functions are performed by four regionally-configured Legal

[222] *Id.* at 1108(d)(1)(A).
[223] Lyon & Farmiloe, *supra* note 14, at 265.
[224] 1 U.S. MARINE CORPS, ORDER 5800.16, LEGAL SUPPORT AND ADMINISTRATION MANUAL ¶ 0201 (2018) [hereinafter 1 LSAM].
[225] 10 U.S.C. § 5046(d)(2) (2018).
[226] 1 LSAM, *supra* note 224, ¶ 0202.
[227] *Id.* ¶ 0203; *see also* COMPREHENSIVE REVIEW, *supra* note 41, at 162 (discussing Marine Corps legal service missions).

Services Support Sections (LSSSs) and ten subordinate Legal Service Support Teams (LSSTs).[228] The SJA to the Commandant of the Marine Corps makes recommendations on legal structure and resource alignment to the Commandant, who retains the authority to change LSSS structure as part of "implementing and administering" the UCMJ in accordance with Title 10 of the U.S. Code.[229] Standing courts-martial are consistent with the LSSS/T construct and in many ways complement it, better enabling execution of the legal services mission.

1. The Current System

LSSS/Ts functionally support commanders and individuals in their region but administratively fall under the Marine Corps installation that hosts them.[230] The LSSS/T chain of command is separate from, and independent of, the respective installation SJA, who focuses solely on command legal advice.[231] Military justice capabilities—trial, defense, victims' legal counsel (VLC), and post-trial review—are regionally consolidated at the LSSS/T, rather than stovepiped by individual locations, for the sake of proficiency, efficiency, and accountability.[232] Each LSSS is led by an Officer in Charge (OIC) (O-6) and supported by a Legal Administrative Officer (CWO-4) and a senior enlisted Legal Services Chief (E-9).[233]

A recent reorganization has left OICs with primarily administrative responsibilities.[234] They oversee the court reporters and the post-trial review section, via the Post-Trial Administration Officer (chief warrant officer or judge

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[228] 1 LSAM, *supra* note 224, ¶ 0203; COMPREHENSIVE REVIEW, *supra* note 41, at 136.

[229] U.S. MARINE CORPS, ORDER 5430.2, ROLES AND RESPONSIBILITIES OF THE STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS 1-2 (2013); *see also* COMPREHENSIVE REVIEW, *supra* note 41, at 135–37 (explaining the Commandant-directed reorganization of the Marine Corps legal community in 2012). A Table of Organization and Equipment Change Request (TOECR) that does not create or consume force structure is usually not controversial and can be executed via the monthly Authorized Strength Report. Changes to employment and function of the LSSS/T can be immediately directed through Marine Administrative Message and then memorialized in the LSAM and published as soon as possible. Telephone interview with Major Gavin K. Logan, Deputy Dir., Joint Strat. Initiatives Branch, Judge Advocate Div., Headquarters Marine Corps (Mar. 30, 2021).

[230] 1 LSAM, *supra* note 224, ¶ 0203; COMPREHENSIVE REVIEW, *supra* note 41, at 136.

[231] *See* U.S. MARINE CORPS, MARADMIN 416/12, PROVISION OF LEGAL SERVICES SUPPORT ¶ 3(B) (2012).

[232] COMPREHENSIVE REVIEW, *supra* note 41, at 137. This was the primary effect of the 2012 reorganization of the Marine Corps legal community, which emphasized "regional consolidation of military justice capabilities (Trial, Defense, Victims' Legal Counsel, and Post-Trial Review)." *Id.* at 155.

[233] *Id.* at 144.

[234] Until recently, the LSSS OICs bore ultimate responsibility for the provision of trial services within their regions. 16 LSAM, *supra* note 186, ¶ 0203. This included supervision of the trial office via the Regional Trial Counsel (O-5), whose reporting senior for fitness reports was the OIC even though the OIC was not a trial counsel and did not try cases. *Id.* ¶ 0204. The same principle applied to LSST OICs and STCs at the sub-regional level. *Id.* ¶ 0213.

advocate),[235] and they ensure compliance with the information reporting requirements of Article 140a by querying case management databases for substantive information on offenses and the production and distribution of records of trial.[236] OICs also maintain installation courthouses, which feature courtrooms, judicial chambers,[237] waiting areas for witnesses, members, and spectators, and work spaces for the trial, defense, VLC, and court reporter sections.[238] To assist in this mission, the LSSS OIC appoints a courthouse security officer to oversee physical security measures within the region and train LSSS personnel in the use of metal detectors, physical searches, and non-lethal force.[239] Trial security officers are responsible for the security of individual military justice proceedings through oversight of courtroom security personnel, bailiffs, and command brig chasers.[240] LSST OICs coordinate with local facilities that provide confinement services for supported commands.[241] OICs are also responsible for assigning officers and enlisted Marines among the LSSS/T offices throughout their tour there.[242]

The Regional Trial Counsel (RTC) (O-5),[243] Regional Defense Counsel (O-5),[244] and Regional VLC (O-4)[245] operate within their own technical chains of command, independent of the OIC, even though they reside at the LSSS and are administratively supported by the OIC. A Trial Services Administration Officer (CWO-2) is directly responsible to the RTC for the administration of trial services throughout the region, including witness travel coordination, notifications required under the Victim-Witness Assistance Program, and "all other administrative tasks associated with a court-martial that do not require Article 27(b) certification."[246] The LSSTs mirror this structure, with an OIC (O-5) administratively supporting a

[235] *Id.* ¶ 022201.
[236] *Id.* ¶ 1303. The military judiciary is responsible for ensuring access to docket information, filings, and records, which would not change under this proposal.
[237] Military judges use facilities maintained and operated by the LSSS or LSST but remain administratively and functionally independent from those chains of command. JAGINST 5813.4I, *supra* note 82; s*ee supra* Part III.B.2.b. (discussing the roles and responsibilities of military judges). This proposal does not affect the current arrangement.
[238] 16 LSAM, *supra* note 186, ¶ 1604.
[239] *Id.* ¶ 150404.
[240] *Id.* ¶ 150405.
[241] *Id.* ¶ 0121203.
[242] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 135–36.
[243] As of 1 June 2021, all trial services personnel fall within the Marine Corps Trial Services Organization and report to the Chief Trial Counsel of the Marine Corps, rather than their respective LSSS/T OIC. MIL. JUST. BRANCH, JUDGE ADVOCATE DIV., HEADQUARTERS MARINE CORPS, PRACTICE DIRECTIVE 1-21, ESTABLISHMENT OF THE MARINE CORPS TRIAL SERVICES ORGANIZATION AND THE CHIEF TRIAL COUNSEL OF THE MARINE CORPS (2021).
[244] *Id.* ¶ 010608.
[245] *Id.* ¶ 010304(B).
[246] *Id.* ¶ 020702.

Senior Trial Counsel (O-4), Senior Defense Counsel (O-4), and VLC (O-3) who actually run their respective shops.[247]

2. The Proposed System

Now that OICs no longer supervise trial counsel, LSSS/T OIC functions are nearly identical to the roles and responsibilities of federal Clerks of Court. Charged with "carry[ing] out the court's administrative functions," clerks maintain the records and dockets of the court, manage the court's information technology systems, administer the court's jury system, provide court reporter services, and provide courtroom support services like security and maintenance.[248] Clerks are "the chief administrative officer[s] of the court."[249] If Congress establishes standing courts-martial, the OICs of LSSSs and LSSTs could easily transition to the equivalent of a "Clerk of Military Court" position, still aligned regionally and responsible to the host installation for the provision of court services. The title of the billet is less important than its responsibilities and authorities, so this proposal recommends that they remain "OIC" for the sake of simplicity and continuity.[250]

The support apparatus that currently falls under the OIC—Legal Administration Officer, Legal Services Chief, Post-Trial Administration Officer, courthouse security officers, and trial security officers—would remain in place and carry on essentially as it does now, with the exception of the oversight of personnel moves within the LSSS.[251] The Legal Administration Officer would continue to "be responsible for the administrative and functional management of the business aspects of the provision of legal services support" and serve as "the principal technical advisor to the [OIC] on all administrative matters."[252] The Legal Services Chief would remain the senior enlisted legal services specialist at the LSSS and act as personnel advisor to the OIC.[253]

Finally, the Post-Trial Administration Officer would retain control of the court reporters[254] and post-trial review section, which ensures proper certification and service of records of trial and tracks, promulgates, and stores records for all court-martial proceedings in the region.[255] Changes to the LSSS structure would not impact the post-trial R.C.M.s discussed above. The post-trial office would

[247] *Id.* ¶¶ 0212, 0213.
[248] ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 82, at 21.
[249] *Id.* at 22.
[250] The names of the "LSSS" and "LSST" also do not need to change.
[251] COMPREHENSIVE REVIEW, *supra* note 41, at 144.
[252] U.S. MARINE CORPS, ORDER 1200.17E, MILITARY OCCUPATIONAL SPECIALTIES MANUAL 1-148 (2013).
[253] COMPREHENSIVE REVIEW, *supra* note 41, at 156.
[254] *Id.* ¶ 022204 (placing court reporters under the Post-Trial Administration Officer); *id.* ¶¶ 1201–11 (detailing court reporter procedures).
[255] *Id.* ¶ 022201.

remain responsible for forwarding the record of trial and convening authority action to the military judge for entry of judgment, which terminates the trial proceedings and initiates the appellate phase.[256] The LSSS would remain responsible for ensuring the collection of trial data according to Article 140a of the UCMJ.[257]

For personnel assignments, the Marine Corps should divide the functional areas within the LSSS/Ts into separate Monitored Command Codes (MCCs), one each for trial, defense, and VLC, with a fourth MCC for the OIC's office (this could remain the same as the current LSSS/T MCC).[258] This will encourage continuity within the three military justice shops and reinforce their functional independence from the OIC.[259] The primary outcome of dividing the LSSS/Ts into MCCs that correspond to trial, defense, and VLC shops is the elimination of the need for the OIC to administratively oversee any of the military justice shops.[260] Instead, the OIC will focus solely on the administrative aspects of the standing court system.[261] This maintains the OIC's "landlord" functions relative to the "tenants" of the military justice system by providing the facilities, security, and administrative support that enable the various components to execute their assigned functions.

One of the more substantial changes will be the staffing of a member identification office within the LSSS. As discussed above, the establishment of

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[256] *Id.* ¶ 170606. The Department of the Navy Chief Judge and Assistant Judge Advocate General (02) remain accountable and responsible for cases from Navy and Marine Corps Appellate Review Activity through Navy and Marine Corps Court of Criminal Appeals. COMPREHENSIVE REVIEW, *supra* note 41, at 239.

[257] *See supra* Part III.B.3.c. (discussing the 1100 series of the R.C.M.s). The LSSS currently "ensure[s] data is collected and reflected accurately in accordance with the Secretary of Defense's standards." 16 LSAM, *supra* note 186, ¶ 1704.

[258] Creating multiple MCCs within a single Reporting Unit Code (RUC) does not alter command relationships, so the administrative command relationships involved with hosting Marine Corps installations would remain unaffected. *See generally* U.S. MARINE CORPS, ORDER 5311-1E, TOTAL FORCE STRUCTURE PROCESS (2015). Modifying MCCs requires a TOECR, which does not move, create, or consume personnel structure. Marine Corps Installations Command is the appropriate command to sponsor this TOECR. Interview with Major Gavin K. Logan, *supra* note 229.

[259] Personnel could still move among MCCs within the time period of their orders if circumstances required. *See* U.S. MARINE CORPS, ORDER 1300.8, MARINE CORPS PERSONNEL ASSIGNMENT POLICY 6-17 (2014).

[260] Congress previously considered a version of this approach but did not ultimately pass it. As detailed above, much has changed in the intervening half-century, and the necessary modifications to the UCMJ in Part III are significantly more modest. *See* Sherman, *supra* note 157, at 42–43 (identifying four proposed bills in the early 1970s that would have established "an independent court-martial command," composed of divisions for military judges, trial counsel, defense counsel, administrative functions, and review, and that would "exercise most of the appointive and administrative functions presently performed by the commander or his subordinates").

[261] The Navy is also considering this approach, by separating the trial shop into its own command to encourage more "focused attention to military justice." COMPREHENSIVE REVIEW, *supra* note 41, at 111.

standing courts-martial will potentially shift the responsibility for identifying panel members from the commander to the administrative office that runs the courts. [262] In this case, that office is the component of the LSSS still functionally controlled by the OIC. The convening authority's SJA and administration shops currently handle this responsibility, and the LSSS office will have to closely coordinate with them to ensure they are working with accurate personnel rosters and availability. To that end, the member identification office should be staffed with an additional administrative component, preferably led by an adjutant or chief warrant officer, in much the same way the trial shop is today augmented by an administrative specialist non-commissioned officer.[263] Potential staffing for this office can also come from the supported SJAs' offices, which will have a significant administrative burden removed from their portfolio.

The bailiffs, brig chasers, and courtroom security personnel who are currently supplied by convening authorities and the LSSS on a case-by-case basis would instead become permanent members of the standing court office.[264] This benefits commanders, who will no longer have their personnel siphoned off to fill duties outside of their Military Occupational Specialties, and the broader military justice institution, which is in need of professionalized support services. [265] Consideration should be given to reassigning responsibility for witness travel to this office so that the trial shop can increase its focus on prosecuting cases.

The first Marine Corps leadership principle is, "Know yourself and seek self-improvement."[266] The Marine Corps legal community has taken that principle to heart, conducting dozens of reviews and initiatives over the last fifty years to assess and refine our capabilities. [267] The above proposal is the next step in that evolution, allowing us to more effectively and efficiently provide legal services to the Fleet through the staffing of standing courts-martial.

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[262] *See* Part III.2.a. (discussing proposed changes to Article 25 of the UCMJ).
[263] *See* 16 LSAM, *supra* note 186, ¶ 0217. The trial shop would retain their trial services clerks, who assist in the execution of trial-specific tasks like witness interview proofers, documentation preparation, and other clerical jobs. *See id.* ¶ 0218.
[264] See *id.* ¶ 150801 (describing OIC roles and responsibilities in the context of courtroom security).
[265] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 146–48, 234 (observing that Navy and Marine Corps courtroom security does not employ permanent personnel and needs to be professionalized to elevate it to civilian courtroom standards).
[266] U.S. MARINE CORPS, MARINE CORPS WARFIGHTING PUBLICATION 6-11, LEADING MARINES 105 (1995).
[267] *See* COMPREHENSIVE REVIEW, *supra* note 41, at 141–42 (listing various evaluations of the Marine Corps legal community that informed the most recent Comprehensive Review Group's work).

B. Military Justice in Deployed Environments

Deployability is a key feature of military law.[268] Yet the nature of deployments is fundamentally different now than when the court-martial model first developed, with technology permitting ease of communication and travel that was not available to earlier generations of servicemembers.[269] The unique circumstances of a deployed environment, even in the modern context, demand flexibility and efficiency in a military justice system. These challenges only heighten the benefits of standing courts-martial, which enable commanders to focus on mission rather than administration by relying on an independently-operated court office to process cases.

World War II marked a turning point in the development of the U.S. military justice system.[270] It was also the last large-scale, multiple-theater war in which the United States was engaged. Perceived inequities in the administration of military justice during World War II led to the implementation of the UCMJ, which has governed military justice for the last 70 years.[271] The first major changes to the UCMJ came in 1969 at the height of the Vietnam War, demonstrating that the military justice system can undergo significant changes to its procedural and substantive framework in the midst of a major conflict.[272] Practical considerations also led to changes in confinement procedures, with commands consolidating their confinees at centralized brigs while awaiting trial or serving sentences because their units lacked the resources to individually supervise them in a non-garrison setting.[273]

This trend toward the centralization of military justice matters soon carried over to courts-martial themselves in an effort to reduce the administrative and logistical strain on units conducting distributed operations.[274] Between 1965 and 1970, the Navy established 30 "law centers" around the world to consolidate legal services for ships and shore commands operating far from home.[275] The Marine Corps followed suit in Vietnam, implementing "the law center concept [as]

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[268] *See, e.g.*, Westmoreland, *supra* note 9, at 7 (The military justice system must be "fully integrated into the Armed Services so that it can operate equally well in war as in peace. We need a system that is part of the Army to permit the administration of justice within a combat zone, and to permit our constitution and American legal principles to follow our servicemen wherever they are deployed.").
[269] Lyon & Farmiloe, *supra* note 14, at 159 (Early military justice systems "evolved over a lengthy period in circumstances in which lawyers were simply not available (fleets at sea or garrisons abroad, at times when communications moved at the speeds of horse and sailing ship).").
[270] *See* MJRG, *supra* note 20, at 67–70.
[271] *See id.* at 70–86.
[272] *See* FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 33 (2001) (describing the Military Justice Act of 1968).
[273] *See id.* at 32–33.
[274] *Id.* at 38–40.
[275] GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 146 (1989).

an efficient method which relieved field commanders of a heavy burden."[276] Each law center in the 1st Marine Division was managed by a Legal Administration Officer (CWO), who tracked case progress, ensured proper documentation, and enforced timeliness "from original complaint to conviction or release."[277] This structure also enabled professionalization of the court reporter cadre, which was struggling to meet the mission in more distributed environments.[278]

The next sustained combat operations came during Operations Enduring Freedom and Iraqi Freedom. From 2001 to 2003, "units handled almost all minor misconduct in the deployed theater; however, they generally sent service members suspected of more serious offenses back to the United States or Germany for prosecution due to austere deployed conditions and mission requirements."[279] Even after the environments in Afghanistan and Iraq became less kinetic, the standard practice was to push courts-martial to rear or supporting units so that combat units could focus on operations.[280] Even if the case remained in theater for trial, the court-martial itself was managed by a centralized office that maintained theater-wide communication and support but consolidated administrative functions at a large installation.[281] This construct has also been applied as a best practice in the joint environment, which presents unique jurisdictional and convening authority issues,[282] and is incorporated into service-specific publications.[283]

Standing courts-martial are fully compatible with today's deployed environments. By consolidating administrative structures and reducing red tape to better provide legal services downrange, they would further streamline military law by formalizing practices that are already in place.

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[276] *Id.*
[277] *See id.*
[278] *See id.* at 145.
[279] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME 1, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003) 233 (2004).
[280] *See* COMMANDERS SURVEY, *supra* note 66, at 1 ("Both the Marine Corps and the Army try a very small percentage of [their] cases forward-deployed.").
[281] *See generally* E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6 (describing the experiences of the Army III Corps' deployed military justice team in support of Operation Iraqi Freedom 10-11).
[282] *See, e.g.*, Mark W. Holzer, *Purple Haze: Military Justice in Support of Joint Operations*, ARMY LAW., July 2002, at 1.
[283] *See, e.g.*, 1 LSAM, *supra* note 224, ¶ 0206 (explaining legal support to deployed Marine Air Ground Task Forces).

V. Conclusion

The military justice system has come a long way from its early days as a method of enforcing discipline far from the constructs of civilian society. The professionalization of military law should culminate in the establishment of standing courts-martial, which comply with the constitutional framework under which the current system operates. With relatively minor adjustments, Congress and the President can increase the efficacy, efficiency, and credibility of military justice, both in garrison and deployed. Ad hoc courts-martial are a legacy capability, useful and necessary at one time but now causing more harm than good. We should divest ourselves of them.

Appendix A: Proposed Changes to Rule for Court-Martial 504

[new language underlined]

(a) *In general*. A court-martial is a standing court established pursuant to 10 USC 816 and operated by each service's Judge Advocate General.

(b) *Who may refer charges to courts-martial*.

(1) *General courts-martial.* Unless otherwise limited by superior competent authority, general courts-martial may have charges referred to them by persons occupying positions designated in article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

(2) *Special courts-martial.* Unless otherwise limited by superior competent authority, special courts-martial may have charges referred to them by persons occupying positions designated in article 23(a) and by commanders designated by the Secretary concerned.

(A) [No changes.]

(B) [No changes.]

(3) [No changes.]

(4) *Delegation prohibited.* The power to refer charges to courts-martial may not be delegated.

(c) *Disqualification*.

(1) *Accuser*. An accuser may not refer charges to a general or special court-martial for the trial of the person accused.

(2) *Other*. A referral authority junior in rank to an accuser may not refer charges to a general or special court-martial for the trial of the accused unless that referral authority is superior in command to the accuser. A referral authority junior in command to an accuser may not refer charges to a general or special court-martial for the trial of the accused.

(3) *Action when disqualified.* When a commander who would otherwise refer charges to a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another referral authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

(d) *Detailing order*.

(1) *General and special courts-martial.* For each court-martial, the detailed military judge shall issue a detailing order.

(A) A detailing order for a general or special court-martial shall—

(i) designate the type of court-martial; and

(ii) detail the members, if any, in accordance with R.C.M. 503(a);

(B) A detailing order may designate when and where the court-martial will meet.

(C) If the referral authority has been designated by the Secretary concerned, the detailing order shall so state.

(2) [No change.]

(3) Additional matters. Additional matters to be included in the detailing orders may be prescribed by the Secretary concerned.

(e) *Place*. The court-martial office shall ensure that an appropriate location and facilities for courts-martial are provided.

LIFE, LIBERTY, *AND PROPERTY*? ASSESSING WHETHER STATES CAN USE FORCE TO DEFEND UNMANNED SYSTEMS UNDER THE *JUS AD BELLUM*

Lieutenant Commander Lucianna H. Stamper, JAGC, USN*

Over the last three decades, unmanned systems like "drones" have emerged as a force multiplier, providing states with an increasing array of capabilities across a variety of domains. However, these systems also make attractive targets for potential adversaries, who may incorrectly assume that the destruction of an unmanned asset will not garner a forcible response. After Iran shot down a U.S. Global Hawk unmanned aerial system that was operating in international airspace over the Strait of Hormuz in June 2019, the United States claimed that the incident triggered its inherent right of individual self-defense under Article 51 of the U.N. Charter. Though the United States called off kinetic strikes in response, the incident highlighted the potential for miscalculation and unintended escalation surrounding the destruction of unmanned systems. States cannot adequately predict the behavior of other states in this realm because the U.N. Charter's underlying self-defense use of force framework has varying interpretations and does not expressly contemplate the destruction of property alone. Widely accepted state practice has not yet emerged, and states have not otherwise agreed to governing norms.

This Article reviews the self-defense use of force framework under the U.N. Charter in this context, demonstrating that the destruction of unmanned systems can, in certain circumstances, rise to the level of an "armed attack" sufficient to trigger the inherent right of self-defense, even where personnel casualties are impossible. It then assesses the customary international law limits of attribution, necessity, proportionality, and immediacy on the exercise of self-

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defense as it pertains to the destruction of property, finding that these limits can be interpreted to appropriately cabin state behavior in this application as well. Finally, it takes a prescriptive approach, arguing that it is in the U.S. interest to reduce the potential for escalation by concluding a non-binding, multilateral, international agreement that reflects the interpretive guidance laid out herein.

I. Introduction

The skies above the Strait of Hormuz (SoH) flashed during the early morning hours of June 20, 2019, as an Iranian surface-to-air missile shot down a U.S. Navy Global Hawk (RQ-4A) unmanned aircraft system (UAS).[1] Though Iran reported that the U.S. intelligence, surveillance, and reconnaissance (ISR) aircraft had entered Iranian national airspace, the United States has maintained that the aircraft was lawfully "operating in international airspace" when it was destroyed.[2] In response, then-U.S. President Donald J. Trump reportedly ordered kinetic military strikes against Iran, but the operation was called off during "its early stages."[3] Instead, the United States purportedly conducted cyber operations against Iranian missile launch systems.[4] Tensions between the United States and Iran continued in subsequent months, and the United States used Iran's decision to shoot down the Global Hawk as partial justification for two future defensive uses of force by the United States—once to destroy an Iranian UAS that closely approached *USS Boxer* (LHD 4) while she was transiting the SoH in July 2019 and again to kill Iranian General Qassem Soleimani in January 2020.[5] The U.S. letter to the U.N. Security Council (UNSC) in the wake of the *Boxer* incident characterized the destruction of the RQ-4A as part of a "series of escalating hostile acts" by Iran,[6] but the U.S. letter regarding the Soleimani incident expressly stated that the RQ-4A's destruction was an "armed attack" against the United States within the meaning of Article 51 of the U.N. Charter.[7]

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[1] Press Statement, U.S. Central Command, Iranians Shoot Down U.S. Drone (June 20, 2019), https://bit.ly/3iCLdet. The action occurred at 2335 GMT on June 19, 2019, which was June 19th in the United States and June 20th in Iran. The U.S. Navy Triton (MQ-4C) is a Global Hawk derivative.

[2] *Id.* Despite the factual dispute between the United States and Iran over the location of the RQ-4A at the time of its destruction, this paper will assume, for the sake of analysis, that it was operating lawfully in international airspace.

[3] Michael D. Shear, Eric Schmitt, Michael Crowley & Maggie Haberman, *Strikes on Iran Approved by Trump, Then Abruptly Pulled Back*, N.Y. TIMES (June 20, 2019), https://nyti.ms/2U3o9LV.

[4] Julian E. Barnes & Thomas Gibbons-Neff, *U.S. Carried out Cyberattacks on Iran*, N.Y. TIMES (June 22, 2019), https://nyti.ms/3pVRrIg.

[5] Letter from Ambassador Cherith Norman-Chalet, Chargé d'Affaires A.I. of the United States Mission to the United Nations, to the President, U.N. Security Council (Aug. 2, 2019), https://bit.ly/3czsrks [hereinafter Norman-Chalet Letter]; Letter from Ambassador Kelly Craft, Permanent Representative of the United States Mission to the United Nations, to Ambassador Dang Dinh Quy, President, U.N. Security Council (Jan. 8, 2020) [hereinafter Craft Letter], https://bit.ly/3gwud74.

[6] Norman-Chalet Letter, *supra* note 5.

[7] Craft Letter, *supra* note 5.

These U.S. claims of self-defense in response to the destruction of an unmanned system (UxS) operating in international airspace raise what appears to be "a question of first impression" under international law.[8] Namely, can the use of armed force against unmanned property alone constitute an "armed attack" sufficient to trigger a state's inherent right of individual or collective self-defense under the U.N. Charter and the customary international law (CIL) provisions embodied within it? If so, when? Though scholars like Ashley Deeks and Scott R. Anderson have astutely flagged this issue,[9] states have not yet addressed it via agreement or practice, and there is a gap in detailed scholarly analysis. This Article therefore provides a comprehensive evaluation of the U.N. Charter framework's use of force analysis in this context by examining the threshold for defensive action with respect to property and analyzing how the CIL limits of attribution, necessity, immediacy, and proportionality could be used to cabin state action in this realm. The Article then approaches the issue from the U.S. perspective and recommends that the United States negotiate a non-binding international agreement on the defense of property in order to shape future state practice in the U.S. interest and in accordance with the rule of law.

This Article proceeds in three parts. Part I explores why this question has remained unanswered by discussing how key technological advances have outpaced baseline assumptions of the U.N. Charter self-defense use of force framework. Part II then analyzes how the current U.N. Charter framework can be interpreted to appropriately limit the use of force to defend property. Part III takes a prescriptive approach, arguing that it is in the U.S. interest to adopt a non-binding international agreement reflecting the interpretation laid out in Part II.

II. Questions Left Unanswered by the Rise of New Unmanned Technologies

The emergence of UxS has created a plethora of new capabilities for states. However, it has also created new vulnerabilities. Specifically, UxS offer a lower cost means of conducting intelligence collection, harassment, and even attacks on adversary states, all with reduced attributability. They can also be viewed as particularly attractive targets for states seeking a relatively "low-risk" method of checking an adversary since their destruction, by definition, does not involve personnel casualties. As these UxS continue integration into the world's armed forces, the potential that destruction of a UxS may lead to unintended escalations in the use of force between states grows. Yet, the current self-defense use of force framework under the U.N. Charter does not expressly contemplate the

[8] Ashley Deeks & Scott R. Anderson, *Iran Shoots Down a U.S. Drone: Domestic and International Legal Implications*, LAWFARE (June 20, 2019), https://bit.ly/3cG8Jn4.
[9] *Id.*

destruction of unmanned property, meaning that states have little guidance to shape their behavior in these situations. This Section explores these technologies, the potential for escalation that their destruction may create, and the relevant gaps in the international legal framework.

A. Key Technological Developments

UxS have proliferated widely over the last three decades, taking on a variety of new military and civilian uses. States around the world, including the United States, "Australia, Canada, China, Denmark, the European Commission, Finland, Germany, India, Israel, Japan, Norway, Russia, Singapore, South Korea, Sweden, and the [United Kingdom]," are actively exploring the potential of UxS, as are a variety of companies.[10] In March 2021, the U.S. Navy released its first Unmanned Campaign Framework with the vision of "mak[ing UxS] a trusted and sustainable part of the Navy force structure, integrated at speed to provide lethal, survivable, and scalable effects in support of the future maritime mission."[11]

To assess how the U.N. Charter self-defense use of force framework applies to these systems, it is necessary to first provide a brief overview of the key technologies, their mission sets, and their navigational rights. U.S. Navy doctrine[12] broadly groups UxS into three main categories: UAS, unmanned surface vehicles (USVs), and unmanned underwater vehicles (UUVs).[13] UxS that are capable of operating in international waters and the super-adjacent international airspace are of particular relevance to our analysis, as no territorial state has complete sovereign jurisdiction over these "global commons."[14] Other types of property, including buoys, mines, and sensors, may also be located in international waters without physical manning.

UAS, often colloquially referred to as "drones," typically dominate headlines. These are defined by the U.S. Navy as "aircraft that do not carry a human operator and are capable of flight with or without human remote control," which "may be launched from the water's surface, subsurface, air or land."[15] The U.S. Department of Defense (DoD) classifies the UAS that it operates as "military aircraft" within the meaning of all applicable international conventions, treaties,

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[10] Craig H. Allen, *Determining the Legal Status of Unmanned Maritime Vehicles: Formalism vs. Functionalism*, 49 J. MAR. L. & COM. 477, 479 (2018).
[11] U.S. DEP'T OF THE NAVY, UNMANNED CAMPAIGN FRAMEWORK 8 (2021) [hereinafter UNMANNED CAMPAIGN FRAMEWORK].
[12] U.S. Navy policy is particularly salient to this discussion because the U.S. Navy operates UxS in international airspace and international waters, both on the surface and subsurface.
[13] U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS §§ 2.3.4, 2.3.5, 2.4.4 (2017) [hereinafter LONO HANDBOOK].
[14] For more on international waters as a "global commons," see, e.g., GLOBAL COMMONS AND THE LAW OF THE SEA (Keyuan Zou ed., 2018).
[15] LONO HANDBOOK, *supra* note 13, § 2.4.4.

and agreements.[16] The DoD also takes the position that its UAS "retain the overflight rights under [CIL] as reflected in the [U.N. Convention on the Law of the Sea (UNCLOS)]" and that they "enjoy all of the navigational rights of manned aircraft."[17] The U.S. military has operated UAS for over 30 years, with mission sets that currently include ISR, targeting, refueling, command and control gateways, and logistics.[18]

USVs are defined by the U.S. Navy as "water craft that are either autonomous or remotely navigated and may be launched from the surface, subsurface, air, or land."[19] USVs enjoy the navigational rights of other craft in international waters as well as "the right of innocent passage in the territorial sea" and "the right of unimpeded transit passage through [covered] straits and their approaches."[20] These craft are viewed as "force multipliers" because of their "anticipated stealth, mobility, flexibility of employment, and network capabilities," and the "missions envisioned [for them] . . . include laying undersea sensor grids, antisubmarine warfare . . . prosecution, barrier operations, sustainment of carrier operating areas, mine countermeasures, [ISR], bottom mapping and survey, and special operations support."[21] Of particular note, the United States' *Sea Hunter*, a 40-meter USV prototype, transited unassisted from Hawaii to San Diego in 2019,[22] and it is currently in operation with Surface Development Squadron One, conducting Fleet Exercises.[23]

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[16] *Id.*; *see also* U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 14.3.3 (2016) [hereinafter LOW MANUAL]. The LOW Manual notes that:

> [m]ilitary aircraft may be understood as aircraft that are designated as such by a State that operates them. The United States has not ratified a treaty that requires certain qualifications before an aircraft may be designated as military aircraft. In general, military aircraft are operated by commissioned units of the armed forces of a State, bearing the military markings of that State, and commanded by a member of the armed forces of that State.

LOW MANUAL § 14.3.3.

[17] LONO HANDBOOK, *supra* note 13, § 2.4.4.

[18] UNMANNED CAMPAIGN FRAMEWORK, *supra* note 11, at 14, 34–35.

[19] LONO HANDBOOK, *supra* note 13, § 2.3.4.

[20] Covered straits are those "used for international navigation between one part of the high seas or an [exclusive economic zone (EEZ)] and another part of the high seas or an EEZ." *Id.* §§ 2.5.2.5, 2.5.3.2; *see also* U.N. Convention on the Law of the Sea arts. 37–38, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. USVs are also presumably included among "[a]ll ships and aircraft" that "enjoy the right of archipelagic sea lanes passage while transiting through, under, or over archipelagic waters and adjacent territorial seas via all routes normally used for international navigation and overflight." LONO HANDBOOK, *supra* note 14, § 2.5.4.1.

[21] LONO HANDBOOK, *supra* note 14, § 2.3.4.

[22] Evan Karlik, *US-China Tensions: Unmanned Military Craft Raise Risk of War*, NIKKEI ASIA (June 28, 2019), https://s.nikkei.com/3xgQuwv.

[23] UNMANNED CAMPAIGN FRAMEWORK, *supra* note 11, at 15.

UUVs similarly comprise of "underwater craft that are either autonomous or remotely navigated and may be launched from the surface, subsurface, air or land," but not "towed systems, hard-tethered devices, systems not capable of fully submerging . . . , semisubmersible vehicles, or bottom crawlers."[24] UUVs also enjoy navigational rights of other craft in international waters as well as "the right of innocent passage in the territorial sea" and "the right of unimpeded transit passage through [covered] straits and their approaches."[25] Myriad UUV missions may include "[ISR], mine countermeasures, [antisubmarine warfare], inspection/identification, oceanography, communication/navigation network nodes, payload delivery, information operations, time critical strike, [and barrier patrol]."[26]

CIL dictates that "all manned and *unmanned vessels and aircraft* owned or operated by a State, and used, for the time being, only on government noncommercial service are entitled to sovereign immunity."[27] This sovereign immune status provides the craft with "complete immunity from the jurisdiction of any State other than the flag State"[28] and protects such craft from "arrest, search, and inspection" regardless of where they are located, to include "protecting the identity of personnel, stores, weapons, or other property on board the vessel."[29]

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[24] *Id.* § 2.3.5.

[25] *Id.* §§ 2.5.2.5, 2.5.3.2. Again, UUVs are presumably included among "[a]ll ships and aircraft" that "enjoy the right of archipelagic sea lanes passage while transiting through, under, or over archipelagic waters and adjacent territorial seas via all routes normally used for international navigation and overflight." *Id.* § 2.5.4.1.

[26] *Id.* § 2.3.5.

[27] *Id.* § 2.1 (emphasis added); *see also* UNCLOS, *supra* note 20, arts. 95–96. As a general matter, "vessels" are defined by the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) to include "every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water." 33 U.S.C. § 1601. Whether unmanned maritime systems categorically qualify as "vessels" under the COLREGs, or as "vessels" or "ships" under other applicable international law, remains unsettled. *See* Allen, *supra* note 10, at 488–92. However, the LONO Handbook explicitly includes USVs and UUVs within the definition of sovereign immune craft. LONO HANDBOOK, *supra* note 13, § 2.3.6. Additionally, some may argue that sovereign immunity as an international legal concept for maritime vessels does not explicitly extend to military aircraft, as they are not "visited" in the same manner as vessels; however, "military aircraft, like warships, [have been] customarily accorded certain privileges and immunities by friendly foreign States." LOW MANUAL, *supra* note 16, § 14.3.3.1. As a matter of policy, the U.S. Navy also "assert(s) full sovereign immunity for all manned and unmanned U.S. Navy aircraft and other State aircraft." NAVADMIN 165/21 ¶ 6 (Aug. 4, 2021). In practice, when a U.S. EP-3E aircraft was clipped by a Chinese aircraft and forced to land on Hainan Island in April 2001, the argument was made that military aircraft forced to land in distress were immune from inspection by China as the territorial state. CONG. RSCH. SERV., RL30946, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL2001: ASSESSMENTS AND POLICY IMPLICATIONS 20 (2001).

[28] *See* UNCLOS, *supra* note 20, arts. 95–96.

[29] LONO HANDBOOK, *supra* note 13, § 2.1. USVs and UUVs could also arguably meet the definition of "warships" under CIL. UNCLOS, which the United States considers to be reflective of peacetime customary law of the sea on this point, defines "warships" as:

B. The Potential for Unintended Escalation

Taken together, these UxS will "serve as an integral part of the [U.S.] Navy's warfighting team" and "a key element of [U.S.] future success" because they offer advantages that will forever elude manned craft, such as "decreased risk to human life," "increased range, endurance, and persistence," and "access to uninhabitable environments."[30] Yet, while these systems can act as force multipliers and cost-savers, they can also "make for tempting targets" because they "have no mothers."[31] As a result, potential adversaries are likely to assume that states will not respond with armed force over the loss of a UxS, and they may therefore be particularly inclined to test limits by destroying UxS or interfering with their missions.[32]

UxS operated by the U.S. government in international waters and airspace have been involved in at least four incidents involving seizure[33] or the threat and/or use of force over the last decade. The first incident occurred in 2012, when Iranian jets fired at an unmanned U.S. Predator (MQ-1) drone operating in international airspace; the fires missed their intended target, and the United States did not respond with known military operations.[34] This attempted strike took place just days before the U.S. presidential election, though it was not reported on or acknowledged by the Pentagon until a week later.[35] Subsequently, in December

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> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Id. § 2.2.1; *see also* LOW MANUAL, *supra* note 16, § 13.4.1; UNCLOS, *supra* note 20, art. 29. However, nothing expressly states that the commander or crew needs to be physically aboard the ship. To the extent that certain USVs and UUVs qualify as "warships," they are authorized to "exercise belligerent rights," like engaging in "offensive combat operations." *See* LONO HANDBOOK, *supra* note 13, § 2.2.1.

[30] UNMANNED CAMPAIGN FRAMEWORK, *supra* note 11, at 2–3, 10.

[31] Karlik, *supra* note 22.

[32] *Id.*

[33] This article focuses primarily on the legal implications of the destruction of UxS. It assumes, without assessing, that seizure of UxS should be treated similarly to destruction of UxS since the seizure of UxS presumptively involves force and can result in more severe harm to the state than destruction of UxS, given the potential for exploitation of sensitive systems. Additional scholarship is needed to fully analyze the legal implications surrounding seizure of UxS.

[34] Ashley Deeks, *Does the U.S. Currently Have a Right of Self-Defense Against Iran?*, LAWFARE (June 19, 2019), https://bit.ly/3zrosAb.

[35] Thom Shanker & Rick Gladstone, *Iran Fired on Military Drone in First Such Attack, U.S. Says*, N.Y. TIMES (Nov. 8, 2012), https://nyti.ms/3xit3Tr.

2016, China seized a U.S. UUV operated by a nearby U.S. survey vessel in the international waters of the South China Sea.[36] China claimed that it seized the UUV "in order to prevent the device from harming the navigation safety and personnel safety of the ship" and asserted that "[t]he U.S. military has frequently dispatched naval vessels to carry out reconnaissance and military measurements in China's water."[37] Following diplomatic protests by the United States, China returned the UUV to a waiting U.S. warship.[38] In June 2019, the United States reported that Iran attempted to shoot down a U.S. Reaper (MQ-9) UAS with a surface-to-air missile as the UAS was surveilling the damage caused by a limpet mine attack on oil tankers in the Persian Gulf; the missile missed its target by approximately one kilometer.[39] The United States maintained that it was "'considering the full range of options'" in response, including military activity,[40] but no known action was taken at that time. Finally, as previously discussed, Iran shot down a U.S. Global Hawk operating in international airspace above the SoH in June of 2019.

Though none of these incidents led to an immediate forcible response by the United States, the incidents increased in severity, and the potential for miscalculation surrounding the interference with or destruction of UxS continues to grow,[41] particularly as more countries develop the technology necessary to destroy the UxS of competitor states.[42] As the above UUV and Global Hawk examples illustrate, these incidents can arise as a matter of opportunity, where the potential for escalation has not been fully assessed. Alternatively, as shown by the 2012 attempt on the Predator in conjunction with the U.S. election, these incidents can be used as a calculated, "low-risk" mechanism for sending a strong political message at key junctures. In that scenario, President Barack Obama was facing domestic pressure to address Iran's nuclear program, but the administration made the conscious decision to avoid escalation.[43] Other leaders may have chosen a different path in an attempt to appear tough on Iran and rally support before the election. Future administrations may not be willing to tolerate such "gray zone"

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[36] Mark Katkov, *China Returns U.S. Navy Drone Seized in South China Sea*, NPR (Dec. 20, 2016), https://n.pr/3pVZRiH.
[37] Missy Ryan & Emily Rauhala, *China Said It Would Return a Seized U.S. Naval Drone. Trump Told Them to 'Keep It,'* WASH. POST (Dec. 18, 2016), https://wapo.st/3wmVi3d.
[38] Katkov, *supra* note 36.
[39] The U.S. also attributed the underlying limpet mine attacks against a Japanese and a Norwegian tanker to Iran. Deeks, *supra* note 34. It does not appear that Iran proffered a legal justification for the attempted strike.
[40] *Id.*
[41] *See* Karlik, *supra* note 22.
[42] The Global Hawk is a high-altitude UAS, which carries a price tag of $176 million and is comparatively difficult to shoot down. Iran's decision to destroy this particular UAS demonstrated its advanced capabilities. Tara Law, *Iran Shot Down a $176 Million U.S. Drone. Here's What to Know About the RQ-4 Global Hawk*, TIME (June 21, 2019), https://bit.ly/3ggEyVU.
[43] Shanker & Gladstone, *supra* note 35.

activity, which has become a hallmark of Iranian, Chinese, and Russian operations.[44] Thus, the proliferation of UxS combined with the high likelihood of unintended escalation and/or miscalculation surrounding their seizure and destruction has created a tinder box for potential conflict. Clear international legal norms are needed to prevent a spark. Unfortunately, the current self-defense use of force framework under the U.N. Charter does not provide that clarity.

C. Gaps in the Current Framework

Theories of "just war" and CIL on the resort to force have contemplated the destruction of property for centuries. Famed Dutch legal theorist Hugo Grotius' 1625 work, *De Jure Belli ac Pacis*, for example, provides an extensive outline of the just causes for war.[45] He rooted his analysis on an individual's rights, under natural law, to defend his or her life *and property*; however, and somewhat controversially, he also assessed that obtaining one's belongings and inflicting punishment could be just cause for war.[46] In other words, Grotius viewed the "revindication" of property rights as a just cause for war.[47] A review of states' "war manifestos" co-authored by Oona Hathaway similarly highlights that "tortious wrongs," including "injuries to life and property," were a common justification for the resort to force through the mid-1800s.[48] The current U.N. Charter use of force framework and the CIL principles embodied within it also allow for the defense of property in a variety of circumstances, including property located within the territory of the defending state and property located abroad, where it is a military unit or installation of the defending state, an embassy of the defending state, or belongs to the nationals of the defending state.[49]

Where property is located within the territory of the defending state, the justification for defending the property is inexorably tied to the broader need to defend the state's borders. Large-scale invasions indisputably constitute armed attacks.[50] The International Court of Justice (ICJ) has concluded that "mere frontier incidents" are insufficient to trigger the right of self-defense in response

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[44] "Gray zone" activity refers to competitive actions and aggressive behaviors that "play[] out primarily below the threshold of major war." LYLE MORRIS, MICHAEL MAZARR, JEFFREY HORNUNG, STEPHANIE PEZARD, ANIKA BINNENDIJK & MARTA KEPE, GAINING COMPETITIVE ADVANTAGE IN THE GRAY ZONE: RESPONSE OPTIONS FOR COERCIVE AGGRESSION BELOW THE THRESHOLD OF MAJOR WAR 1–2 (2019).

[45] John Yoo, *Hugo Grotius, De Jure Belli ac Pacis (1625)*, HOOVER INST. (Feb. 6, 2019), https://hvr.co/3woZ7VC.

[46] *Id.*

[47] Randall Lesaffer, *Too Much History: From War as Sanction to the Sanctioning of War*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 37 (Marc Weller ed., 2015).

[48] Oona Hathaway et al., *War Manifestos*, 85 U. CHI. L. REV. 1139, 1188–89 (2018).

[49] TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTION IN CUSTOMARY LAW AND PRACTICE 184–249, 347–50 (2010).

[50] D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 29 (1958).

to a territorial incursion by land, sea, or air,[51] but the line that divides a mere frontier incident and a territorial breach that warrants a forcible response remains somewhat unclear. Tom Ruys offers that defense can be permissible where a territorial incursion occurs and an "*animus aggressionis*" is evident from the political context, the gravity of the incursion, the type of forces making the incursion, and the *proximity of the incursion to sensitive targets*, such as military bases.[52]

Where property is located abroad or on the high seas, the justification for defending the property centers on the property's status as an "external manifestation[] of the state."[53] Military units and installations located abroad are universally accepted as external manifestations of the state, capable of being defended with force.[54] To this end, the North Atlantic Treaty Organization (NATO) Treaty, which is intended to operate as part of the U.N. Charter system on the use of force, explicitly allows for collective self-defense in response to "an armed attack . . . on the forces . . . of any party."[55] More recently, in *Oil Platforms*, the ICJ left open "the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defense.'"[56] William H. Taft, IV, the former Legal Adviser for the U.S. State Department, also observed that "[t]here is certainly nothing in the [ICJ's] discussion in *Nicaragua* implying that missile and mine attacks on naval and commercial vessels are anything less than an armed attack," and "there is no support in international law or practice for the suggestion that missile or mine attacks carried out by a State's regular armed forces on civilian or military targets of another State do not trigger a right of self-defense."[57]

Embassies and diplomatic envoys are also often considered to be external manifestations of the state because they officially represent the state; still, some scholars argue that they should not be viewed in that manner because "an embassy lacks the quasi-territorial connection to the sending state which military units abroad are endowed with."[58] The United States chose to characterize the 1998 terrorist bombings of the U.S. embassies in Nairobi and Dar Es Salaam as armed attacks and relied on Article 51 of the U.N. Charter for defensive strikes against

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[51] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 ICJ 14, ¶ 195 (Jun. 27) [hereinafter *Nicaragua*].
[52] RUYS, *supra* note 49, at 347–49 (emphasis added).
[53] *Id.* at 199–200.
[54] *Id.* at 200.
[55] *Id.* (quoting North Atlantic Treaty art. 6, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243).
[56] *Id.* (quoting Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 72 (Nov. 6) [hereinafter *Oil Platforms*]).
[57] William R. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 302 (2004).
[58] RUYS, *supra* note 49, at 201, 204.

the responsible Al Qaeda cells.[59] In reacting to that assertion, "[n]o State suggested that the embassy bombings could not as such constitute an armed attack."[60]

Additionally, civilian aircraft and merchant vessels are arguably viewed as external manifestations of the flag state, though they too "do not constitute quasi-territorial extensions of their respective home states."[61] Here, the link to the flag state is economic in nature, as attacks against a fishing fleet, for example, could cause impacts akin to a blockade.[62] Thus, it is widely accepted that a flag state may protect its merchant vessels and aircraft from attack on the high seas.[63] U.S. Navy policy recognizes that "[i]nternational law, embodied in the doctrine[] of self-defense . . . provides authority for the use of proportionate force by U.S. warships and military aircraft when necessary for the protection of U.S. flag vessels and aircraft."[64] When the Tanker Wars between Iran and Iraq in the 1980s created a threat to neutral U.S. shipping in the Persian Gulf, the U.S. Navy acted on this policy, protecting U.S. flagged vessels, including vessels re-flagged from Kuwait.[65]

Lastly, nationals and their property located abroad may be viewed as external manifestations of the state.[66] CIL recognized that "'prior to 1945, States assumed the right to use force abroad for the protection of their nationals when their lives *or their property* were in imminent danger,'" though the circumstances in which nationals and their property may be defended under the U.N. Charter remains hotly debated.[67] In determining whether actions against nationals are of a sufficient magnitude to constitute an "armed attack," Kristen Eichensehr offers that one should weigh the position of the nationals relative to the state (*i.e.*, those conducting official business vice those acting as individuals), the reason that the nationals are targeted (*i.e.*, whether it is because of affiliation with the state), and whether the action against them (*e.g.*, hostage taking) violates other treaty provisions.[68] U.S. Navy policy also recognizes that international law provides for

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[59] *Id.* at 202.
[60] *Id.* Similarly, in 1980, the United States referenced the "Iranian armed attack" on the U.S. embassy in Tehran as justification for launching an ultimately failed military rescue mission into Iran. Letter from Ambassador Donald F. McHenry, Permanent Representative of the United States of America to the United Nations, to the President, U.N. Security Council (Apr. 25, 1980), https://bit.ly/3h4ooPx.
[61] RUYS, *supra* note 49, at 204.
[62] *Id.*
[63] *Id.* at 204–05.
[64] LONO HANDBOOK, *supra* note 13, § 3.10.1.
[65] JAMES KRASKA & PAUL PEDROZO, THE FREE SEA: THE AMERICAN FIGHT FOR FREEDOM OF NAVIGATION 211–16 (2018).
[66] *See generally* RUYS, *supra* note 49, at 213–49; s*ee also* Kristen Eichensehr, *Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues*, 48 VA. J. INT'L L. 451, 459–67 (2008).
[67] Eichensehr, *supra* note 66, at 463–67 (quoting Derek W. Bowett, *The Use of Force for the Protection of Nationals Abroad*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 39 (A. Cassese ed., 1986) (emphasis added).
[68] Eichensehr, *supra* note 66, at 468–70.

the protection of "U.S. nationals (whether embarked in U.S. or foreign flag vessels or aircraft), *and their property* against unlawful violence in and over international waters."[69]

In all the above examples, property mentioned is implicitly presumed to be physically co-located with nationals of the defending state, whether they are persons present in the defending state's territory or whether they are military personnel, diplomats, or nationals of the defending state in international waters/airspace or abroad. For example, in discussing the *Oil Platforms* judgement, Taft observed that "[f]or its part, if the United States is attacked with *deadly* force by the military personnel of another State, it reserves its inherent right preserved in the U.N. Charter to defend itself and its citizens."[70] Analysis of the Harvard Law School Program on International Law and Armed Conflict's compilation of all Article 51 letters submitted to the UNSC between October 24, 1945 and December 31, 2018 shows that states have consistently referenced destruction of property as a justification for the resort to force in self-defense; however, each such assertion is accompanied by a corresponding territorial breach and/or the potential loss of life.[71] Now, given the aforementioned advances in technology, that baseline presumption no longer holds. Property can operate independently of personnel and outside the sovereign territory of nation states.

III. Adapting the Self-Defense Use of Force Analysis

The ability to isolate UxS from both personnel and sovereign territory presents two inexorably intertwined questions—is property the *type of thing* that states have a right to defend when there is no possibility of corresponding personnel casualties? And, if so, can the destruction of property alone ever rise to the level of a "use of force" or "armed attack" within the meaning of the U.N. Charter? The latter question requires one to determine whether the impossibility of personnel casualties prevents the destruction of UxS from reaching those thresholds. This Section analyzes how the U.N. Charter self-defense use of force framework can adapt to answer these questions. It first explores the traditional triggers for self-defense and their application to the destruction of property. It then discusses how the CIL limitations of attribution, necessity, proportionality, and immediacy can apply to the defense of property. Finally, it touches on the UNSC's ability to authorize a forcible response to the destruction of property.

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[69] LONO HANDBOOK, *supra* note 13, § 3.10.1 (emphasis added).
[70] Taft, *supra* note 57, at 302 (emphasis added).
[71] *See* Dustin Lewis, Naz K. Modirzadeh, & Gabriella Blum, *Quantum of Silence: Inaction and* Jus ad Bellum *Annex*, HLS PILAC, i (2019).

A. Triggers for Self-Defense: A Right Worth Defending and Armed Attack

1. Background Use of Force Framework and Process for Adaptation

The use of force framework for states under the U.N. Charter is primarily governed by Articles 2(4) and 51. Article 2(4) sets the baseline prohibition on the use of force, stating in full that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[72] In this context, "force" is interpreted to refer to military or armed force rather than force of a "political, economic, or technological nature."[73] The terminology is a break from precursor prohibitions contained in the Covenant of the League of Nations and the Kellogg-Briand Pact, which used "war" instead of "force."[74] This change was intended to cover military action by states that did not amount to a declared or acknowledged war or armed conflict.[75] As a result, "any use of inter-State force by Member States for whatever reason is banned, unless explicitly allowed by the Charter."[76]

The last two clauses of Article 2(4) also present two challenges of interpretation relevant to our inquiry. First, are uses of force only prohibited when they are specifically directed at the territorial integrity or political independence of a state? Second, and relatedly, does the last clause of Article 2(4) serve as a catchall, preventing all uses of force inconsistent with the purposes of the United Nations?[77] Article 1 of the U.N. Charter lays out its broad purpose:

> To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[78]

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[72] U.N. Charter art. 2, ¶ 4.
[73] CHRISTIAN HENDERSON, THE PERSISTENT ADVOCATE AND THE USE OF FORCE: THE IMPACT OF THE UNITED STATES UPON THE *JUS AD BELLUM* IN THE POST-COLD WAR ERA 10 (2010).
[74] *Id.* at 10 n.17.
[75] Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624 (1984).
[76] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 94 (6th ed. 2017).
[77] *Id.* at 93–94; HENDERSON, *supra* note 73, at 11.
[78] U.N. Charter art. 1, ¶ 1.

Consistent with this goal, the *travaux préparatoires* of the U.N. Charter clearly indicate that the drafters intended to create "an absolute prohibition on the international use of force by states, accepted not only as a norm of [CIL], but also as a rule of *jus cogens*."[79] The ICJ expounded upon this principle in the *Corfu Channel* case, where the court rejected the United Kingdom's argument that its use of force, specifically "mine-sweeping operation[s] . . . carried out in Albanian waters—but without the consent of Albania," was permitted because it did not threaten Albania's territorial integrity or political independence.[80] The ruling made clear that force cannot be used under the U.N. Charter framework for "self-help" vice "self-defense."[81]

Article 51 is the provision that recognizes the individual and collective "self-defense" exception to the blanket prohibition in Article 2(4). It reads in relevant part "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[82] The terms "inherent right" and "armed attack" have triggered debate.

The first issue is whether "inherent right" is intended to preserve CIL notions of self-defense or whether self-defense may only be exercised in response to an "armed attack."[83] The widely accepted majority position finds that the inclusion of "inherent right" within Article 51 brings CIL concepts of self-defense, such as anticipatory self-defense and the customary limitations of necessity and proportionality, into the U.N. Charter framework.[84] As James A. Green observes, "it is . . . undeniable that the right of self-defence is, at least to some extent, governed by [CIL]."[85] The U.S. DoD concurs, finding that "[t]he Charter of the United Nations was not intended to supersede a State's inherent right of individual or collective self-defense in [CIL]."[86] Current debate therefore centers mainly on the *scope* of CIL as incorporated into the U.N. Charter, for example whether preemptive or preventative self-defense is authorized, rather than the survival of CIL norms under the U.N. Charter.[87]

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[79] LINDSAY MOIR, REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, *JUS AD BELLUM* AND THE WAR ON TERROR 8–9 (2010).
[80] *Id.* at 7; HENDERSON, *supra* note 73, at 11.
[81] Schachter, *supra* note 75, at 1626.
[82] U.N. Charter art. 51.
[83] Schachter, *supra* note 75, at 1633.
[84] HENDERSON, *supra* note 73, at 13–14 (observing that states have not advanced the argument that CIL and the U.N. Charter framework differ with respect to the principles on the use of force).
[85] JAMES A. GREEN, THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW 2 (2009).
[86] LOW MANUAL, *supra* note 16, § 1.11.5.
[87] *See generally*, Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005); Schachter, *supra* note 75, at 1634.

The second issue is whether the choice to use the language of "armed attack" in Article 51 rather than authorizing self-defense in response to an unlawful "use of force" as mentioned in Article 2(4) is intended to signify a gap between the two terms.[88] The ICJ's jurisprudence on this matter and the stated position of the United States best represent the two schools of thought. In its *Nicaragua* and *Oil Platforms* decisions, the ICJ took a restrictive reading of "armed attack," stating that "it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[89] The ICJ indicated in *Nicaragua* that the "scale and effects" of an operation can be used to parse "armed attacks" from other "uses of force,"[90] but it "did not offer any assistance in terms of determining the relevant gravity threshold."[91] Still, language in the *Nicaragua* and *Oil Platforms* decisions does leave open the "theoretical possibility" that small-scale incidents may be considered cumulatively in determining whether an "armed attack" has occurred.[92] Overall, the ICJ's gravity threshold is presumably intended to prevent escalation in the face of minor infractions by providing states with the time and space to resolve issues, but as U.S. government officials like Taft have argued, "if States were required to wait until attacks reached a high level of gravity before responding with force, their eventual response would likely be much greater, making it more difficult to prevent disputes from escalating into full-scale military conflicts."[93]

To that end, the United States has long maintained that "use of force" and "armed attack" are co-extensive.[94] The basis for this position goes back to the negotiating process of the U.N. Charter at the San Francisco Conference. Due to concerns about regionalism, an early U.S. draft provision of Article 51 distinguished between "aggression," which would be the trigger for individual self-defense by states, and the clearest cases of aggression, referred to as "armed attacks," which would be required for collective self-defense.[95] Because of difficulty in defining "aggression" the term was dropped from the ultimate text of Article 51 as it related to individual self-defense, but the reporter for the subcommittee noted that, in making this adjustment, "'it was clear to the subcommittee that *the right of [individual] self-defence against* aggression should

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[88] MOIR, *supra* note 79, at 22.
[89] *Nicaragua*, *supra* note 51, ¶ 191; *Oil Platforms*, *supra* note 56, ¶ 51.
[90] *Nicaragua*, *supra* note 51, ¶ 195.
[91] MOIR, *supra* note 79, at 23.
[92] *Id.* at 123 (citing *Oil Platforms*, *supra* note 56, ¶ 64; *Nicaragua*, *supra* note 51, ¶ 231); GREEN, *supra* note 85, at 43.
[93] Taft, *supra* note 57, at 301. Scholars like Christine Gray have questioned whether Taft's claim is supported by empirical analysis of state practice since the *Nicaragua* decision. MOIR, *supra* note 79, at 120.
[94] *See, e.g.*, LOW MANUAL, *supra* note 16, § 1.11.5.2.
[95] TADASHI MORI, ORIGINS OF THE RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW: FROM THE *CAROLINE* INCIDENT TO THE UNITED NATIONS CHARTER 225 (2018).

not be impaired or diminished.'"[96] Indeed, the negotiating history shows that, ultimately, "the majority of states did not view the phrase 'armed attack' as having a particular character as a legal term of art."[97] Thus, under this interpretation, the U.N. Charter is thought to preserve a broad individual right of self-defense in response to all uses of force.[98]

States are the primary and ultimate arbiters of how that background framework will be applied to the defense of sovereign property, though they act in a decentralized, disaggregated manner.[99] In assessing whether the community of states has reached agreement on a particular interpretation or practice, the stance of the most powerful states should not be given particular weight, as that would run counter to the principle of sovereign equality; however, the stance of "specially affected" states may be of greater importance.[100] In practice, a victim state will decide in the first instance whether the use of force in self-defense is permissible.[101] It will then seek buy-in from other states through both physical acts and pronouncements until an interpretation is "generally shared."[102] Christian Henderson offers that, in determining when this threshold has been met, it is useful to consider: (1) action by the state advancing the interpretation where it could have acted in a similar way but failed to do so; (2) the support or non-support of the advancing state's traditional allies; (3) the actions of other states in similar circumstances; and (4) the reactions of intergovernmental organizations.[103] This factor-based construct means that "state practice and reaction, far from being an exact science, often seem[s] to be more of a rough sketch."[104] A "secondary interpretive community" including scholars, lawyers, judges, courts, and non-governmental organizations (NGOs) also impacts the development of international law.[105] The bar for altering *jus cogens* like the prohibition on the use of force is especially high and theoretically requires acceptance by the community of states "as a whole."[106]

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[96] *Id.* at 227 (citation omitted); *see also* Schachter, *supra* note 75, at 1633–34.
[97] GREEN, *supra* note 85, at 114.
[98] Interestingly, the United States does not now require a higher threshold for the exercise of collective self-defense. As the LOW Manual notes, "Article 51 of the Charter of the United Nations also recognizes the right of States to engage in collective self-defense with a State *that can legitimately invoke its own right of national self-defense*." § 1.11.5.5 (emphasis added).
[99] *See* HENDERSON, *supra* note 73, at 15.
[100] An example of a "specially affected" state is a coastal state in determining an issue with respect to the law of the sea. *Id.* at 20–21.
[101] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 495 (2012).
[102] HENDERSON, *supra* note 73, at 19, 22, 27.
[103] *Id.* at 30.
[104] *Id.* at 27.
[105] *Id.* at 25–26.
[106] *Id.* at 29.

2. Current Status of State Practice on the Defense of Unmanned Property

The text and context of the relevant U.N. Charter provisions are silent on the defense of property. It is unclear whether the object and purpose of the U.N. Charter is best served by strictly limiting the ability of states to respond to the destruction of property, as advocated by the ICJ, or whether the object and purpose of the treaty is best served by deterring repeated, low-level uses of force against property by authorizing a forcible response, as advocated by Taft. Thus, it is appropriate to consider state practice in interpreting the U.N. Charter framework in this application.[107]

As aforementioned, the United States was the first known victim state to threaten a forcible response to the destruction of a UxS after Iran shot down a Global Hawk transiting the SoH in June 2019.[108] President Trump reportedly decided to cancel kinetic military strikes in the days following the Global Hawk shoot down due to concerns about collateral damage.[109] When the United States destroyed an Iranian drone that approached *Boxer* in the SoH the following month, the U.S. Article 51 letter to the UNSC justified the action as a defensive use of force in response to a "series of escalating hostile acts by the Islamic Republic of Iran that have endangered international peace and security," including the Global Hawk shoot down.[110] The wording in this letter is questionable, as it references the *jus in bello* concept of self-defense in response to a hostile act, rather than using the *jus ad bellum* terminology of an "armed attack."[111] The United States clarified its position, however, in its January 2020 Article 51 letter regarding the Soleimani killing.[112] The latter letter specifically stated that the defensive use of force against Soleimani was justified in response to "an escalating series of armed attacks in recent months," including "an armed attack on June 19, 2019, by an Iranian surface-to-air missile on an unmanned U.S. Navy [Global Hawk] surveillance aircraft on a routine surveillance mission monitoring the [SoH] in international airspace."[113] Thus, the United States has now advanced the position that unmanned property is the type of thing that can rightfully be defended and that its destruction can amount to an "armed attack" within the U.N. Charter framework.

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[107] Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331. Though the United States is not a party to the Vienna Convention on the Law of Treaties, it considers its provisions on treaty interpretation to be reflective of CIL. Memorandum from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, n.9 (Oct. 19, 2010) (on file with author).
[108] Deeks & Anderson, *supra* note 8.
[109] Michael D. Shear, Helene Cooper & Eric Schmitt, *Trump Says He Was 'Cocked and Loaded' to Strike Iran, but Pulled Back*, N.Y. TIMES (June 21, 2019), https://nyti.ms/3i13d0o.
[110] Norman-Chalet Letter, *supra* note 5.
[111] For more on the *jus in bello* concept of self-defense, see, e.g., LOW MANUAL, *supra* note 16, § 5.8.3.3.
[112] Craft Letter, *supra* note 5.
[113] *Id.*

Draft domestic legislation to amend the War Powers Resolution, which is currently pending in the U.S. House of Representatives, also contemplates that the destruction of property may lead to forcible responses from other states, resulting in hostilities.[114] Specifically, it defines "hostilities" to include "any situation involving . . . purposeful destruction of property considered to be an exercise of use of force."[115]

An analysis of Henderson's factors, however, demonstrate that the U.S. position does not yet enjoy the general or wholesale support of the community of states. To begin, the United States itself did not classify prior attempts to shoot down U.S. UAVs or to seize a U.S. UUV as "armed attacks."[116] This is, of course, not dispositive. States that suffer internationally wrongful acts are not obliged to label them as such unless they plan to engage in self-defense or countermeasures; thus, the United States could have rightfully concluded that an armed attack had occurred in those situations but that a forcible response was unnecessary.[117] Traditional U.S. allies have been silent with respect to the legality of the use of force to defend property. After Iran shot down the Global Hawk, for example, the United Kingdom called for "de-escalation" without taking a stance on whether strikes against Iran would be a permissible response under international law.[118] Russia, though not specifically a U.S. ally, also "urged caution," while Israeli Prime Minister Benjamin Netanyahu got closer to accepting the U.S. position by "urg[ing] support for U.S. efforts to halt what he called escalating Iranian provocations."[119] To date, no other states are known to have faced a similar factual situation involving the destruction of unmanned property during peacetime.[120]

The response from intergovernmental organizations has also been muted. Immediately following the Global Hawk shoot down, the U.N. Secretary General Antonio Guterres called for the "parties to 'avoid any action that could inflame the situation,'"[121] and he similarly called for the "exercise [of] maximum restraint" on the part of both parties in response to the Soleimani killing.[122] For its part, the

[114] H.R.J. Res., 117th Cong. § 9(1) (Mar. 8, 2021), https://bit.ly/3yJXdQk.
[115] *Id.*
[116] *See* discussion in Part I.b, *supra*.
[117] Deeks, *supra* note 34; *see also* discussion in Part II.b, *infra*.
[118] Reuters Staff, *U.K. in Regular Contact with U.S. Over Iran, Urges De-Escalation*, REUTERS (June 21, 2019), https://reut.rs/2UG2KZi.
[119] Nassar Karimi & Jon Gambrell, *Iran Shoots Down US Surveillance Drone, Heightening Tensions*, ASSOC. PRESS (June 20, 2019), https://bit.ly/3hWxnSt.
[120] Deeks & Anderson, *supra* note 8. Iran maintained that *Boxer* did not destroy any of its UAS and that the United States may have mistakenly destroyed one of its own UAS. David Reid, *Iran Rejects Trump's Claim that the US Navy Destroyed One of Its Drones*, CNBC (July 19, 2019), https://cnb.cx/3ASPyRx. Iran therefore did not take a position on whether the destruction of its UAS constituted an "armed attack."
[121] Karimi & Gambrell, *supra* note 119.
[122] *Iran-US Attack in Iraq: Guterres Pledges 'Active Engagement' in Further De-Escalation Efforts*, U.N. NEWS (Jan. 8, 2020), https://bit.ly/3AU2JBS.

UNSC did not take action in response to either Iran's shoot down of the Global Hawk or the forcible responses by the United States. However, the U.N. Human Rights Council's Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions went so far as to say that the classification of the Global Hawk shoot down as an "armed attack" was "questionable."[123]

Scholars have also not reached consensus, though early analysis indicates skepticism of the U.S. position. Much of this criticism appears grounded in the disparity between the United States' equivalence of "armed attack" and "use of force" and the *Nicaragua*-based requirement of a minimum threshold of force to allow forcible response. Deeks and Anderson, for example, found that "[m]ost observers would conclude that, on its own, [Iran's decision to shoot down the Global Hawk] would only warrant U.S. responses short of using military force, such as lawful countermeasures."[124] They explained that "the fact that the Iranian attack could not under any scenario have resulted in fatalities—because the drone was unmanned—no doubt weights against a U.S. claim of self-defense."[125] However, they acknowledged that "it [wa]s still undoubtedly a foreign military attack on a U.S. aircraft engaged in lawful activities in international airspace, which the U.S. executive branch, at least, seems likely to find sufficient to trigger a forcible response."[126] Michael Schmitt similarly provided the following assessment:

> It is difficult to definitely conclude that the proposed U.S. kinetic strikes would have been valid exercises of self-defense. Even assuming the downed drone was in international airspace, and though the attack thereon would clearly qualify as a use of force, it is unclear that the Iranian action amounted to an armed attack except by the United States' particular approach to the threshold for armed attacks.[127]

3. Should States Consider Defense of Unmanned Property as a Right Worth Defending, and Can Destruction of Property Alone Rise to the Level of an "Armed Attack"?

With that background framework and status in mind, the first question to address is whether property alone should be the type of thing that can be defended. The German notion of *die Rechtsgüter*, which refers to "the substantive rights

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[123] *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, ¶ 58, U.N. Doc. A/HRC/44/38 (June 29, 2020) (advanced unedited version) [hereinafter Executions Report].
[124] Deeks & Anderson, *supra* note 8.
[125] *Id.*
[126] *Id.*
[127] Michael Schmitt, *Top Expert Backgrounder: Aborted U.S. Strike, Cyber Operation Against Iran and International Law*, JUST SECURITY (June 24, 2019), https://bit.ly/3xBXPat.

which can be protected by the right of self-defence,"[128] can assist in this analysis. Rights customarily captured under this concept inarguably include territorial integrity and political independence,[129] as reflected in the aforementioned plain language of the U.N. Charter.[130] Derek W. Bowett has identified "defense of state security on the high seas, protection of nationals, and defence of economic interests" as additional customary *Rechtsgüter* apparently preserved in the U.N. Charter framework.[131] As previewed above in Part I(c), these *Rechtsgüter* are consistent with post-U.N. Charter state practice regarding the defense of property located within the territory of the defending state or co-located with nationals of the defending state abroad, and they should logically extend to allow for the protection of unmanned property with ties to the defending state, particularly unmanned sovereign property.

Like other military vessels and aircraft, DoD-operated UASs, USVs, and UUVs are indisputably external manifestations of the state. As Bowett astutely observed:

> It can scarcely be contemplated that a state must remain passive whilst a serious menace to its security mounts on the high seas beyond its territorial sea. It is accordingly maintained that it is still permissible for a state to assume a protective jurisdiction, within the limits circumscribing every exercise of the right of self-defence, *upon the high seas in order to protects its ships, its aircraft,* and its rights of territorial integrity and political independence from an imminent danger or actual attack.[132]

Ian Brownlie takes a similar view, noting that "[i]t seems clear that vessels on the open sea may use force proportionate to the threat offered to repel attack by other vessels or aircraft. This right must rest on the general principles whether the analogy of a vessel and state territory is accepted or not."[133] Their reasoning is equally applicable to unmanned military vessels and aircraft. They do indeed function as territorial extensions of the state, as evidenced by the U.S. Navy's classification them as sovereign immune vessels and aircraft.[134] This protection, analogous to that of sovereign territory, is a key factor in the categorization of manned military assets as objects of attack that are worthy of defense.

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[128] MORI, *supra* note 95, at 14–15.
[129] *Id.* at 15.
[130] U.N. Charter art. 2, ¶ 4.
[131] MORI, *supra* note 95, at 15 (citing BOWETT, *supra* note 50, at 29–114).
[132] That exercise of jurisdiction can include "the use of force to repel an imminent danger to the state's security and, to a lesser degree, the exercise of a right of visit and search backed by force." BOWETT, *supra* note 50, at 71 (emphasis added).
[133] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 305 (1963).
[134] NAVADMIN 165/21 ¶ 2 (Aug. 4, 2021).

Additionally, unmanned sovereign property operated by the DoD serves to protect the state, meaning that destruction of such property, particularly in aggregation, could put the state's actual territorial integrity and political independence into jeopardy.

State-owned or -exclusively operated UxS and commercial UxS flagged to a particular state[135] should also warrant protection by extending the analogies from their manned counterparts. The former are still sovereign immune, official representations of the state, and the latter have jurisdictional and economic ties to the state. However, the link between commercial UxS and the flag state is more tenuous than the link between sovereign UxS and the state. Eichensehr's factors for the protection of nationals[136] can be adapted to help assess whether a particular UxS should be afforded protection. Specifically, one should weigh the position of the UxS relative to the state (i.e., those that are state-owned or -contracted vice those that are flagged to the state), the reason that the UxS is targeted (i.e., whether it is because of affiliation with the state), and whether the action against the UxS violates other treaty provisions or legal norms (e.g., the law of the sea). One should also consider ownership interests in the UxS.[137] Analysis along these lines is likely why the ICJ seemed to treat the attack on *USS Samuel B. Roberts* (FFG 58) differently than the attack on the U.S.-flagged, Kuwaiti-owned merchant *Sea Isle City* in its *Oil Platforms* ruling. Though the ICJ did not find that the mining of *Samuel B. Roberts* triggered the right to self-defense, it left open the possibility that such an attack on one military vessel could reach that threshold; in contrast, it declined to find that the attack on the merchant vessel *Sea Isle City* was of sufficient gravity, even in accumulation with other incidents.[138]

Having established that states have similar interests in defending certain unmanned property in international waters/airspace as they do in defending property located within their territory or co-located with their nationals, the second question to address is whether an attack on UxS could constitute a "use of force" or "armed attack" within the meaning of the U.N. Charter. Here, one must reckon with whether the impossibility of personnel casualties prevents such activity from rising to the requisite thresholds of severity.

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[135] To the author's knowledge, states are not yet flagging commercial UxS. Should unmanned maritime systems be authorized to operate in international waters without flagging, additional analysis will be required. On legal issues surrounding the operation of unmanned maritime vehicles, see generally Allen, *supra* note 10.

[136] Eichensehr, *supra* note 66, at 468–70.

[137] It is the flag state and not the state with ownership interests that is responsible for a vessel on the high seas. *See* UNCLOS, *supra* note 20, arts. 91–92. However, a national's ownership interests in a vessel that is already flagged to the state indicates even closer economic ties with the state.

[138] The court found that the incident involving *Samuel B. Roberts* was insufficient to trigger the right of self-defense due to issues with attribution. GREEN, *supra* note 85, at 38–41.

Given the breadth of Article 2(4)'s prohibition on the use of force, it is almost inarguable that physical destruction of a UxS, and indeed the unlawful seizure of a UxS, should be viewed as a "use of force," even if no casualties are possible. Support for this argument is found in the related area of cyber operations, where scholars and states alike are also seeking to adapt the U.N. Charter framework to new technologies. The Tallinn Manual 2.0, which provides an overview of the international law governing said cyber operations, notes that:

> [s]ubject to a *de minimis* rule, consequences involving physical harm to individuals *or property* will in and of themselves qualify a cyber operation as a use of force . . . the more consequences impinge on critical national interests, the more they will contribute to the depiction of a cyber operation as a use of force.[139]

That physical destruction of a UxS constitutes a prohibited "use of force" also makes intuitive sense in light of the U.N. Charter's object and purpose.[140] The question as to whether an attack on a UxS should rise to the level of an "armed attack" is less clear.

Given the U.S. stance that there is no gap between a "use of force" and "armed attack," the determination that destruction of a UxS is a "use of force" should settle the question for the United States. Indeed, this line of reasoning explains the U.S. determination in the Article 51 letter related to the killing of Soleimani that the Global Hawk shoot down constituted an "armed attack."[141] However, in practice, even the United States seems to view attacks without the possibility of personnel casualties as qualitatively different. Although the United States has not been explicit, the following actions point toward a moderated U.S. position on responses to attacks without human targets, which is driven by CIL factors, as discussed in Part II(b), *infra*. For instance, as noted in Part I(b), *supra*, the United States has declined to respond forcibly in self-defense to several attacks and attempted attacks on U.S. UxS. Former Secretary of State Michael Pompeo also previously established a "red line" with Iran at human loss, indicating that "even a single U.S. casualty would trigger a military response."[142] Following the shoot down of the Global Hawk, President Trump even commented that the absence of a threatened U.S. pilot "made a big, big difference" in the U.S. decision to call off defensive kinetic strikes and to opt for a cyber solution.[143] Similarly, in

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[139] INT'L GRP OF EXPERTS, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 334 (Michael N. Schmitt ed., 2017) [hereinafter TALLINN MANUAL 2.0] (emphasis added).
[140] U.N. Charter art. 1, ¶ 1.
[141] *See* Craft Letter, *supra* note 5.
[142] Deeks & Anderson, *supra* note 8.
[143] *Id.*; Shear et al., *supra* note 3.

a wargaming simulation, U.S. military personnel placed in a tactical scenario responded differently to the destruction of manned and unmanned aircraft; where a U.S. pilot was lost, all participating teams approved strikes against the attacking state, but where a UAS alone was destroyed, none of the participating teams approved such defensive strikes.[144] These views are also consistent with U.S. guidance on collateral damage estimation in the *jus in bello* context, where the expected destruction of property is given less weight than expected civilian deaths and injuries.[145] Lastly, though the United States will want to discourage destruction of UxS by leaving open the possibility of a forcible response, it is not in the U.S. interest to create parity in its response to the loss of property and the loss of human life—again, UxS have no mothers.

Other countries should be less likely than the United States to view attacks on UxS as of sufficient gravity to be an "armed attack," since they adhere to the *Nicaragua* standard.[146] Yet states, acting in their own national interests, are unlikely to foreclose the theoretical possibility that destruction of UxS could rise to the level of an "armed attack," just as the ICJ was hesitant to foreclose on the possibility that destruction of one military vessel could constitute an "armed attack." To the author's knowledge, no states have issued pronouncements indicating that attacks on property cannot, categorically, rise to the level of an "armed attack." Where states have criticized the U.S. response to the Global Hawk shoot down, they have done so on the basis of CIL limitations on the right of self-defense, as discussed in Part II(b), *infra*, rather than on the U.S. characterization of it as an "armed attack."

Again, support for the idea that destruction of UxS can constitute an "armed attack" even under the *Nicaragua* standard can be found in scholarship on cyber operations. The International Group of Experts that drafted the Tallinn Manual 2.0 "agreed that a cyber operation that seriously injures or kills a number

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[144] Kyle Rempfer, *War Game: If China or Russia Downed an ISR Aircraft, How Would the US Really Respond?*, AIR FORCE TIMES (Jan. 17, 2019), https://bit.ly/3k6JkHO.

[145] *See* LOW MANUAL, *supra* note 16, § 5.12.1.1. In the domestic tort context, harms against property are permissible to prevent human death or mitigate human injury. A. Michael Froomkin & P. Zak Colangelo, *Self-Defense Against Robots and Drones*, 48 CONN. L. REV. 1, 4 (2015).

[146] To the author's knowledge, no country other than the United States has taken the position that "uses of force" are synonymous with "armed attacks." However, international legal experts at the Chatham House in the United Kingdom have found that:

> '[a]n armed attack means any use of armed force, and does not need to cross some threshold of intensity. Any requirement that a use of force must attain a certain gravity . . . is relevant only in so far as the minor nature of an attack is *prima facie* evidence of absence of intention to attack or honest mistake. It may also be relevant to the issues of necessity and proportionality.'

MOIR, *supra* note 79, at 120 (quoting Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMPAR. L. Q. 963, 966 (2006)).

of persons *or* that causes significant damage to, or destruction of, property would satisfy the scale and effects requirement" of *Nicaragua*.[147] They go on to suggest a factor-based test that looks at the scale of the destruction as well as the links to the state, akin to the test discussed above for assessing UxS' links to the state:

> It is sometimes unclear in international law whether a cyber operation can qualify as an armed attack if the object of the operation consists of property or citizens situated outside the State's territory. Attacks against non-commercial government facilities or equipment and government personnel certainly qualify as armed attacks so long as the [other relevant] criteria are met . . . . The determination of whether other operations are armed attacks depends on, but is not limited to, such factors as: the extent of damage caused by the operation; whether the property involved is governmental or private in character; . . . ; and whether the operations were . . . conducted against the property or individuals because of their nationality. No bright-line rule exists in such cases.[148]

Applying this test, "some members of the International Group of Experts" determined that the Stuxnet cyber operation, which damaged Iranian nuclear centrifuges on Iranian soil, "had reached the armed attack threshold (unless justifiable on the basis of anticipatory self-defense . . .)."[149]

Thus, it appears that both the United States and adherents to the *Nicaragua* standard have similar end goals regarding self-defense in response to the destruction of unmanned property, despite their disagreements over the gravity threshold for an "armed attack." Though *Nicaragua* proponents believe a certain gravity threshold must be reached before destruction of unmanned property would be an "armed attack," they are willing to leave open the possibility that destruction of one UxS could meet that test. Though the United States wants to prevent a gap from forming between "uses of force" and "armed attacks," it does not want to equally incentivize the destruction of manned and unmanned aircraft and vessels.

In sum, these positions indicate that destruction of UxS should, in some circumstances, meet the trigger for the inherent right of self-defense under Article

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[147] TALLINN MANUAL 2.0, *supra* note 139, at 341 (emphasis added). The earlier edition of the Tallinn Manual included arguably stronger language to this effect, noting that "[t]he International Group of Experts agreed that *any use of force* that injures or kills persons *or* damages or destroys property would satisfy the scale and effects requirement." INT'L GRP OF EXPERTS, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 55 (Michael N. Schmitt ed., 2013) (emphasis added).
[148] TALLINN MANUAL 2.0, *supra* note 139, at 346.
[149] *Id.* at 342.

51. Since neither the United States nor the *Nicaragua* adherents are likely to change their underlying interpretation of the criteria for an "armed attack," the CIL limitations on the exercise of self-defense should be used to shape state practice in response to the destruction of unmanned property.

B. Customary Limits on Self-Defense

Even if the *Rechtsgüter* and "armed attack" requirements are satisfied, the CIL criteria of attribution, necessity, proportionality, and immediacy limit states' right to respond in self-defense. The defense of UxS raises new questions for states in applying these factors, which are outlined in this subpart. Yet, these CIL limitations can effectively cabin state action in this realm, as discussed in Part III(a), *infra*.

1. Attribution

Before a state can act in self-defense, it must attribute the precipitating "armed attack" or imminent threat thereof to another state or non-state actor.[150] Often, this is a matter of producing timely intelligence that will allow the state to act against the progenitor of an attack while the threat is still extant. A related challenge is providing reasonable assurance to the international community of the source of an armed attack. If a state cannot do so, its exercise of self-defense may be deemed unlawful. The ICJ has never set a clear evidentiary standard for satisfying the attribution criterion, and the court's language on that matter has been decidedly inconsistent both within and across opinions, but scholars have largely concluded that the court's jurisprudence implies a "clear and convincing" standard.[151] For example, in *Oil Platforms*, the ICJ found that the United States had not produced sufficient evidence to indicate that Iran was the source of the missile that hit the merchant vessel *Sea Isle City* or the mine that hit *Samuel B. Roberts*.[152] The court called the U.S. evidence, which included surveillance images, expert testimony, eyewitness testimony, weapons fragments, and recovered mines "highly suggestive, but not conclusive."[153]

The need to actually produce said evidence also presents a hurdle for states looking to attribute an internationally wrongful act. In some circumstances, states may be unwilling to share evidence of attribution for fear of revealing

[150] Whether self-defense against non-state actors is permissible under the U.N. Charter remains somewhat controversial. *See* STUART CASEY-MASLEN, *JUS AD BELLUM*: THE LAW ON INTER-STATE USE OF FORCE 154 (2020). However, the UNSC recognized the United States' right of individual self-defense in the wake of the September 11 attacks. *See* S.C. Res. 1368 (Sep. 12, 2001).
[151] Kristen Eichensehr, *The Law & Politics of Cyberattack Attribution*, 67 UCLA L. REV. 520, 559–62 (2020).
[152] *Oil Platforms*, *supra* note 56, ¶¶ 61, 71.
[153] *Id.* ¶¶ 53, 56, 69, 71.

intelligence methods, as was the case with Israel's bombing of Iraq's Osirak Nuclear Reactor in 1981.[154] In other cases, states may choose to share intelligence regarding attribution only after defensive action has occurred, as was the case with Israel's bombing of Syria's al Kibar reactor in 2007.[155] In the former instance, the community of states overwhelmingly criticized Israel's actions,[156] in the latter, states were largely silent.

Generally, issues with attribution in the context of destruction of UxS are likely to mirror issues with attribution in the context of manned aircraft and vessels. However, the likelihood of obtaining eyewitness accounts is lower, as the property is unmanned. Remote operators may still have full motion video of the UxS' operations, but their field of vision will be limited based upon the capabilities of the particular UxS technology. Additionally, states may be less willing to share intelligence collected by UxS due to concerns about revealing the platform's capabilities and/or other intelligence collection methods. In such circumstances, states should seek to satisfy the attribution criterion by sharing intelligence with close allies, who will vouch for the intelligence's import to the remainder of the international community. Producing such intelligence would also have the added benefit of resolving factual disputes used to justify the destruction or seizure of the UxS in the first place (e.g., that a UAS has crossed into national airspace or that a USV is of unknown origin/tasking). To that end, platforms that launch UxS, such as the survey vessel that launched the UUV seized by China in 2016, should also videotape operations when feasible.

2. Necessity

The CIL limitation of necessity requires that states take forcible action in self-defense as a last resort, when all non-forcible means of redress have been exhausted.[157] Not every non-forcible measure must actually be attempted before the necessity prong is met; non-forcible means may be considered exhausted where it is not reasonable for the state to be expected to attempt non-forcible redress in advance of the resort to forcible measures.[158] For example, U.S. DoD guidance indicates that "diplomatic means must be exhausted or provide no reasonable prospect of stopping the armed attack or threat thereof."[159] As noted in Part I(b), *supra*, a state's decision to destroy or seize a foreign UxS is likely to be opportunistic or specifically calculated to fall in the "gray zone" where it is unlikely to lead to escalation. In both situations, diplomatic efforts are likely to be

[154] *See* U.N. SCOR, 36th Sess., 2282d mtg., U.N. Doc. S/PV.2288 ¶¶ 15, 113 (June 19, 1981).
[155] Leonard S. Spector & Avner Cohen, *Israel's Airstrike on Syria's Reactor: Implications for the Nonproliferation Regime*, ARMS CONTROL TODAY (Aug. 2008), https://bit.ly/3hxMqDd.
[156] RUYS, *supra* note 49, at 96–97.
[157] Taft, *supra* note 57, at 304; GREEN, *supra* note 85, at 85.
[158] GREEN, *supra* note 85, at 85.
[159] LOW MANUAL, *supra* note 16, § 1.11.1.3.

successful in resolving discrete disputes, though repeated destruction of UxS in the face of diplomatic talks would, taken cumulatively, indicate that reliance on continued diplomatic engagement is unreasonable and that diplomacy has been exhausted. There are a variety of other non-forcible alternatives available to consider, including economic coercion, warnings, and lawful countermeasures, like cyber operations that fall below the "use of force" threshold. Economic methods may be particularly useful in the context of destruction of UxS. An international arbitral tribunal or a national mechanism akin to a prize court could be established to facilitate claims for reimbursement of unlawfully destroyed property.[160] Cyber countermeasures also appear attractive, as evidenced by the United States' reported decision to use cyber operation countermeasures as an alternative to forcible means immediately following the Global Hawk shoot down.[161] Still, states need not use cyber operations before resorting to more traditional kinetic measures in every circumstance. Cyber tools are often rendered obsolete once employed,[162] so it would be unreasonable to expect a state to employ a clandestine cyber tool in order to eliminate the threat evidenced by the destruction of a UxS in all instances.

To satisfy necessity, defensive action must also protect the interests of the state, though the interests need not threaten the state's survival.[163] It is under this aspect of the necessity prong that the strength of the *Rechtsgüter*, or the character of the UxS attacked, should carry significant weight. Put simply, the greater interest that the state has in the property, the more likely that its destruction, either individually or in accumulation, will satisfy the necessity requirement. In the *jus in bello* context, the use of deadly force to protect property is generally limited, at least as a matter of policy under the relevant rules of engagement. For example, property may be protected with deadly force during an ongoing armed conflict when it is considered "mission essential."[164] Similarly, property that has been specified (*e.g.*, because it contains sensitive classified systems whose exposure

[160] The prize court-inspired mechanism could, for example, include a national tribunal that applies internationally accepted standards for determining whether the destruction or seizure of a UxS was legal and whether compensation is appropriate. For more background on the origins of prize courts and their procedures, see Francis Deak & Philip C. Jessup, *Early Prize Court Procedure: Part One*, 82 U. PENN. L. REV. 677 (1934), and Francis Deak & Philip C. Jessup, *Early Prize Court Procedure: Part Two*, 82 U. PENN. L. REV. 818 (1934).

[161] Schmitt, *supra* note 127. Detailed analysis of whether that specific cyber operation constituted a "use of force" or "armed attack" is beyond the scope of this paper. For guidelines on use of force in the cyber realm, see TALLINN MANUAL 2.0, *supra* note 139, at 328–56.

[162] Erica D. Borghard & Shawn W. Lonergan, *Cyber Operations as Imperfect Tools of Escalation*, 13 STRATEGIC STUD. Q. 122, 134 (2019). Practically speaking, the community of states may also not know that the victim state even possesses a cyber capability that could counter the relevant threat.

[163] GREEN, *supra* note 85, at 76–80.

[164] *See* Alan Cole et al., SANREMO HANDBOOK ON RULES OF ENGAGEMENT 40 (2009) [hereinafter SANREMO HANDBOOK].

would present a national security threat to the victim state) can also be protected.[165] If the use of deadly force to defend property is limited in the context of an already ongoing armed conflict, then the use of defensive force to protect property should also be limited in the *jus ad bellum* context, where a forcible response may escalate into a wholly new armed conflict. Here too, the necessity of using force to protect UxS is clearest when the property's destruction or seizure would result in mission failure or create a broader national security threat. Limiting forcible defensive actions by reference to the necessity prong also allows the United States and the *Nicaragua* adherents to achieve the desired end state of prioritizing the protection of manned aircraft and vessels without having to adjust their underlying interpretations of "armed attacks."

Additionally, for actions taken in anticipatory self-defense, the "certainty of the threat of irreparable harm" must also be high to satisfy the necessity requirement.[166] It is harder to argue that a potential future threat to property alone presents any true threat of "irreparable harm," particularly where the destructive potential is limited to a single UxS.[167] Thus, though CIL generally allows for anticipatory self-defense, this aspect of the necessity limitation indicates that states should be reluctant to use force to defend UxS alone, unless an "armed attack" is immediately forthcoming,[168] ongoing, or has recently been completed.

3. Proportionality

Proportionality serves as the third CIL limitation on the use of force in self-defense. The ICJ's jurisprudence on this issue is not well-defined,[169] and certain aspects of the *Oil Platforms* decision could be "read to suggest" that "a State exercising its right of self-defense must use the same degree or type of force used by the attacking State in its most recent attack."[170] However, state practice makes "clear that, in the main, states refer to equivalence between the response

[165] *See id.* This need is especially salient where force is used to prevent seizure of the property in order to thwart the opportunity for intelligence collection by an adversary.
[166] Eichensehr, *supra* note 66, at 470.
[167] If the threat to the UxS also includes threat of a territorial breach or threats to personnel, this line of reasoning would not apply.
[168] "Immediate" as used here is distinct from "imminent" and is intended to convey an attack that will be close-in-time. Specifically, on-the-spot uses of force to defend UxS in this context should, at a minimum, satisfy a temporally strict reading of the *Caroline* standard's requirement that anticipatory uses of defensive force be limited to circumstances where the need to respond in self-defense is "instant [and] overwhelming, leaving no choice of means, and no moment for deliberation." R.Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AM. J. INT'L L. 82, 89 (1938). For additional discussion of on-the-spot uses of force to defend UxS, see Part II(b)(3), *infra*.
[169] *See* GREEN, *supra* note 85, at 93.
[170] Taft, *supra* note 57, at 305.

taken and the goal of restoring security, rather than the scale employed."[171] A singular armed attack may not reflect the wider threat picture; thus:

> [a] proper [proportionality assessment] . . . would require looking not only at the immediately preceding armed attack, but also at whether it was part of an ongoing series of attacks, what steps were already taken to deter future attacks, and what force could reasonably be judged to be needed to successfully deter future attacks.[172]

Still, Yoram Dinstein raises a distinction between "single or 'on-the-spot' uses of force in self-defense . . . —what he terms 'defensive reprisals'—and a 'full-scale war of self-defence,'" with the former being a matter of scale and the latter requiring an "assess[ment] with regard to the general goal of responding to the defensive necessity created by the initial attack."[173] Consistent with Dinstein's dichotomy, states should be able to use direct fire organic defensive systems to defeat tactical, on-the-spot threats to UxS, as employment of those systems to protect the specific platform facing an immediate threat is highly unlikely to be disproportionate or to escalate into a full-scale armed conflict and may only require destruction of an inbound missile. Even in this context, as time and circumstances permit, states should use escalation of force measures (e.g., warning shots) and pre-planned responses to determine the nature of the threat and to confirm the need for defensive force.[174]

However, the destruction of the UxS may point to a larger threat picture that encompasses personnel, other platforms, and/or a potential territorial breach. For example, a state that destroys a UAS while it is operating in its normal mode during a strait transit with a carrier strike group may present a broader threat to all of the air and maritime assets in the strike group as well as the personnel aboard them. Because the relevant point of comparison is the continuing threat rather than the precipitating attack, the type of force used in the initial attack is not relevant in scoping the response. This principle is recognized in the cyber context, where there is widespread agreement that cyber attacks do not require a cyber response.[175] Thus, states should apply the same proportionality analysis to destruction of UxS as they do to other types of "armed attacks," and states should not restrict themselves to using force against unmanned property of the attacking state. With respect to the Global Hawk incident and defense of UxS, President Trump was

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[171] GREEN, *supra* note 85, at 94.
[172] Taft, *supra* note 57, at 305.
[173] GREEN, *supra* note 85, at 95 (quoting Yoram Dinstein, *Remarks on "Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity"*, *in* 86 AM. SOC. INT'L L. PROCEEDINGS (1992)). *See also* RUYS, *supra* note 49, at 350–55.
[174] SANREMO HANDBOOK, *supra* note 164, at 24.
[175] TALLINN MANUAL 2.0, *supra* note 139, at 349.

quoted as stating that the anticipated fatalities likely to be caused by the planned defensive strikes against Iran "would not be proportionate to shooting down an unmanned drone."[176] This quote misinterpreted the proportionality analysis in a way that was potentially detrimental to U.S. interests by referencing the precipitating attack rather than the underlying threat.[177] In the future, to demonstrate that a forcible defensive response to the destruction of UxS is proportionate, states should take particular care in explaining the nature of the continued threat when drafting their Article 51 letters to the UNSC.

4. Immediacy

Immediacy, the fourth and final CIL limitation on the use of force in self-defense requires that "[t]here must not be an undue time lag between the armed attack and the exercise of self-defense."[178] When there is an extensive time lag between the "armed attack" and the victim state's use of force, and no additional attacks occur or the threat appears neutralized, the decision to use force can appear to be more retaliatory than defensive. This concern is alleviated where the attack remains ongoing, as is the case with an occupation,[179] or when the triggering incident is part of an ongoing series of attacks. Immediacy can run in tension with the limitation of attribution. For example, if it takes a victim state six months to "conclusively" establish the identity of an attacker, a forcible response may no longer comply with the immediacy limitation. In that instance, states must take defensive action with the knowledge that the community of states may question the immediacy criterion, or they must refer the matter to the UNSC for resolution, as South Korea did after it took months for an international investigative team to establish that North Korea had sunk its naval warship *Cheonan*.[180] Immediacy can also run in tension with the limitation of necessity in the context of exhaustion of non-forcible alternative means.[181] Yet, if states are required to exhaust other means before resorting to force, and those other means are unsuccessful, it follows that states should be afforded the opportunity to eliminate any remaining threat, as long as the forcible response is taken within a reasonable amount of time under the circumstances.[182] Lastly, immediacy can run in tension with the limit of necessity in the context of incidents that accumulate to form an "armed attack." In that case, the immediacy criterion should be viewed as satisfied where the accumulated

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[176] Shear et al., *supra* note 109.
[177] *See* Schmitt, *supra* note 127.
[178] HENDERSON, *supra* note 73, at 139 n.9.
[179] *See* GREEN, *supra* note 85, at 102–03.
[180] Kang Hyun-kyung, *Seoul Refers* Cheonan *Case to UNSC*, KOREA TIMES (June 5, 2010), https://bit.ly/3z0KGIz.
[181] *See* GREEN, *supra* note 85, at 104.
[182] *Id.*

events represent a series of ongoing attacks and the forcible response is immediate to the most recent attack.[183]

Because attacks on UxS are likely to be calculated to remain in the gray zone, below the red-line estimated to trigger a forcible response, it is likely that states will struggle with attributability in the short term and will need to accumulate attacks to satisfy the necessity threshold. As a result, concerns about immediacy will become prevalent. The United States, for example, faced criticism after the Soleimani killing on the basis that the armed attacks cited in the Article 51 letter, including the Global Hawk shoot down, were outside the bounds of the immediacy limitation.[184] In that case, the most recent armed attack attributed directly to Iran occurred six months before the strike against Soleimani, though attacks attributed to Iranian-backed militias occurred in the week before the strike, and the United States indicated that they were all part of a coordinated, ongoing series of attacks.[185] Opportunistic destruction of UxS is also likely to cause immediacy concerns because it may appear that the threat is isolated to the individual UxS and that actions days or weeks after a UxS is destroyed are retaliatory. Statements by President Trump and other senior administration officials regarding the aborted strikes in the days following the Global Hawk shoot down caused concerns on these grounds because they framed the planned strikes as retaliatory rather than necessary to counter an ongoing threat in response to an "armed attack."[186] Moreover, it did not appear that additional attacks by Iran were forthcoming, as Iran had justified its action on the basis that the drone had crossed into its national airspace. Without better knowledge of the intelligence that the United States relied upon, it is impossible for the community of states to assess the claim's legality in this respect.[187] Immediacy therefore provides yet another reason that states should share intelligence to the extent possible and use the Article 51 letter to clearly articulate the justifications for their defensive actions.

C. Other Options for Using Force to Defend Property Under the U.N. Charter Framework

The UNSC also has the power to authorize the use of force under Chapter VII of the U.N. Charter. Specifically, it is within the UNSC's power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and

[183] *See* Taft, *supra* note 57, at 305.
[184] *See, e.g.*, Executions Report, *supra* note 123, ¶ 58.
[185] The United States also indicated that the strike against Soleimani was partially rooted in anticipatory self-defense. Craft Letter, *supra* note 5.
[186] Schmitt, *supra* note 127.
[187] *See id.*

security."[188] The UNSC has interpreted this provision broadly, authorizing forcible measures in response to a wide variety of situations, including "armed aggression, the overthrow of democratically elected governments, genocide and other serious atrocities, internal disorder leading to humanitarian crises or massive refugee flows, and the possible acquisition of [weapons of mass destruction] by dangerous regimes or private actors."[189] The powers of the UNSC under Chapter VII therefore dwarf the powers of states acting unilaterally or collectively under Article 51.[190] Legally speaking, it is therefore almost certainly within the UNSC's power to determine that a use of force against property constitutes a "threat to the peace, breach of the peace or act of aggression" within the meaning of Article 39 and to authorize a forcible response under Article 42. However, as a practical matter, it is unlikely that the five permanent members of the UNSC will provide the "concurring votes" necessary to authorize forcible measures in response to the destruction of property in any given situation.[191] Even in the post-Cold War era, use of the "veto" by permanent members has caused gridlock within the UNSC,[192] and that trend is prone to continue as the United States faces growing threats from China and Russia, two states that are keen to exploit gray zone opportunities, like those associated with the destruction of property.[193]

IV. Towards Non-Binding International Interpretative Guidelines

As indicated by Parts I and II, *supra*, there is a gap in the U.N. Charter self-defense use of force framework when applied to the *jus ad bellum* destruction and seizure of UxS; however, the framework can be interpreted to address these emerging concerns.[194] The follow-on questions therefore become whether this adapted interpretation provides adequate legal guidance and whether and how the United States should seek to solidify such an interpretation.

A. Sufficiency of the Adapted U.N. Charter Framework

Relying on Abram Chayes' description of the ways that international law can shape state behavior, Deeks lays out three functions of properly developed

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[188] U.N. Charter art. 39.
[189] MICHAEL J. MATHESON, COUNCIL UNBOUND: THE GROWTH OF UN DECISION MAKING ON CONFLICT AND POSTCONFLICT ISSUES AFTER THE COLD WAR 136–37 (2006).
[190] *Id.* at 137.
[191] Security Council decisions, including those authorizing a nation state's use of force, require a concurrent vote of the five permanent members. U.N. Charter art. 27, ¶ 3. The five permanent members are China, France, Russia, the United States, and the United Kingdom. U.N. Charter art. 23, ¶ 1.
[192] MATHESON, *supra* note 189, at 22–23.
[193] JOSEPH R. BIDEN, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 6, 14 (2021).
[194] For more analysis on when technological developments require new law, see Rebecca Crootof, *Regulating New Weapons Technologies*, *in* THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT (THE LIEBER STUDIES SERIES) 3 (Eric Talbot Jensen & Ronald T.P. Alcala eds., 2019).

international law tests or standards: "as a constraint on action, as a basis of justification or legitimation for action, and as a way to provide organizational structures, procedures, and forums."[195] Advancing the interpretation of the current U.N. Charter framework in the manner discussed above would serve each of those goals.

With respect to substantive constraints, the question is whether the test properly balances the interests of the victim state with the interests of the international community in maintaining peace. The adapted U.N. Charter framework does. It allows states to exercise the right of self-defense in response to the destruction of property by acknowledging that destruction of UxS may, in some circumstances, amount to an "armed attack." However, it protects the international community's interests in maintaining peace through a restrictive necessity limitation that accounts for the strength of the property's ties to the state, favoring the protection of military and other sovereign UxS.

With respect to legitimacy, the question is whether the test is sufficiently clear, such that a victim state can demonstrate whether it acted consistently with the test. In addressing this question, it is worth noting that the underlying U.N. Charter framework is somewhat notoriously indeterminate,[196] causing some like Thomas Franck to famously question "who killed Article 2(4)?"[197] However, as Louis Henkin has noted, the reports of Article 2(4)'s death are "greatly exaggerated,"[198] and even Franck has come to observe that the U.N.'s practice during "its first fifty-five years demonstrates the capacity of 'the whole scheme of the Charter' to adapt and fulfil the purposes of the Organization…in the face of unexpected obstacles and unanticipated challenges."[199] So too can the U.N. Charter framework adapt to the proliferation of UxS. This process will be aided by the pre-existing obligation to submit Article 51 letters, which require justification for the resort to force in self-defense.[200] The test's clarity will also be enhanced by the additional specificity of non-binding interpretive guidelines, as discussed in Part III(b), *infra*. States are already familiar with this vocabulary of self-defense, and the guidelines will ideally serve to minimize the future likelihood of legally inaccurate statements from high-ranking government officials, which

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[195] Deeks, *supra* note 101, at 507 (citing ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF INTERNATIONAL LAW 7 (1974)).
[196] GREEN, *supra* note 85, at 143.
[197] Thomas Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).
[198] Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).
[199] THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 23–24 (2002).
[200] U.N. Charter art. 51.

were extensive following the Global Hawk shoot down, as noted in Part II(b), *supra*.

Finally, with respect to procedural guidance, the question is whether the test's structure helps to drive better, more consistent decision-making. The adapted U.N. Charter framework does because the CIL limitations also function as a procedural checklist for victim states, facilitating more informed and more predictable decision-making. Moreover, the UNSC as an institution still has the authority to act, terminating defensive rights should they be mis-applied in the UxS context.

B. Advantages of Non-Binding International Interpretive Guidelines

How then should the United States go about generating widespread acceptance for the above interpretation of the adapted U.N. Charter framework? The Biden administration has made its intent to re-engage with the international community clear in both its Interim National Security Strategic Guidance and in Secretary of State Anthony Blinken's first speech. President Joseph R. Biden, Jr. noted that "America cannot afford to be absent any longer on the world stage,"[201] and Secretary Blinken elaborated that:

> American leadership and engagement matter . . . . Whether we like it or not, the world does not organize itself. When the [United States] pulls back, one of two things is likely to happen: either another country tries to take our place, but not in a way that advances our interests and values; or, maybe just as bad, no one steps up, and then we get chaos and all the dangers it creates. Either way, that's not good for America.[202]

Advocating for international consensus in the defense of UxS is one area where the United States can exercise such leadership in order to both advance U.S. interests and to create stability in the international system.

Peter Pascucci, writing about the need for additional guidance on the application of the *jus in bello* principles of distinction and proportionality in the cyber context, notes that states looking to clarify the application of international law principles have a variety of options at their disposal, including "a new treaty,

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[201] BIDEN, *supra* note 193, at 4.
[202] Anthony J. Blinken, U.S. Sec'y of State, A Foreign Policy for the American People, Speech (Mar. 3, 2021), https://bit.ly/3hA1tMk.

a new additional protocol to an existing treaty, and refinement through State practice."[203] Which tool to use depends on the goals to be achieved.

Given that the U.N. Charter, the U.N.'s constitutive document, provides the baseline use of force framework, the idea that a new treaty would supplant it is a political non-starter. Prospects for a formal optional protocol to supplement the U.N. Charter are similarly grim. As shown above, "because an entire new protective structure is not required, . . . nor is one likely to be agreed upon by States, a treaty is not the correct mechanism to resolve this issue."[204]

From the U.S. perspective, refinement through state practice is also not the ideal mechanism. Future attacks on UxS would undoubtedly provide discrete opportunities to develop state practice and opinio juris, and it is likely that the United States will be involved in such incidents given the U.S. inventory of UxS. However, relying on that methodology would force the United States to proffer its positions on the defense of UxS in the context of those specific incidents, so the United States would not be able to take as deliberate of a role in shaping the resulting interpretation. Moreover, the potential for unintended escalation remains high. Though Blinken's language of "chaos" in the international system is a bit strong, the international community need not accept the very real risk of miscalculation while waiting for states to coalesce around accepted practices.

Fortunately, another option exists—the use of non-binding international agreements, such as the Joint Comprehensive Plan of Action regarding Iran's nuclear program and certain provisions of the Paris Agreement on climate change.[205] Non-binding agreements "are generally considered to fall exclusively within the scope of the president's unilateral authority—both as to their creation and withdrawal from them,"[206] meaning that the Biden administration could immediately begin using this tool to advance U.S. interests and create consistency regarding the defense of UxS.

Indeed, a non-binding agreement known as the Code for Unplanned Encounters at Sea (CUES), signed by 21 nations including the United States and China, already governs state behavior in the related context of unplanned interactions in international waters and airspace.[207] The CUES was signed in 2014,

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[203] Peter Pascucci, *Distinction and Proportionality in Cyber War: Virtual Problems with a Real Solution*, 26 MINN. J. INT'L L. 419, 452 (2017).
[204] *Id.* at 454.
[205] *See generally* U.S. DEP'T OF STATE, GUIDANCE ON NON-BINDING DOCUMENTS, https://bit.ly/2TQP8dX.
[206] Oona Hathaway, *Reengagement on Treaties and Other International Agreements (Part II): A Path Forward*, JUST SECURITY (Oct. 6, 2020), https://bit.ly/2TQOY6l.
[207] W. PAC. NAVAL SYMP., CODE FOR UNPLANNED ENCOUNTERS AT SEA: VERSION 1.0 (2014), https://bit.ly/3yPUO6v.

during the Western Pacific Naval Symposium,[208] a biennial meeting between states' Naval representatives intended to foster cooperation between countries with interests in the Western Pacific.[209] The final signature of the CUES came after a period of increased tension related to China's establishment of an air-defense identification zone encapsulating the Senkaku/Diaoyu islands, which are claimed by both China and Japan;[210] however, negotiations on the CUES agreement dated as far back as 1998.[211] The CUES creates "a standardized protocol of safety procedures, basic communications and basic maneuvering instructions to follow for naval ships and aircraft during unplanned encounters at sea."[212] This non-binding agreement could theoretically be expanded to incorporate interpretive guidelines on the adapted U.N. Charter framework regarding the resort to force in cases of unplanned encounters with UxS. [213] Such an agreement, though, would have limited reach in terms of factual context and geographic span.

Instead, the United States should propose a separate, globally oriented, non-binding agreement with interpretive guidelines for the protection of UxS in order to generate more widespread participation. Though a non-binding agreement on the protection of UxS would be rooted in the U.N. Charter's provisions, framing this new agreement as part of the broader lattice of international agreements intended to ensure safe operations in international waters and airspace is likely to generate the widest adherence. This participation has been observed previously, as key competitors like China, Russia, and Iran have acceded to treaties such as the 1972 Convention on the International Regulations for Preventing Collisions at Sea[214] and, in the case of Russia, the bilateral Incidents at Sea Agreement (INCSEA) with the United States.[215] As with those agreements, this document could address basic standards for operating with due regard in the vicinity of military units or national airspace and guidelines avoiding unintentionally unsafe operation. It could also clarify behavior likely to result in destruction of UxS as a hazard. This framing is sensible because the destruction of UxS is likely to occur as the result of miscalculations during opportunistic encounters, as previously

[208] *See* Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 108 AM. J. INT'L L. 516, 529–30 (2014).
[209] *See generally The Western Pacific Naval Symposium*, SEMAPHORE (Austl. Dep't of Def., Austl.), Jul. 2006, at 1.
[210] *See* Daugirdas & Mortenson, *supra* note 208, at 530.
[211] *See* Austrl. Dep't of Def., *supra* note 209, at 2.
[212] *Naval Leaders Agree to Code for Unplanned Encounters at Sea at 14th Western Pacific Naval Symposium*, PACOM NEWS (Apr. 23, 2014), https://bit.ly/2SgqIK0.
[213] *See* Karlik, *supra* note 22 (noting that the CUES should be expanded to address interaction between manned and autonomous systems at sea).
[214] *See* United Nations, Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16.
[215] *See* Agreement Between the Government of the United States of America and the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, U.S.-U.S.S.R., May 25, 1972, 23 U.S.T. 1168.

discussed in Part I.b, *supra*. States are also more likely to reach agreement on this proposal, which addresses more traditional physical destruction, than they are to reach agreement in the cyber context, where states must consider myriad new effects and implications. Moreover, states that field UxS have a common interest in avoiding miscalculations and in creating predictability with respect to the treatment of UxS. The United States could leverage this common interest to build diplomatic bridges with China, Russia, and Iran, despite otherwise tense relations, like Russia and the United States did in extending the New START Treaty.[216]

Key provisions to incorporate and clarify in the non-binding agreement's interpretive guidance should include: that the destruction and seizure of UxS can rise to the level of an "armed attack"; that there is a presumption of greater necessity to defend military and other state-operated UxS than privately owned UxS; that aggregation of attacks on UxS is permissible for establishing the necessity of a forcible response; that anticipatory self-defense should not be exercised with respect to protection of UxS alone,[217] unless "on-the-spot"; that forcible responses in defense of UxS must be proportionate to the overall threat picture presented by the "armed attack" rather than the scale of the attack on the UxS; and that, when dealing with an ongoing series of destruction of UxS, immediacy should be determined based on the most recent attack in the series. Finally, the interpretive guidance should stress the importance of clear, consistent communication through detailed Article 51 letters.

V. Conclusion

As UxS become more prevalent, there will surely be additional international incidents involving their destruction and seizure. At present, states contemplating the destruction of UxS and/or responding to the destruction of UxS have little clear guidance, which significantly heightens the risk of miscalculation and unintended escalation.

This Article explored whether the use of force framework under the U.N. Charter can be adapted to sufficiently address the destruction of unmanned property that has been isolated from personnel and sovereign territory. It reviewed the traditional triggers for self-defense, argued that property alone is the type of thing states have a right to defend, and found that the destruction of property can, in some cases, amount to an "armed attack" within the meaning of Article 51. This

[216] *See e.g.*, Press Statement, Anthony J. Blinken, U.S. Sec'y of State, Blinken Statement on the Extension of the New START Treaty with the Russian Federation (Feb. 3, 2021), https://bit.ly/3wPfWcQ.

[217] Should a future UxS become essential to a nation's overall national security posture (e.g., an unmanned aircraft carrier), its destruction may put the state's overall territorial integrity and/or political independence at risk. In such circumstances, a state may determine that anticipatory self-defense is exercised to protect more than just the UxS itself.

Article also analyzed the CIL limits of attribution, necessity, proportionality, and immediacy as they apply to the destruction of property and found that these concepts can be interpreted to provide adequate restrictions on the exercise of self-defense in this UxS context. Lastly, this article argued that the United States should support an effort to develop non-binding international interpretive guidelines on the protection of property in order to create predictability in the international system and avoid miscalculations.

DEALING WITH THE "SHORTER" LIMITED SPECIAL COURTS-MARTIAL

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The new type-II judge-alone special court-martial has created plenty of buzz and controversy, starting with what to call the venue. Here, we call them limited special courts-martial. This venue is a type of special court-martial with a limited jurisdiction for a limited purpose and with limited punishment options compared to general and regular special courts-martial. Unfortunately, the fleet does not have a clear understanding of the purpose of this venue, and some still believe the venue adjudicates offenses much quicker than a typical special court-martial. We suggest that a better understanding of what should merit a limited special court-martial and better policies to support plea deals at limited special courts-martial will not only improve the experience with this forum, it will also improve the efficiency of the military justice system as it pertains to lesser offenses and create certainty in the process for accused servicemembers.

I. What's in a Name: Limited Special Courts-Martial

Limited special courts-martial, or type-II military judge alone special courts-martial, came into existence through the Military Justice Act of 2016 at the recommendation of the Military Justice Review Group (MJRG).[1] The MJRG was comprised of senior judge advocates from each branch of the military who were military justice experts and civilian Department of Defense attorneys.[2] These experts came together to provide recommendations on how to improve the

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[1] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5161, 130 Stat. 2898 (2016); Military Justice Review Group, *Report of the Military Justice Review Group, Part I: UCMJ Recommendations*, 8 (Dec. 22, 2015) [hereinafter MJRG], https://bit.ly/2VWvxKj.
[2] MJRG, *supra* note 1, at 5.

Uniform Code of Military Justice (UCMJ).[3] This total review of the UCMJ tasked members of the MJRG with updating military justice processes using the federal criminal justice system as a model and considering the changing times to ascertain relevance and effectiveness of punitive articles, among its other mandates.[4] In his article, "Reforming Military Justice: An Analysis of the Military Justice Act of 2016," Professor David Schlueter of St. Mary's University School of Law described the overall impetus for the Act as a convergence of a variety of factors, including the lack of holistic review of the UCMJ since its codification in 1950, the desire among practitioners and commentators for change, and congressional interest in the prosecution of military sex assaults.[5] One of the major process recommendations made by the MJRG and implemented in MJA 2016 was the creation of the limited special court-martial that serves as the subject of this Article. The new limited special court-martial is a criminal forum similar to that of traditional special and general courts-martial but differs in its structure and jurisdiction.

The new limited special court-martial consists of trial by military judge alone and may not adjudge a bad-conduct discharge, confinement over six months, or forfeitures of pay for over six months.[6] A servicemember cannot elect to be tried in front of members at this forum, which makes it distinct from other special courts-martial.[7] The Rules for Courts-Martial (RCM) further dictate what types of charges this new iteration of a special court-martial can adjudicate.[8] These restrictions include offenses with a maximum confinement period of two years or less as well as use or possession of controlled substances and attempts of the same offenses.[9] Additionally, an accused may consent to this forum's use for adjudication of more serious charges.[10] However, offenses eligible for sex offender registration are prohibited from adjudication at this forum.[11] These limitations lead to the notion that this as an expedited special court-martial. In reality, the forum is merely a subcategory of a special court-martial, rather than a completely different forum such as a summary or general court-martial.[12] As further discussed below, the difference in the time it takes to adjudicate charges at

[3] *See id.* at 6–8.
[4] *Id.*
[5] David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 13–16 (2017). He also noted that due to the meticulous research conducted by the MJRG, which involved stakeholder engagement, and the thorough report it filed, Congress did not hold hearings in anticipation of enacting MJA 2016. *Id.* at 21.
[6] Article 19, Uniform Code of Military Justice (UCMJ), 10 U.S.C.A. § 819(b) (West 2021).
[7] *Id.*
[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt II, § 201(f)(1)(E) (2019) [hereinafter RCM].
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Article 19, UCMJ, 10 U.S.C.A. § 819.

this type of court-martial compared to a regular special court-martial is negligible.[13]

A. Purpose of this Forum

The limited special court-martial stemmed from a desire to move minor and lesser offenses, such as nonjudicial punishment refusals and simple drug crimes, through the military justice process quickly in a way that the accused could not refuse.[14] This forum is also roughly analogous to how the federal criminal justice system processes petty offenses, which highlights an overall theme of the MJRG to bring the military justice system into closer alignment with the federal criminal justice system.[15] The MJRG looked to the federal criminal justice system as a model for its proposed reforms, but many reforms, including the limited special court-martial, also share similarities with state practices.

1. Looking at the Federal System

In the federal criminal system, a petty offense is defined by statute and consists of "Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual . . . ."[16] There, magistrates may hear cases without a jury if the offense is petty or if the defendant assents.[17]

2. Looking at State Systems

The MJRG primarily looked to the federal criminal justice system for inspiration, but many states' judicial systems similarly limit the use of juries for minor offenses.[18] The National Center for State Courts provides a look into how

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[13] *See* discussion *infra* Part III.
[14] MJRG, *supra* note 1, at 225.
[15] *Id.* at 234; *see* FED. R. CRIM. P. 58(b)(2).
[16] Article 19, Crimes and Criminal Procedure, 18 U.S.C.A. § 19 (West 2021).
[17] FED. R. CRIM. P. 58(b)(2). *See also Baldwin v. New York*, 399 U.S. 66, 73 (1970) (noting that any disadvantage to an accused facing up to six months imprisonment "may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications"); *United States v. Merrick*, 459 F.2d 644, 645 (4th Cir. 1972) (stating that a petty offense is defined as a crime with a punishment of less than six months, and that a person accused of such a crime has no right to a trial by jury in the federal criminal justice system).
[18] Notably, each state defines offenses and the severity of them differently. We do not seek to draw comparisons of the types of offenses here, but rather note the normality of adjudications of many minor, juvenile, and domestic offenses without juries. *See* Ctr. for Jury Studies, *Comparative Data*, NAT'L CTR. FOR STATE COURTS, https://bit.ly/3sfVtfC; Court Statistics Project, *State Court Structure Charts*, NAT'L CTR. FOR STATE COURTS, https://bit.ly/3CQuNHo.

many states follow this practice.[19] In total, 30 states limit the usage of juries for some types of criminal offenses.[20] These limitations are typically for misdemeanors or other minor infractions—like traffic tickets—but some states do not use juries for domestic relations crimes or juvenile crimes.[21] For example, in Virginia, general district courts first hear all misdemeanors.[22] Additionally, juvenile and domestic relations courts—district courts of limited jurisdiction—are specialized courts that hear juvenile offenses and offenses involving domestic relationships.[23] Neither type of Virginia district court allows for juries; however, any party can appeal their case to circuit court for a de novo review and is entitled to a jury at that venue.[24] Much like the federal system, this design fosters an efficient and economical processing of minor crimes.[25]

II. But How is It Limited?

Limited special courts-martial cap punishment similar to punishment limits in the federal criminal justice system in matters before magistrates.[26] However, while the limited special court-martial caps confinement to six months like "petty offenses," this cap stems from a jurisdictional maximum rather than an offense maximum.[27] Furthermore, a minor offense in the military justice system is defined as, "an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial."[28] This definition is narrower than the jurisdictional maximum of a limited special court-martial, which allows adjudication of crimes carrying penalties of two years confinement, or more with the accused's consent.[29]

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[19] Court Statistics Project, *State Court Structure Charts*, NAT'L CTR. FOR STATE COURTS, https://bit.ly/3CQuNHo.
[20] *See id.*
[21] *See id.*
[22] OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., VIRGINIA COURTS IN BRIEF 2, https://bit.ly/3AEsEMU.
[23] *Id.*
[24] *Id*. at 3.
[25] *See id.*
[26] *Compare* 10 U.S.C.A. § 819(b) (limiting punishment to six months confinement and six months' forfeitures), *with* FED. R. CRIM. P. 58(b)(2) (allowing magistrates to try petty offenses without a jury), *and* 18 U.S.C.A. §§ 19, 3581 (defining and capping punishment for a petty offense).
[27] *Compare* FED. R. CRIM. P. 58(b)(2) (discussing the forum of a case before a magistrate) *and* 18 U.S.C.A. §§ 19, 3581 (limiting punishment based on the crime), *with* 10 U.S.C.A. § 819 (limiting the punishment based on the forum).
[28] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt V, § 1.e (2019) [hereinafter MCM].
[29] *Compare id.* (defining a minor offense as offenses which carry a penalty of up to a year), *with* RCM 201(f)(1)(E) (prohibiting referral of offenses that carry a potential punishment over two years confinement to limited special court-martial without accused assent). Given this, the military defense bar has regularly contested this venue as a member could ostensibly be prosecuted for a military crime that is even greater than a "minor offense," and certainly more severe than a "petty offense" in the federal criminal justice system. Conversely, the prosecution bar asserts that the jurisdictional

Given this limited scope of jurisdiction, especially over minor offenses, the new courts-martial were envisioned to hear cases from nonjudicial punishment and summary courts-martial refusals.[30] These fora are also convened for military specific crimes like violations of Article 92, UCMJ, or certain types of drug offenses. [31]

The MJRG cited the capability of military judges, who have presided over military judge alone trials since 1968, as rationale for recommending this new type of court-martial to Congress.[32] The MJRG traced the need for this type of venue back to the Navy's need to convene military justice proceedings on ships.[33]

The small number of personnel needed to convene a limited special court-martial in theory enables easy convening in inconvenient places.[34] Whether onboard an aircraft carrier, deployed to Iraq, or onboard a Coast Guard sector, these courts-martial can effectuate good order and discipline through compulsory means far from judicial chambers and close to the deck plates where members can witness what happens when someone violates the UCMJ.[35] To that end, the Code allows for military magistrates to preside over these fora, providing even greater flexibility in accommodating good order and discipline in the field or in the midst of a busy docket.[36]

III. How a Limited Special Court-Martial Grows Long

A. Neither the UCMJ nor the RCMs Practically Shorten the Limited Special Court-Martial

The rationale from the MJRG shows an intention to create a forum to move minor and other lesser offenses through the military justice system expeditiously, especially when members refuse a nonjudicial punishment or

maximum provides the same level of protection, and that military members do not have the same right to a panel in a way that civilians have to a jury. While this Article does not address this issue, we acknowledge that this issue has been litigated at motions hearings.

[30] MJRG, *supra* note 1, at 222.

[31] Based on cases seen by the authors. The authors also spoke with other U.S. Coast Guard, U.S. Navy, U.S. Marine Corps, and U.S. Army counsel to ascertain an anecdotal understanding of cases that have been referred to this forum.

[32] MJRG, *supra* note 1, at 5, 221.

[33] *Id.* at 233.

[34] *Id.* at 222.

[35] *Id.*

[36] 10 U.S.C.A. § 819(c).

summary court-martial.[37] However, short of circuit rules to compress the discovery process, these courts-martial may be just as long, if not longer, than the typical special court-martial, because, as identified in this Article, there is little incentive to settle, and the military justice process prevents a faster conclusion.[38] Given this, we recommend against the often-heard term "short-martial" to refer to this forum, as it may lead commands to believe the process is quicker than the traditional special court-martial.

B. A Limited Punishment Limits the Impetus to Deal

The fastest way to adjudicate a case short of dismissal of charges is for the parties to agree to alternative disposition, usually in the form of a plea agreement.[39] In an ideal agreement, the United States gets the benefit of accountability, saved resources, and ability to close the matter promptly.[40] In exchange, the accused receives a lesser form of punishment, an ability to have some control over the punishment adjudged,[41] and can move on from the investigation and allegations, potentially returning to their career or starting a new life outside the service.

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[37] MJRG, *supra* note 1, at 222.

[38] *See generally* 10 U.S.C.A. §§ 801–940a; RCM 101–1210 (showing that aside from the Article and Rule discussing the limited special court-martial, the Articles and Rules generally do not exempt the limited special court-martial from processes or procedures). The only inherent factors speeding the adjudication of a case at this forum are the lack of a panel and less appellate review than a case ordering confinement over six months or a punitive discharge. Correspondence with each of the sea services' military justice analytics personnel revealed that services are struggling to track this forum. Often these courts-martial are included in data concerning other special courts-martial, making it difficult to ascertain practical procedural benefits, or lack thereof, with this new limited version of the special court-martial. To the Marine Corps' credit, its Trial Counsel Assistance Program staff were able to provide sentencing data from the venue in a more tangible way than any other service. Based on discussions with MJRG staff attorneys, the Marine Corps was the service driving this venue's creation, and they do appear to lead the other services in utilizing this tool.

[39] Mary M. Foreman, *Let's Make A Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53, 54–55 (2001); *see generally* Carlton L. Jackson, *Plea-Bargaining in The Military: An Unintended Consequence of The Uniform Code of Military Justice*, 179 MIL. L. REV. 1 (2004).

[40] *See* Jackson, *supra* note 39, at 4–5, 43. *See also* Foreman, *supra* note 39, at 54–55; 26 AM. JUR. *Trials* 69 § 5 (2021).

[41] *See* Jackson, *supra* note 39, at 46–50. *See also* Adam Wolrich, *Giving the Referee a Whistle: Increasing Military Justice Legitimacy by Allowing Military Judges to Reject Plea Agreements with Plainly Unreasonable Sentences*, 228 MIL. L. REV. 124, 141 (2020) (discussing the new method of plea agreements versus the legacy system, which shows the increased control that the defense/accused has in the punishment determination of a plea deal); Foreman, *supra* note 39, at 54, 116 ("[A]ffording both the accused and the convening authority unlimited opportunities to bargain with each other within the confines of fair play."). *See generally* 26 AM. JUR. *Trials* 69 § 5.

Plea agreements today allow for the parties to create punishment minimums, maximums, or both, among other arrangements, such as referral of charges to a different forum.[42] To reach an agreement, a plea deal must be enticing for both parties.[43]

Given the jurisdictional punishment limitations of limited special courts-martial as well as the types of offenses prosecuted at the forum, creating a deal beneficial to both parties can prove challenging. The types of offenses tried often do not receive substantial punishment, so the accused receives little practical benefit from any sentencing protections.[44] Thus, commands can practically offer little more than referral to lower fora to entice the defense into a deal for a speedy resolution. This could affect the command's pursuit of good order and discipline, especially in cases that begin with a nonjudicial punishment or summary court-martial refusal, because the accused may just accept a forum that he initially rejected.

Thus, in a limited special court-martial, punishments may not be the biggest concern for the accused.[45] The likely follow-on administrative separation and characterization of service is a stigmatizing long-term consequence that is a serious, if not harsher, consequence than the limited punishment allowed by this type of court-martial.[46] As military justice practitioners know, often a board waiver, regardless of forum, is a condition of a plea agreement, so even if the court-martial does not award a bad-conduct discharge or dishonorable discharge, the member will likely be separated with an Other than Honorable characterization of service. A board waiver expedites a separation from the service, because the government does not need to convene a physical administrative separation board (if the member would not otherwise have a right to a board). It also exposes the accused to the most severe discharge characterization that can be issued administratively, an Other than Honorable Characterization, without any further

[42] RCM 705.
[43] 26 AM. JUR. *Trials* 69 §§ 5, 13.
[44] *See* List of U.S. Marine Corps Art. 16(c)(2)(A) Cases as of 3 May 2021 (available with authors). The authors also spoke with other U.S. Coast Guard and U.S. Navy counsel to ascertain an anecdotal understanding of sentences.
[45] *See* Steven E. Asher, *Reforming the Summary Court-Martial*, 79 COLUM. L. REV. 173, 174–75 (1979) (discussing the stigma of an Other than Honorable, or undesirable, discharge); *see* U.S. Coast Guard, *Model Plea Agreement* [hereinafter *USCG Model Plea Agreement*], https://bit.ly/2Uhhuy9 (warning signatories that if separated with a characterization of Other Than Honorable that they may be deprived of veterans' benefits based upon their current period of active service, and that they can expect to encounter substantial prejudice in civilian life in many situations but not elaborating on significance of brig time or other punishments of the court-martial).
[46] Asher, *supra* note 45; USCG Model Plea Agreement, *supra* note 45.

due process.[47] Similarly, should the court-martial convict the accused and not issue a punitive discharge, without a board waiver, the command can process the member for separation notwithstanding the added procedural rights some services provide.[48] If the command has the ability to do so, it often in practice seeks an Other than Honorable characterization of service.[49]

While Other than Honorable discharges are administrative rather than punitive, the consequences of a bad-conduct discharge align closely with those of an Other than Honorable characterization of service.[50] Many military justice practitioners are familiar with the Lost Battalion article by Colonel Miller, which compares the similarities between an Other Than Honorable characterization and a bad-conduct discharge.[51] Col Ralph Miller, U.S. Army, even encourages prosecutors and commands to seek an Other than Honorable discharge given the similarities, understanding that the Other than Honorable comes without the burden of appellate leave and accompanying resources dedicated to the accused.[52] Furthermore, the Marine Corps Separation Manual provides some examples of when an Other than Honorable discharge should be given.

> [Other than Honorable] is appropriate when the basis for separation is commission or omission of an act that constitutes a significant departure from the conduct expected of a Marine. Examples of factors that may be considered include, but are not limited to: the use of force or violence to produce serious bodily injury or death, abuse of special positions of trust, disregard of customary senior-subordinate relationships, acts or omissions endangering the security of the Marine Corps, deliberate acts or

[47] *See, e.g.*, *USCG Model Plea Agreement*, *supra* note 45 (showing administrative separation board waiver as a commonly used condition of the agreement); 32 C.F.R. § 724.109 (showing that an Other than Honorable characterization of service is the most severe administrative characterization); Richard F. Walsh, *Concurrent Administrative and Criminal Proceedings*, 36 NAVAL L. REV. 134–36 (1986) (noting that except for when discharged in lieu of court-martial, respondents get the benefit of a board hearing for an Other than Honorable discharge characterization).

[48] *See* discussion *infra* Part IV.

[49] As elaborated on later in this Article, some services restrict significantly who may seek an Other than Honorable characterization of service after a court-martial. U.S. COAST GUARD, COMMANDANT INSTR. 1000.4, Military Separations, ch. 1.B.17.b., 1.B.22.f. (2017) [hereinafter COMDTINST 1000.4]; NAVAL MIL. PERS. MAN. 1910-704, Determining Separation Authority, para. 6 (2016) [hereinafter MILPERSMAN 1910-704]; MARINE CORPS ORDER 1900.16, MARINE CORPS SEPARATION MANUAL, para. 1004 (2021) [hereinafter MCO 1900.16].

[50] Ralph F. Miller, *The Lost Battalion*, MARINE CORPS GAZETTE 53 (Jan. 2007), https://bit.ly/3lei3E5. *See, e.g.*, *Benefits at Separation*, U.S. ARMY, https://bit.ly/3xbUUUQ; Eligibility for Benefits Chart, U.S. MARINE CORPS, https://bit.ly/3AydXLk.

[51] Miller, *supra* note 50, at 53–55.

[52] *Id.* at 54–55.

> omissions seriously endangering the health and safety of others, and drug abuse.[53]

Aside from drug abuse, these examples differ greatly from the typical minor offense to be tried at limited special courts-martial. With that in mind, the administrative sanction far outweighs the punitive sentence. If an accused is to receive an Other than Honorable discharge whether they plead guilty or are otherwise convicted at court-martial, with little additional punishment, what incentive do they have to do anything other than fight the charges? A loss at trial has the potential to result in little punishment juxtaposed to the greater punitive ramifications of the discharge. Additionally, depending on the crime and with the potential time it may take to try the case, the accused can keep working and providing for themself and their family while having the chance of achieving an acquittal at trial.

If the government wants to incentivize plea agreements, and the quick resolution and certainty that results, it would be a significant benefit if plea agreements could guarantee a servicemember's characterization of service.[54] Accused servicemembers often take pride in their service and care about protecting their military careers.[55] However, if a servicemember is already considering leaving the service or knows that there is a high probability they will be separated because of misconduct, an option that guarantees a specific type of characterization would provide an amount of certainty that may be attractive to members pending a limited special court-martial.[56] Accused servicemembers are also concerned about their ability to look for future employment.[57] While confinement is not insignificant, servicemembers are aware that the characterization on their DD-214 has the potential to affect them for life.[58]

C. Due Process Requirements and Legal and Ethical Burdens Remain the Same Regardless of Forum

The inability to facilitate deals is a contributor to why the limited special court-martial process can be just as long as a typical special court-martial, though other reasons exacerbate the problem. Of the three naval services, only the Navy-

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[53] U.S. MARINE CORPS, ORDER 1900.16 Ch 2, SEPARATION AND RETIREMENT MANUAL para. 1004.2.c(2) (2019). Similar descriptions of this characterization of service be found in MILPERSMAN 1910-304, Description of Characterization of Service (June 30, 2008) and COMDTINST 1000.4.
[54] Kenneth M. Theurer & Mr. James W. Russell III, *Pretrial Agreements: The Hidden Costs*, 38 THE REPORTER 2, 3 (2011).
[55] *Id.* at 3; *see also* Foreman, *supra* note 39, at 69, 90, 107; Walsh, *supra* note 48, at 156.
[56] Walsh, *supra* note 48, at 156; *see also* Foreman, *supra* note 39, at 69, 90, 107.
[57] Walsh, *supra* note 48, at 156.
[58] *Id.*

Marine Corps' Eastern and Western Judicial Circuits—two circuits which primarily try Marine Corps cases—have promulgated local rules that expedite the limited special court-martial trial process.[59] In the Western Judicial Circuit, limited special courts-martial must go to trial within 30 days of arraignment, down from 60 days for a typical special court-martial.[60] Implementing this rule, of course, relies on the manpower and resources to support such docketing for the cases. While magistrates can hear these cases, conversations with judge advocates in each service revealed that no service currently uses magistrates to preside over limited special courts-martial. Without magistrates, there is no docket relief benefit for using a limited special court-martial. Even if a service has magistrates, the parties must consent to their presiding over a limited special court-martial.[61] Additionally, more complicated cases may merit detailing additional counsel, which only further complicates scheduling. As with any trial, either party can file motions, which must be litigated with enough time left prior to trial for the judge to resolve any lingering issues so that both parties can prepare their case.[62]

Defense counsel still have an obligation to investigate the charged offenses with due diligence, regardless of the court-martial forum.[63] The complexity of the case, the number of witnesses involved, the location where the alleged crime took place, and the ability to get monetary support from the convening command drive the time and resources needed to investigate a case. This can be the most time-consuming part of a case for defense counsel. Investigating will take additional time if the defense counsel does not have the assistance of Defense Service Office investigators, who typically have limited availability and are only detailed to more serious, felony-level cases. Therefore, it is unlikely that a defense counsel will receive assistance from an investigator for the types of lesser crimes likely to be tried at a limited special court-martial. The location where the alleged crime occurred could further complicate defense counsel's ability to conduct a due diligence investigation efficiently. Defense counsel will need to request funding to travel to the location of the alleged crime, which may take the convening command weeks to approve.

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[59] *Compare* R. of Ct. for E. Jud. Cir. 6.10 *and* R. of Ct. for W. Jud. Cir. 6.15; *with* Uniform R. of Ct. Before Navy and Marine Corps Courts-Martial, Cent. Jud. Cir. R. of Prac., R. of Ct. Before the Nw. Jud. Cir. Navy–Marine Corps Trial Judiciary, *and* R. of Ct. Before Coast Guard Courts-Martial (showing the different rules of Navy, Marine Corps, and Coast Guard circuits and inclusion, or lack thereof, of rules concerning timelines for limited special courts-martial). Rules from each Navy-Marine Corps circuit can be found at https://bit.ly/3g2bu3L, and the Coast Guard Rules can be found at https://bit.ly/3xFcaSQ.

[60] R. of Ct. for W. Jud. Cir. 6.15.

[61] RCM 503(b)(4).

[62] *See id.* at 905–07.

[63] *See, e.g.*, U.S. DEP'T OF NAVY, JAGINST 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, Rule 1.3 Diligence (2015).

Finally, as in all courts-martial, once the investigation is complete, defense counsel will need time to prepare motions. Based on the experience of the authors, the trial management order will dictate how long in advance counsel for both sides have to prepare. Trial judges seem to require at least a week between the initial motions deadline and the responses deadline; and then a week between the final responses deadline and the Article 39(a) motions hearing. The time a judge takes to rule on motions varies widely. All of these factors contribute to the length of process and why the limited special court-martial does not actually shorten the process for the accused or the convening command.

The Marine Corps has been most successful in finding a way to shorten the time from preferral of charges to trial for a limited special court-martial by incorporating the 30-day rule into their circuits to drive a speedy adjudication.[64] However, the 30-day imposition relates to scheduling of the trial date; it does not guarantee a case will go to trial within 30 days of arraignment.[65] Given the reasons above, the limited special court-martial proceeds at a slower pace than likely originally intended.

IV. Shortening the Military Justice Process for Lesser Offenses Without Sacrificing Due Process

The best way to improve the current process is to create an environment that facilitates deals that are advantageous to both the government and the accused, or solve the problem of efficient adjudication of minor misconduct through other means. When parties can make deals that benefit both sides, they can quickly clear the matter from the docket, rather than prolong the current process.[66] This enables commanders to focus on warfighting rather than additional administrative burdens.[67] What would entice the defense to enter into a deal when the gravest threat is the discharge characterization and not the court-martial sentence?

As a foundational issue, some judge advocates or convening authorities may have reticence to engage in plea negotiations.[68] However, the practice has

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[64] R. of Ct. for W. Jud. Cir. 6.15.
[65] *Id.* ("*Proposed* trial dates for judge-alone special courts-martial shall *normally* be within thirty (30) days of arraignment." (emphasis added)).
[66] Jackson, *supra* note 39.
[67] Asher, *supra* note 45, at 173.
[68] *See generally* Theurer & Russell, *supra* note 54. Col Theurer presents a skeptic's opinion of plea agreements, then known as pre-trial agreements. Importantly, he published this article prior to the Military Justice Act of 2016's amendments to incorporate plea agreements directly into the U.C.M.J., which is Congress effectively blessing the use of plea agreements. He scoffs at making plea deals for the sake of getting a deal, which may undercut good order and discipline and public confidence if the deal does not accurately reflect the gravamen of the offense or a realistic punishment for that crime. Col Theurer's perspective stems from a historical Air Force perspective that only recently welcomed

proven vital to our services to foster efficiencies, enabling counsel to focus their efforts on cases needing the most attention.[69] Furthermore, the practice has gained increased backing by policymakers, as exhibited by congressional codification of plea agreements.[70] Prior to this, the RCM and case law provided the primary guidance on the practice.[71]

The sea services should adopt policies to facilitate improved discharge qualifications for cooperative accused. Currently, special court-martial convening authorities (SPCMCA) in all the naval services cannot issue a general discharge to members who have served over six years of service, or eight years for the Coast Guard, without initiating the discharge board process.[72] Additionally, in the Navy, there are some bases of separation, or UCMJ violations, that limit a SPCMCA's ability to separate sailors with a general characterization of service without the convening of an administrative separation board.[73]

Precedent exists for agreeing to better characterizations of service through a plea agreement. Through UCMJ, Article 53a, Congress allows military judges to sentence less than the mandatory minimum discharge for offenses when issued pursuant to a plea agreement or at the request of trial counsel.[74] The sea services can provide a similar means through which the accused and the government could agree to a better administrative discharge as a follow-on to the court-martial. While courts-martial cannot issue administrative discharges, the court-martial convening authority could promise to take certain administrative actions in their role as a separation authority, if so empowered, as part of the plea

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plea agreements. Special courts-martial convening authorities in the Air Force could not enter into plea agreements of their own fruition until 1996. Col Theurer sees trials as the best way to resolve cases. He also points to plentiful Air Force resources and the fact that cases frequently deal out just before trial in the Air Force as additional reasons to proceed to trial generally rather than dealing. For reference, the Air Force was the last service to adopt plea bargaining as an accepted practice. Jackson, *supra* note 39, at 4.

[69] *See generally* Jackson, *supra* note 39. Col Jackson's positive opinion regarding plea deals comes from the Army perspective. The Army was the first branch to adopt pre-trial agreements. While published six years before Col Theurer's article, Col Jackson notes the Army's busy docket and points to the inability to process cases without plea agreements, then known as pre-trial agreements, as a driver of using the tool. The docket issue came into existence with the transition from the Articles of War, which had limited due process, to the Uniform Code of Military Justice in 1950, catalyzed by the Army's engagement in Korea. Col Jackson opines through incorporation of Major General Franklin Shaw's (then-Judge Advocate General of the Army) writings that without plea deals, military accused stand to suffer more than their civilian counterparts. The government can benefit by focusing resources into complicated cases that may not be easily proven.

[70] 10 U.S.C. § 853a.

[71] MJRG, *supra* note 1, at 481–90.

[72] COMDTINST 1000.4, *supra* note 49, at Ch. 1.B.17; MILPERSMAN 1910-704, *supra* note 49, at para. 6; MCO 1900.16, *supra* note 49, at para. 1004.

[73] MILPERSMAN 1910-704, *supra* note 49, at para. 10.

[74] 10 U.S.C. § 853a.

agreement.[75] This creates a predictable process with certainty for the accused and efficiency for the command.

The policy changes would look slightly different in each service. In the Coast Guard currently, few commanders outside of Personnel Service Centers (PSC) have separation authority, that is, the authority to approve separations and certain characterizations of service.[76] The Commandant would need to delegate to commands the authority to issue general discharges in the limited instances of the command entering into a plea agreement. To do this, the Military Separations Manual could be amended in Chapter 1.B.1.a.(4) to read, "[A] general or special court-martial convening authority may act as a separation authority for the purposes of discharging members under honorable or general conditions pursuant to an Article 53a, UCMJ, plea agreement, or other request for separation based on preferred charges against them." This opens up the opportunity to agree to a characterization of service at any level court-martial.

In the Department of the Navy, the member's time in service dictates the separation authority.[77] If a sailor has at least six years of service, SPCMCA may separate members using only the board process, regardless of characterization of service sought. If the sailor has less than six years, the SPCMCA commands can use notification procedures for some bases of separation depending on the alleged offenses.[78] This Article recommends that the Navy adopt the following language, or something similar, into the Military Personnel Manual (MILPERSMAN): "A general or special court-martial convening authority may act as separation authorities for the purposes of discharging members under honorable or general conditions pursuant to an Article 53a, UCMJ, plea agreement, or other request for separation, including separation in lieu of trial, based on preferred charges against them."

Finally, in the Marine Corps, general court-martial convening authorities (GCMCA) act as the separation authority generally, though the Marine Corps Separation and Retirement Manual allows for GCMCA to delegate this to the SPCMCA if they choose to do so.[79] A policy change in the Marine Corps might be a simple uniform delegation to all SPCMCA to issue general discharges,

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[75] *Compare* RCM 1003(b) (showing the only authorized punishments for courts-martial, of which, administrative discharge is not a punishment) *and* 10 U.S.C. §§ 822–824 (designating courts-martial convening authorities) *with* COMDTINST 1000.4, *supra* note 49, at Ch. 1.B.1.a, MILPERSMAN 1910-704, *supra* note 49, at para. 8, *and* MCO 1900.16, *supra* note 49, para. 1004 (showing who may act as a separation authority).
[76] COMDTINST 1000.4, *supra* note 49, at Ch. 1.B.1.a.
[77] MILPERSMAN 1910-704, *supra* note 49, at para. 8; MCO 1900.16, *supra* note 49, at para. 1004.
[78] MILPERSMAN 1910-704, *supra* note 49, para. 6.
[79] MCO 1900.16, *supra* note 49, at para. 1004.

contingent on a plea agreement. Language in the Marine Corps manual could generally reflect the Navy's language, as drafted above. While some may be concerned about commanders abusing their status as a separation authority, the language as written only allows for separations contingent on plea agreements akin to how accused members must enter into a plea agreement to avoid mandatory minimum discharges in sexual assault cases.[80] Albeit, clearly the Marine Corps allows some SPCMCA to have this authority in other instances already, so there may be comfort allowing these SPCMCA to discharge a member as a result of court-martial conviction with an honorable or general discharge as well.

Unlike the Other than Honorable characterization of service, which is discussed above, the General characterization is suitable for the limited special court-martial given the types of offenses that are properly adjudicated at this forum.[81] Most offenses at this type of forum include military-specific offenses, like an Article 92 orders violation, and nonjudicial punishment-level crimes.[82] Additionally, there are some drug offenses charged at this forum, but many services have changed their drug policies to allow for a general discharge for certain types of drugs, like marijuana.[83]

If services refuse to delegate separation authority in these situations to the SPCMCA, an alternative could provide the same result though with a bit more administrative burden. Multi-party agreements between the separation authority, court-martial convening authority, and the accused could exist. Currently, plea agreements are between the convening authority and the accused, and because SPCMCA typically do not have separation authority, plea agreements encompass only a SPCMCA's recommendation for a type of characterization if a servicemember agrees to waive their administrative separation board; the separation authority will make the final determination on characterization of service.[84] However, to achieve the end of guaranteeing a characterization of service that will incentivize plea agreements and make more efficient the limited special court-martial, the sea services could permit the separation authority to be a

[80] Article 53a, UCMJ, 10 U.S.C.A. § 853a.
[81] *See* DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, encl. 4, para. 3 (2020) [hereinafter DoDI 1332.14].
[82] *See* List of U.S. Marine Corps Art. 16(c)(2)(A) Cases of 3 May 2021. The authors also spoke with other U.S. Coast Guard, U.S. Navy, and U.S. Marine Corps counsel to ascertain an anecdotal understanding of sentences.
[83] *See* List of U.S. Marine Corps Art. 16(c)(2)(A) Cases of 3 May 2021; *see also* COMDTINST 1000.4, *supra* note 49, at Ch. 1.B.1.a; NAVAL MIL. PERS. MAN. 1910-146, Separation by Reason of Misconduct – Drug Abuse, para. 5 (2019).
[84] COMDTINST 1000.4, *supra* note 49, at Ch. 1.B.17; MILPERSMAN 1910-704, *supra* note 49, atpara. 6; MCO 1900.16, *supra* note 49, at para. 1004.

signatory of the plea agreement for the plea deal to be enforceable as to characterization of discharge.[85]

The military already has more experience with this than it may first appear. Article 6b, UCMJ, compels convening authorities to solicit feedback from victims concerning plea agreements.[86] While a victim is not a party to a plea agreement, depending on how much credence the convening authority gives a victim, the victim may need to approve the deal.[87] In this way, counsel are already used to engaging in multiparty deals.

As mentioned above, this does not have to be limited to limited special courts-martial. Under the current regime, convening authorities are entrusted to bind a particular punitive discharge through a plea agreement, but as shown in current service policy above, often cannot agree to an administrative characterization.[88]

V. Other Paths to Achieve the Same Goals

The fundamental underlying question at play is what is the primary purpose of military justice, especially when dealing with 'lesser' offenses? Is it to ensure accountability through a criminal process or is it to ensure mission readiness?[89] While the Manual for Courts-Martial discusses this in the Preamble, "strengthen[ing] the national security of the United States" can take different practical forms.[90] If the priority is to "promote justice" and obtain a criminal conviction, then disposing of offenses through the military justice process is the most natural choice.[91] However, should commanders prioritize "efficiency and effectiveness in the military establishment," then removing members who commit misconduct from the unit quickly allows the command to focus on mission readiness.[92] Given the limited criminal culpability for crimes disposed of at a limited special court-martial, administrative separation may make more sense for

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[85] *See* COMDTINST 1000.4, *supra* note 49, at Ch. 1.B.17; MILPERSMAN 1910-704, *supra* note 49, at para. 6; MCO 1900.16, *supra* note 49, at para. 1004.
[86] Article 6b, UCMJ, 10 U.S.C.A. § 806b; U.S. COAST GUARD, COMMANDANT INSTR. 5810.1G, MILITARY JUSTICE MANUAL, ch. 16 (2019); DEP'T OF DEF., INSTR. 1030.02, VICTIM AND WITNESS ASSISTANCE, para. 3.2.d.1.l (Sept. 2, 2020).
[87] *See* Haley Britzky, *A New Pentagon Report on Sexual Assault in the Military Is A Wakeup Call to A 'Systemic' Problem*, TASK & PURPOSE (Oct. 30, 2020 7:48 PM), https://bit.ly/3jjO0Ij.
[88] *See* 10 U.S.C. § 853a (allowing for minimum and maximum punishments in plea agreements, to include setting a minimum or maximum punitive discharge).
[89] Asher, *supra* note 45, at 173; *see also* Cheryl Pellerin, *Mattis: DoD Lines of Effort Include Building a More Lethal Force*, DOD NEWS (Sep. 20, 2017), https://bit.ly/3iofVHG.
[90] MCM, *supra* note 28, pt I, § 3.
[91] *Id.*
[92] *Id.*; Asher, *supra* note 45, at 173.

these crimes than ensuring accountability through criminal convictions.[93] Ideally, the government can obtain accountability with speed—which comes most often in the form of a plea agreement.[94]

A. Pursue Administrative Separation Instead

Because of existing Navy and Marine Corps policy regarding administrative separations, commanders must choose to pursue administrative separation or criminal conviction early in the process. In contrast, the Coast Guard commanders do not, because while Navy and Marine Corps commanders may not process acquitted members for the same act post-acquittal, Coast Guard commanders may.[95] Navy and Marine Corps commanders must decide, based on the quality of the evidence, whether they want to risk a trial for stronger accountability, or simply separate the member administratively. In some cases, Navy and Marine Corps commanders are required to initiate administrative separation if there is no court-martial for the alleged offenses.[96] Conversely, Coast Guard commanders have little incentive not to process the member through the military justice system, and if that fails, proceed through the administrative separation process, which may take months or even years after the military justice process is complete.[97] This means one member can take bandwidth from the command for an inordinate amount of time, wasting resources as time passes in the pursuit of amorphous accountability.[98] Meanwhile, the accused is left in a purgatory state for what could be years, usually unable to do the job they had been trained to do, and thus duties the Coast Guard needs performed, all while still occupying a billet. For minor crimes, does minimal punishment merit retaining a member with a government paycheck and other benefits let alone the time spent monitoring and managing the member for months? For minor misconduct in which the command intends to ultimately separate the member, it is a better use of Government time and resources to proceed with administrative separation rather than pursue a court-martial that will not have a significant bearing on the servicemember's civilian life.

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[93] DoDI 1332.14, *supra* note 83.
[94] *See* Jackson, *supra* note 39.
[95] *Compare* NAVAL MIL. PERS. MAN. 1910-100, Reasons for Separation (2011) [hereinafter MILPERSMAN 1910-100], *with* COMDTINST 1000.4, *supra* note 49, at ch. 1.B.17.b.(3) (showing different policies between the services concerning administrative separations after courts-martial).
[96] MILPERSMAN 1910-100, *supra* note 95.
[97] COMDTINST 1000.4, *supra* note 49, at ch. 1.B.17.b.(3).
[98] Asher, *supra* note 45, at 173.

B. Attack the Problem of Nonjudicial Punishment Refusals

If limited special courts-martial do not provide the intended efficiency, another reform could be attacking the problem itself—nonjudicial punishment refusal—rather than the symptoms.[99] The MJRG referenced nonjudicial punishment and summary court-martial refusals as a rationale for the creation of the limited special court-martial.[100] If servicemembers were denied the ability to refuse nonjudicial punishment, commands could efficiently address the misconduct and then consider separating the servicemember administratively. This would also protect an accused from a criminal conviction.[101] We already entrust commanding officers of afloat units with this authority.[102] Measures like a heightened appellate process or allowing only certain grade commanders to issue nonjudicial punishment—similar to the Sexual Assault Initial Disposition Authority in sex assault cases—could alleviate concerns that commands will abuse this power.[103] The minimal timeline of adjudication and punishment allowed provides for benefits to both the command and the accused.[104]

VI. Conclusion

Limited special courts-martial acknowledge the need to handle minor misconduct efficiently in a criminal forum. However, with an Other than Honorable administrative discharge characterization likely to have significant impacts on their future, accused servicemembers are often more concerned with the administrative consequences than the limited punishment this forum can issue. Commanders should consider this and realize that referring a matter to a limited special court-martial is not necessarily a pathway to a "short-martial." To truly increase the efficiency for the government and the certainty for the accused, the sea services should empower special court-martial convening authorities with the ability to separate members with a general discharge pursuant to plea agreements or look at other ways to expedite processing to achieve equitable results. Without such changes, these limited special courts-martial are not the efficient forum envisioned by MJRG and Congress to dispose of minor offenses.

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[99] MJRG, *supra* note 1, at 222.
[100] *Id.*
[101] Article 15, UCMJ, 10 U.S.C.A. § 815. While members may still have charges preferred against them for court-martial after nonjudicial punishment, it is atypical to receive nonjudicial punishment and then have those charges referred to court-martial.
[102] *Id.*
[103] Memorandum from the Sec. of Defense to Distribution, Subject: Withholding Initial Disposition Authority under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012).
[104] Theurer & Russell, *supra* note 56, at 3.

ROAD TO RATIFICATION: HOW INCORPORATION OF THE RULES OF THE ROAD INTO UNCLOS ART. 94 IN THE SOUTH CHINA SEA ARBITRATION STRENGTHENS THE CASE FOR U.S. RATIFICATION OF UNCLOS

Lieutenant Commander Jennifer H. Schwartau, JAGC, USN*

This Article examines the South China Sea Arbitration's finding that UNCLOS art. 94 incorporates the COLREGS into UNCLOS as the standard for safe navigation. The Article argues that if the U.S. ratifies UNCLOS, it will gain access to UNCLOS's compulsory arbitration procedures and would have standing to challenge China's violations of the COLREGS while harassing U.S. vessels using PAFMM or the CCG. The Article discusses the South China Sea Arbitration and the response from the international community in order to explore the award's impact on international law and practice. The Article also analyzes the costs of U.S. ratification of UNCLOS as weighed against the benefit of obtaining access to UNCLOS's compulsory arbitration procedures. While arbitration under UNCLOS cannot address questions of sovereignty, the South China Sea Arbitration demonstrated that a tribunal does not have to answer questions of sovereignty to resolve many of the disputes in the region. This Article proposes that ratifying UNCLOS to access its compulsory arbitration procedures will allow the U.S. to influence international law while highlighting China's violations of the COLREGS and chipping away at China's claims regarding the legitimacy of their actions.

I. Introduction

There is a wicked problem stewing in the South China Sea.[1] Overlapping maritime claims abound in the region, and violent incidents at sea result in property

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damage, injury, and death.[2] China, in particular, has created militarized artificial islands and uses a quasi-militarized fishing fleet to harass other countries' vessels.[3] China defends its actions with nebulous statements about sovereignty while refusing to delineate its maritime claims under the United Nations Convention on the Law of the Sea (UNCLOS) or customary international law (CIL).[4]

In 2013, the Philippines initiated compulsory arbitration against China under UNCLOS ("South China Sea Arbitration").[5] The Philippines challenged several of China's excessive maritime claims and accused China of violating Article 94 of UNCLOS by violating the International Regulations for Prevention of Collisions at Sea ("COLREGS").[6] The tribunal's findings and award relating to China's violations of the COLREGS would have broader practical application for the United States if the United States ratified UNCLOS.

On several occasions, China has violated the COLREGS by harassing and impeding U.S. vessels engaged in lawful activities in the South China Sea.[7] Thus far, the United States has responded through protest, freedom of navigation operations, and consistent condemnation of China's actions in the region.[8] However, a glaring deficiency in the United States' toolbox is the lack of access to a compulsory legal forum in which to challenge China's violations.

The United States' failure to ratify UNCLOS means the United States cannot initiate arbitration under UNCLOS against China for violations of UNCLOS Article 94. If the United States ratifies UNCLOS, it will gain access to that redress mechanism. Additionally, the South China Sea Arbitration award

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[1] "Wicked" problems are defined as complex problems that are not solvable or easily understood and for which we should not use trial and error to find a solution because of a high cost of failure. *See generally* Kenneth J. Menkhaus, *State Fragility as a Wicked Problem*, 1.2 PRISM 85, 86 (2010).

[2] *See* U.S. Naval Inst., CHINA'S MARITIME GRAY ZONE OPERATIONS 283 (Andrew S. Erickson & Ryan D. Martinson eds., 2019) [hereinafter CHINA'S MARITIME GRAY ZONE OPERATIONS].

[3] *Id.* at 173.

[4] *See id.* at 174.

[5] South China Sea Arbitration (Phil. v. China), Award, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016).

[6] *Id.*

[7] CHINA'S MARITIME GRAY ZONE OPERATIONS, *supra* note 2, at 61; Liu Xiaobo, *How China Can Resolve the FONOP Deadlock in the South China Sea*, ASIA MAR. TRANSPARENCY INITIATIVE (Mar. 1, 2019), https://bit.ly/2SgyHXw.

[8] *See* Ronald O'Rourke, Cong. Rsch. Serv., R42784, U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress 27 (2020).

regarding the COLREGS would provide an avenue for the United States to show standing under UNCLOS to challenge China's harassment. An award in favor of the United States in such a dispute would shine a light on China's illegal gray-zone activities and would help build the international consensus necessary to combat China's excessive claims. Accordingly, the United States should ratify UNCLOS to gain access to the compulsory arbitration process. This would allow the United States to bring complaints against China under UNCLOS Article 94, thereby leveraging international law to increase international pressure on China.

Part II of this Article will briefly discuss the history of territorial disputes in the South China Sea to provide context for the South China Sea Arbitration award and its relevance to the United States. Part III will present the legal framework of the COLREGS and UNCLOS which, together, form the basis of the tribunal's awards. Part IV will discuss the South China Sea Arbitration, the response from the Arbitration's parties and the international community, and the award's impact on the persisting disputes over China's maritime claims. Finally, Part V will analyze the costs and benefits of U.S. ratification of UNCLOS in light of UNCLOS's compulsory arbitration provision and argue that the benefits of ratification outweigh the costs.

II. History of the South China Sea Dispute

Multiple countries hold overlapping maritime claims in the South China Sea. The region encompasses approximately 1,423,000 square miles, stretching from Borneo and Sumatra in the South, to Taiwan in the North.[9] Moreover, the region contains some of the most important shipping lanes in the world, including the Strait of Malacca and the Luzon Strait, through which trillions of dollars' worth of shipping passes each year.[10] This Part will identify overlapping territorial claims, explore the tactics China uses in the region, and discuss the dispute leading up to the 2013 South China Sea Arbitration.

A. Overlapping Maritime Claims

China essentially claims the entire South China Sea region as its territory, basing its claims on historical control of trade routes in the region.[11] This claim has no basis under either UNCLOS or CIL, and China refuses to clarify the

[9] *See* Eugene C. LaFond, *South China Sea*, *in* ENCYC. BRITANNICA, https://bit.ly/3gOZ0w0.
[10] *See* Ctr. for Strategic and Int'l Studies, *How Much Trade Transits the South China Sea?*, CHINA POWER PROJECT, https://bit.ly/3zDllFA.
[11] *See* Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. INT'L L. 124, 127–28 (2013).

underlying international law it believes supports its claims.[12] China has also created artificial islands and claims, in contravention of UNCLOS, that these islands generate territorial seas.[13] Within this same area, the Philippines claims the Spratly Islands and Scarborough Shoal. The overlapping claims and resulting power struggle between the Philippines and China has resulted in a number of incidents at sea.[14]

B. China's Use of Gray-Zone Tactics at Sea

China enforces its claims to the region through tactics that do not amount to a use of force under the U.N. Charter but which are coercive, nevertheless. China has weaponized its civilian fishing fleet by creating the People's Armed Forces Maritime Militia (PAFMM), a fishing fleet militia operating in concert with the People's Liberation Army Navy (PLAN) and the Coast Guard (CCG) to harass foreign vessels.[15] PAFMM vessels ostensibly operate as civilian fishing vessels, but have reinforced hulls and often have former PLAN members as crew.[16] PAFMM conducts sabotage and harassment operations in coordination with the PLAN and CCG.[17] PAFMM ram other vessels, force other vessels to stop or take evasive action to avoid collision, cut fishing lines, and sabotage oil and natural gas exploration operations.[18] CCG vessels often operate in a similar manner.[19] The CCG purports to engage in law enforcement while illegally harassing and sabotaging other vessels in areas where China makes excessive maritime claims.[20] These tactics have been a thorn in the side of the United States and other countries who operate in the region, as the ambiguous status PAFMM and the CCG make them difficult to categorize under international law.[21]

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[12] *See id.*
[13] U.N. Convention on the Law of the Sea, art. 60, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
[14] *See* Ctr. for Strategic & Int'l Studies, *Maritime Claims of the Indo-Pacific*, ASIA MAR. TRANSPARENCY INITIATIVE, https://bit.ly/3vIQPXJ.
[15] China's Maritime Gray Zone Operations, *supra* note 2, at 2, 30.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] CHINA'S MARITIME GRAY ZONE OPERATIONS, *supra* note 2, at 2, 30.

C. The Philippines and China

The South China Sea Arbitration arose out of a standoff between China and the Philippines at Scarborough Shoal.[22] In 2012, the Philippines sent a frigate to inspect Chinese vessels illegally fishing in the Philippines' exclusive economic zone (EEZ).[23] The Chinese vessels requested assistance from Chinese authorities, who, in response, sent two China Marine Surveillance (CMS) vessels.[24] The CMS vessels anchored just outside the mouth of the lagoon, beginning a weeks-long standoff.[25]

During the standoff, Chinese vessels caused a number of near-collisions, which became the subject of Submission Thirteen in the South China Sea Arbitration.[26] In one incident, a Chinese Fisheries and Law Enforcement Command (FLEC) vessel repeatedly approached two Philippine vessels at 20 knots before veering off.[27] In another incident, a CMS vessel repeatedly crossed the bow of a Philippine vessel, forcing it to take emergency action.[28] As it did so, three more Chinese vessels appeared and took similar actions while trying to encircle the Philippine vessel.[29] The Chinese vessels then laid out mooring lines in front of the Philippine vessel to impede its progress.[30] In a final dangerous maneuver, one of the vessels tried to ram the Philippine vessel, missing it by approximately ten meters.[31]

After approximately a month, the Philippine vessels withdrew, expecting the Chinese vessels to follow suit; however, the Chinese vessels stayed.[32] China, thereafter, prevented Philippine fishermen from fishing in the shoal.[33] China's actions throughout this standoff, and its subsequent denial of access to fishing grounds, led the Philippines to initiate compulsory arbitration against China.[34]

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[22] Michael Green, Kathleen Hicks, Zack Cooper, John Schaus & Jake Douglas, *Counter-Coercion Series: Scarborough Shoal Standoff*, ASIA MAR. TRANSPARENCY INITIATIVE (May 22, 2017), https://bit.ly/2SLBx74.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *See* South China Sea Arbitration Award, *supra* note 5 ¶ 1044.
[27] *Id.* ¶¶ 1048–49.
[28] *Id.* ¶¶ 1050–58.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] Michael Green et al., *supra* note 22.
[33] *See id.*
[34] *See* South China Sea Arbitration Award, *supra* note 5 ¶¶ 1–16.

III. Legal Framework for the South China Sea Arbitration

To understand the value of UNCLOS's compulsory arbitration in light of the South China Sea Arbitration, it is important to understand both the COLREGS and the arbitration procedures under UNCLOS. This Part will outline the general scope and application of the COLREGS, the dispute resolution procedures under UNCLOS, and China's declarations regarding the dispute resolution procedures.

A. The International Regulations for Prevention of Collisions at Sea

The COLREGS are the codification of CIL relating to safe navigation by "all vessels upon the high seas and all waters connected therewith navigable by seagoing vessels."[35] Thus, the COLREGS apply to both military and civilian vessels. All countries follow the COLREGS, including the U.S. and China, who are both signatories.[36] The COLREGS codify the navigation rules that all vessels must adhere to, including rules for overtaking vessels, crossing with vessels, maintaining safe speed, and avoiding the risk of collision.[37] The COLREGS require parties to ensure that all vessels under their jurisdiction abide by these rules.[38] Parties enact domestic laws and procedures to enforce the COLREGS within their jurisdiction.[39] There is no compulsory international forum for adjudicating disputes between states regarding COLREGS violations, although the International Court of Justice has jurisdiction to hear cases if the state parties agree to arbitration.[40]

B. Compulsory Arbitration Under UNCLOS

From its inception, UNCLOS's drafters wanted to include compulsory dispute resolution procedures in the Convention to prevent interpretation and application of the provisions from being left solely in the hands of the signatories.[41] During the 1958 United Nations Conference on the Law of the Sea, which included both the United States and China, the drafters ultimately gave way to the practical reality that several powerful parties objected to compulsory arbitration on the

[35] Convention on the International Regulations for Preventing Collisions at Sea, rule 1(a), Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREGS].
[36] *See generally* Details of UNCLOS, UNITED NATIONS TREATY COLLECTION, https://bit.ly/3hdhzu6.
[37] COLREGS, *supra* note 35, rule 3.
[38] *See id.* art. 1.
[39] *Id.*
[40] *See* Charter of the United Nations and Statute of the International Court of Justice, art. 36, Oct. 24, 1945, 33 U.N.T.S. 993.
[41] *See* U.N. Conference on the Law of the Sea, Vol. II, 7th plen. mtg. at 7, U.N. Doc. A/CONF.13/BUR/L.3, L.5, L.6 (Apr. 21, 1958).

grounds that it infringed on sovereignty.[42] Accordingly, although the 1958 Convention included a compulsory arbitration clause, it was only an optional protocol.[43] The United States ultimately signed, but did not ratify, the optional protocol.[44]

The parties revived the idea of compulsory dispute settlement during the third Law of the Sea Conference of 1973.[45] After some debate, the committee agreed to have one arbitral tribunal for sea-bed matters and another for all other disputes, ultimately taking the form of Article 186 and Articles 286-299 of UNCLOS, respectively.[46] The final version of UNCLOS is the 1982 United Nations Convention on the Law of the Sea, which came into effect in 1994 and remains in effect today.[47]

Under the 1982 Convention, UNCLOS Part XV, Section 1, requires parties to the Convention to settle all disputes peacefully and provides non-compulsory means to do so.[48] When parties cannot agree under the non-compulsory measures of Section 1, then either party may turn to the binding, compulsory dispute resolution procedures of Section 2.[49] There are four dispute settlement options under Section 2: 1) The International Tribunal for the Law of the Sea, 2) The International Court of Justice, 3) ad hoc arbitration established in accordance with Annex VII of UNCLOS, or 4) a special arbitral tribunal in accordance with Annex VIII.[50] The parties to the Convention can declare acceptance of any of those four forums upon joining the Convention or anytime thereafter.[51] If a party has not made a declaration, then the party's forum selection defaults to the ad hoc tribunal procedures under Annex VII.[52] Accordingly, failure to declare acceptance of a forum does not exempt a party from compulsory arbitration.[53] If both parties to a dispute declared acceptance of the same forum, then the parties use that forum unless they agree otherwise.[54] If the parties declared

[42] *See id.*
[43] Geneva Conventions on the Law of the Sea, Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29, 1958, 450 U.N.T.S. 169.
[44] *See id.*
[45] *See* Third U.N. Conference on the Law of the Sea, Vol. VI, U.N. Doc. A/CONF.62/WP.9/Rev.2 (Nov. 23, 1976).
[46] *See* Third U.N. Conference on the Law of the Sea, Vol. VI, 72nd plen. mtg. at 8, U.N. Doc. A/CONF. 62/SR.72 (Sept. 7, 1976); *see also* UNCLOS, *supra* note 13, arts. 186, 286–99.
[47] *See* UNCLOS, *supra* note 13.
[48] *Id.* art. 279.
[49] *See id.* art. 286.
[50] *Id.* art 287.
[51] *Id.*
[52] *See id.*
[53] *Id.*
[54] *See id.*

acceptance of different forums, then jurisdiction over the dispute defaults to the ad hoc tribunal procedures under Annex VII, unless the parties agree otherwise.[55]

There are several automatic exceptions to the compulsory arbitration forums' jurisdiction.[56] There are also three discretionary, à la carte exceptions that parties can select upon joining UNCLOS.[57] The first of these discretionary exceptions includes "disputes over interpretation or application of arts. 15, 74 and 83, relating to sea boundary delimitations, or those involving historic bays or titles."[58] The second exception applies to military activities and law enforcement activities related to the exercise of sovereign rights or jurisdiction.[59] The last exception is for disputes under consideration by the United Nations Security Council.[60] These exceptions are important in determining both the effectiveness of the compulsory process in the types of disputes likely to arise in the South China Sea and in determining any potential negative impact on the United States' interests should it choose to ratify UNCLOS. Significantly, any disputes that fall outside the mandatory and discretionary exceptions are subject to compulsory jurisdiction and cannot be unilaterally avoided by any party.

C. China's Declarations Under UNCLOS

When joining UNCLOS, China declared that it reserved all three of the exceptions to compulsory arbitration jurisdiction provided under article 298(1)(a), (b), and (c).[61] China made no declaration regarding choice of forum under article 297. Accordingly, the ad hoc arbitration tribunal under Annex VII has default jurisdiction for any compulsory arbitration involving China as a party.[62] Thus, all of the exceptions apply to China.

IV. The South China Sea Arbitration

A. The Jurisdiction Award

When the Philippines initiated compulsory arbitration against China in 2012, China refused to participate, claiming that the dispute concerned sovereignty and was, therefore, outside the jurisdiction of compulsory arbitration

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[55] *See id.*
[56] UNCLOS, *supra* note 13, art. 297.
[57] *Id.* art. 298.
[58] *Id.*
[59] *Id.* art. 298(1)(b).
[60] *Id.* art. 298(1)(c).
[61] Declarations and Reservations to UNCLOS, UNITED NATIONS TREATY COLLECTION, https://bit.ly/2UcQWOd.
[62] UNCLOS, *supra* note 13, art. 297.

proceedings.[63] To combat China's effort to avoid compulsory arbitration, the South China Sea Arbitration Tribunal ("the Tribunal") extensively analyzed its jurisdiction over each allegation against China. While various scholars have discussed the Tribunal's jurisdictional award for its deft avoidance of sovereignty questions in the dispute, they have paid little attention to the award regarding jurisdiction over violations of the COLREGS.[64] However, ignoring that portion of the decision misses the award's potential implications for arbitration over China's gray-zone tactics involving PAFMM and the CCG.[65] The Tribunal accepted jurisdiction over the Philippines' Submission Number 13, relating to the application of UNCLOS articles 21, 24, and 94 to incidents of unsafe navigation by Chinese vessels.[66] The Tribunal also reserved its consideration of Submission Number 14 pending analysis on the merits of whether the activities related to the claim were "military activities" or not.[67] Accordingly, the Tribunal refused China's attempt to wriggle out of the compulsory arbitration clause with regard to the disputes over violations of the COLREGS.

B. The Award on the Merits

After the Tribunal found it had jurisdiction over the allegations, it turned to the merits and ultimately found in favor of the Philippines.[68] To reach this finding, the Tribunal first concluded that China's disputed activities were not military activities.[69] The Tribunal based this finding on China's own statements regarding the nature and character of its island-building and fishing activities.[70] In doing so, the Tribunal demonstrated a willingness to turn China's preposterous denials of militarization against it in the legal sphere.[71] Thus, the Tribunal refused to apply any military exception that would have excused China's activities.[72]

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[63] South China Sea Arbitration (Phil. v. China), Award on Jurisdiction and Admissibility, PCA Case Repository 2013-19, pt. IV (Perm. Ct. Arb. 2015).
[64] Lyle J. Morris, *The Crucial South China Sea Ruling No One is Talking About*, DIPLOMAT (Sep. 9, 2016), https://bit.ly/3x5UZKJ.
[65] *Id.*
[66] South China Sea Arbitration Award on Jurisdiction and Admissibility, *supra* note 63, ¶ 410 (finding that obligations exist for both the coastal state and those engaged in innocent passage within a territorial sea, and so sovereignty over Scarborough Shoal is irrelevant to the dispute).
[67] *Id.* ¶ 411.
[68] South China Sea Arbitration Award, *supra* note 5, ¶ 1203.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] Lori Fisler Damrosch, Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS, 110 AM. J. INT'L L. UNBOUND 273 (2016).

The Tribunal also refused to apply the law enforcement exception, stating that the exception applied only inside a nation's exclusive economic zone.[73] Furthermore, the Tribunal found that UNCLOS article 94 incorporates the COLREGS into the Convention, thereby requiring parties to UNCLOS to abide by the COLREGS in order to meet the requirements of article 94.[74] After finding that article 94 incorporates the COLREGS, the Tribunal considered whether China had any defenses that might have allowed it to deviate from the COLREGS.[75] The dispute in question concerned incidents of near-collisions at sea caused by CCG vessels.[76] A public Chinese position paper provided China's only potential defense to violating the COLREGS, which was that China's actions during the incidents were necessary to protect its sovereignty.[77] The Tribunal interpreted that to mean that if China had participated in the arbitration, it might have claimed violating the COLREGS was "necessary to avoid immediate danger" under COLREGS rule 2(b).[78] The Tribunal rejected that defense and found that prior to China's actions there was no "immediate danger" and that the Chinese vessels' actions caused the danger of collision.[79] Accordingly, the Tribunal rejected rule 2(b) as a potential defense.[80]

The findings incorporating the COLREGS into UNCLOS and rejecting rule 2(b) as a defense might have had even more wide-ranging implications for the South China Sea, but the Tribunal narrowed the scope of its award. It did so by determining that China had direct "command and control" of all of the Chinese-flagged vessels involved in the incidents of unsafe navigation.[81] Thus, because all the vessels belonged to various government agencies, the acts were official acts of the Chinese government.[82] This finding leaves room for debate about how the Tribunal would have viewed non-agency vessels, such as PAFMM, and suggests that each case would be handled on an individual, fact-specific basis. Given the way in which China organizes, deploys, and controls PAFMM through the PLAN and the CCG, it is likely that a future tribunal would impute the acts of PAFMM to China.

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[73] South China Sea Arbitration Award, *supra* note 5, ¶ 1045.
[74] *Id.* ¶¶ 1083, 1090.
[75] *Id.* ¶ 1090.
[76] *Id.* ¶¶ 1046–58.
[77] Position of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (promulgated by Ministry of Foreign Affairs of China, December 7, 2014), https://bit.ly/3qx0dg9.
[78] South China Sea Arbitration Award, *supra* note 5, ¶ 1095; COLREGS, *supra* note 35, rule 2(b).
[79] South China Sea Arbitration Award, *supra* note 5, ¶ 1095.
[80] *Id.*
[81] *Id.* ¶ 1091.
[82] *Id.*

The importance of the South China Sea Arbitration regarding the COLREGS rests largely on its effect on the interpretation of UNCLOS going forward and its reception by the international community. There is no enforcement mechanism for the award other than to initiate arbitration again, which would likely be futile if China's refuses to participate.[83] Accordingly, any arbitration's value lies in its potential as ammunition in legal warfare, or "lawfare," against China, and its potential to help rally a rules-based coalition of countries in the region to oppose China's activities.

C. China's Response to the South China Sea Arbitration

After refusing to participate in the arbitration, in 2014, China provided a position paper outlining its objections in greater detail.[84] In that paper, China claimed the "essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features . . ." and "that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 . . . ." This statement indicates that China's rejection of the arbitration was due to its desire to classify the dispute as a sovereignty issue. Subsequent to the award, the Ministry of Foreign Affairs of China provided another white paper, which stated,

> The Philippines deliberately mischaracterized and packaged the territorial issue which is not subject to the United Nations Convention on the Law of the Sea (UNCLOS) and the maritime delimitation dispute which has been excluded from the UNCLOS dispute settlement procedures by China's 2006 optional exceptions declaration pursuant to Article 298 of UNCLOS.[85]

These vague statements do not clarify China's position but they do make it clear that China wanted to characterize the dispute as a sovereignty issue outside the jurisdiction of compulsory arbitration. The second paper also purported to provide a number of examples of China's exercise of sovereignty over the area and later alluded to enforcement of a fishing moratorium.[86] This may have been an attempt to claim the area as an EEZ and trigger the law enforcement exception, although, again, China did not clearly state its position.[87] China ultimately rejected

[83] *See* UNCLOS, *supra* note 13.
[84] South China Sea Arbitration Award, *supra* note 5, ¶ 30.
[85] China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (promulgated by Ministry of Foreign Affairs of China, July 13, 2016), https://bit.ly/35XDb8L.
[86] *Id.*
[87] *Id.*

the Tribunal's assertion of jurisdiction, refused to recognized the award, and claimed the arbitration was "null and void."[88]

Following China's public statements rejecting the arbitration, the Asia Maritime Transparency Initiative created a chart analyzing the extent to which China has complied or not complied with the various findings in the South China Sea award.[89] According to their analysis, China has complied with only two minor parts of the 11 parts of the award, in keeping with their historical behavior in the South China Sea.[90] Of relevance to the United States and its operations in the South China Sea, China has continued to violate the COLREGS on a number of occasions since the award, including an incident involving USS DECATUR (DDG 73) in 2018.[91] There is some evidence that the arbitration did effect how China interacts with international law, as China has since made a greater effort to influence the development of international law.[92] However, the importance of the South China Sea Arbitration rests largely on its effect on the interpretation of UNCLOS going forward, its reception by the international community, and its potential to rally international coordination against China and in opposition to its illegal activities in the region.

D. Western Response to the South China Sea Arbitration

The wider international community's initial response to the award was lackluster but has strengthened over time, particularly in the past year. The Group of Seven issued a carefully-worded joint communiqué in 2018, calling the award a "useful basis" for resolving other disputes in the region without commenting on the merits or China's noncompliance.[93] China, predictably, responded by calling the statement "irresponsible."[94] At the time of the award, the United States encouraged China to comply with the award, but did not take a firm position on the merits until 2020.[95] U.S. Secretary of State, Michael Pompeo, finally issued a

[88] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (promulgated by Ministry of Foreign Affairs of China, July 12, 2016), https://bit.ly/3hlKiNt.
[89] Ctr. for Strategic & Int'l Studies, *Failing or Incomplete? Grading the South China Sea Arbitration*, ASIA MAR. TRANSPARENCY INITIATIVE (Jul. 11, 2019), https://bit.ly/3y2qsgU.
[90] *Id.*
[91] *Id.*
[92] Laura Zhou, *Why China is Now Looking to Have its Say on International Law*, S. CHINA MORNING POST (Dec. 5, 2020), https://bit.ly/3w906Zc.
[93] Group of Seven, *Foreign Ministers Communiqué* (Apr. 23, 2018), https://bit.ly/3AcFmD2.
[94] Eimor P. Santos, *China Calls Out G7 for 'Irresponsible' Statement on South China Sea*, CNN PHIL. (Apr. 26, 2018), https://bit.ly/3x5zrhj.
[95] Robert D. Williams, *What Did the U.S. Accomplish With Its South China Sea Legal Statement?*, LAWFARE (Jul. 17, 2020), https://bit.ly/3jrVn2e.

statement on July 13, 2020, reaffirming the United States' position that the arbitral award is binding on both parties, and affirmatively endorsed parts of the award which rejected some of China's excessive maritime claims.[96] Following suit, the United Kingdom, France, and Germany issued a joint note verbale on September 16, 2020, affirmatively rejecting China's claim that its "historic rights" establish its sovereignty over the entire South China Sea. In the note verbale, the foreign ministers pointed to the South China Sea Arbitration's rejection of the "historic rights" claim, indicating that they view the arbitration as an authoritative and correct interpretation of international law.[97] Australia also issued a note verbale on July 23, 2020, similarly rejecting several of China's excessive claims.[98] While it has taken about four years to come to fruition, the broader international community appears to have recognized the value of the South China Sea Arbitration and is now using the award to pressure China into resolving its excessive claims.

E. ASEAN Response to the South China Sea Arbitration

Much like the broader international community's response, the Association of South East Asian Nations' (ASEAN) response was lukewarm. The ASEAN reaction is of particular importance as the coalition includes all of the claimants in the South China Sea, with the exception of China and Taiwan. ASEAN's primary purposes include promoting peace and stability based on the rule of law and collaborating on issues of common interest; accordingly, they often release joint statements calling for peaceful resolution of the territorial disputes.[99] ASEAN's response was initially tentative and the arbitration award has been a point of contention amongst some ASEAN states.[100] For instance, the ASEAN foreign ministers issued a joint communique in 2016 reiterating the importance of adhering to UNCLOS and the principles of safety and freedom of navigation, only to retract the statement hours later.[101] Additionally, the Philippines has been hesitant to enforce the award or to even refer to it, despite having initiated the arbitration.[102] Nevertheless, the sentiment in the region has slowly shifted and ASEAN countries are starting to assert their support for the award and the rule of

[96] Press Release, Michael J. Pompeo, U.S. Sec. State, U.S. Position on Maritime Claims in the South China Sea (Jul. 13, 2020), https://bit.ly/2Uf5oF6.
[97] Joint Note Verbale from the U.K., Fr., and Ger. to the U.N., U.K. N.V. No. 162/20 (Sep. 16, 2020), https://bit.ly/3hik3Yb.
[98] Note Verbale from Austl. to the U.N., Austl. N.V. No. 20/026 (Jul. 23, 2020), https://bit.ly/36ezSu1.
[99] Ass'n of South East Asian Nations, Charter pmbl, https://bit.ly/3627hIe.
[100] Manuel Mogato, Michael Martina & Ben Blanchard, *ASEAN Deadlocked on South China Sea, Cambodia Blocks Statement*, REUTERS (Jul. 25, 2016), https://reut.rs/3jnkSl1.
[101] Ankit Panda, ASEAN Foreign Ministers Issue, Then Retract Communique Referencing South China Sea, DIPLOMAT (Jun. 15, 2016), https://bit.ly/3jpZ0p7.
[102] Renato Cruz De Castro, *After Four Years, the Philippines Acknowledges the 2016 Arbitral Tribunal Award!*, ASIA MAR. TRANSPARENCY INITIATIVE (Jul. 27, 2020), https://bit.ly/3dqypVa.

law. For instance, on July 12, 2020, the Philippines issued a forceful statement against China, rejecting China's claims to the area within the nine-dash line, rejecting China's continued violations of the Philippines' EEZ, and calling on China to abide by the award.[103] Despite the four year gap, the fact that the Philippines was finally willing to point to the award and call on China to follow international law suggests there is increasing impatience with China's behavior. Vietnam, which has been one of the most vocal ASEAN opponents of China, recently began openly flirting with the idea of initiating arbitration against China, although it is unclear if this is simply posturing or if it indicates an actual intent to wield international law against China.[104] Additionally, in a note verbale on March 30, 2020, Vietnam rejected China's excessive maritime claims using language lifted straight from the South China Sea Arbitration to support Vietnam's position under UNCLOS.[105] Thus, the United States' recent affirmation of the South China Sea Arbitration appears to have emboldened ASEAN nations to stand up to China through legal and diplomatic means, suggesting that both arbitration and the affirmative backing of United States for that arbitration are critical to build a consensus against China in South East Asia. Accordingly, if the United States ratifies UNCLOS and participates in arbitration against China's unlawful actions, it will influence the willingness of countries in the region to assert their rights under UNCLOS.

V. Ratification of UNCLOS in Light of the South China Sea Arbitration

A. The Benefits of Access to Compulsory Arbitration.

What the South China Sea Arbitration and the international response demonstrates is that if the United States ratifies UNCLOS it will gain access to an additional international legal process through which it can cast China as an illegal actor in the South China Sea dispute. Ratification will give the United States standing to initiate compulsory arbitration against China for violations of the COLREGS during U.S. freedom of navigation operations, scientific research operations, and other lawful exercise of the high seas freedoms UNCLOS codifies, without having a territorial interest in the region. However, to reap the benefits of the compulsory arbitration, it will be more important than ever for Judge Advocates to understand both UNCLOS and the COLREGS and how those rules might be applied by an arbitral tribunal. Judge Advocates will have to review all

[103] Statement of Teodoro L. Locsin, Jr., Sec'y of Foreign Affs. for Phil., On the 4th Anniversary of the Issuance of the Award in the South China Sea Arbitration (Jul. 12, 2020), https://bit.ly/3jmiZFn.
[104] Ankit Panda, China Warns Vietnam Not to 'Complicate' South China Sea Dispute by Seeking Legal Arbitration, DIPLOMAT (Nov. 9, 2019), https://bit.ly/2TgjIgw.
[105] Note Verbale from Viet. to the U.N., Viet. N.V. No. 22/HC-2020 (Mar. 30, 2020), https://bit.ly/3qwKZYu.

U.S. naval operations for compliance with international law and will have to ensure proper documentation of all incidents. Doing so will preserve the United States' option to exercise the compulsory arbitration clause against China. Additionally, it will be even more critical for U.S. vessels to adhere to UNCLOS and the COLREGS during deployments so that the compulsory arbitration does not backfire on the U.S. If commanding officers and bridge crews are well-trained on their obligations under UNCLOS and the COLREGS, and planners include Judge Advocates in the early stages of planning for operations in sensitive regions, the United Stated could capitalize on the benefits of compulsory arbitration to combat China's illegal harassment of vessels in the South China Sea with no impact to our own operations.

The harassment of USNS IMPECCABLE (T-AGOS-23) in 2009 is a perfect case study for examining how the United States might use the COLREGS against China. At the time of the incident, USNS IMPECCABLE's actions were consistent with UNCLOS and CIL, so an analysis of the incident can meaningfully inform the discussion of the untapped value of arbitration under UNCLOS.[106] USNS IMPECCABLE was conducting lawful undersea intelligence collection while towing a sonar array inside China's EEZ.[107] Five Chinese-flagged vessels approached and surrounded USNS IMPECCABLE: a PLAN intelligence vessel, a FLEC vessel, a CMS vessel, and two Chinese-flagged fishing trawlers.[108] After the five vessels surrounded USNS IMPECCABLE, the two trawlers approached USNS IMPECCABLE. One of the trawlers tried to sever the tow cable or damage the sonar array by cutting across USNS IMPECCABLE's wake.[109] USNS IMPECCABLE communicated its intention to leave the area over bridge-to-bridge radio.[110] As USNS IMPECCABLE was leaving, the two trawlers approached within 25 yards and dropped debris just off USNS IMPECCABLE's bow, forcing USNS IMPECCABLE to make an emergency stop to avoid collision.[111] These actions violated COLREGS Rules 8, 13, 15, 16, and 18.[112] Additionally, in this particular incident, the trawlers were the primary actors. Therefore, the military and law enforcement activities exceptions would not apply, despite this taking place inside China's EEZ, and in contrast to the South China Sea Arbitration where the incident occurred outside China's EEZ.

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[106] Raul Pedrozo, *Close Encounters at Sea*, 62 NAVAL WAR C. REV., no. 3, 2009, at 101, https://bit.ly/3w5HQzK.
[107] *Id.*
[108] *Id.*
[109] Michael Green, Kathleen Hicks Zack Cooper, John Schaus & Jake Douglas, *Counter-Coercion Series: Harassment of the USNS Impeccable*, ASIA MAR. TRANSPARENCY INITIATIVE (May 9, 2017), https://bit.ly/2UPJ2up.
[110] *Id.*
[111] *Id.*
[112] COLREGS, *supra* note 35, rules 8, 13, 15, 16, 18.

Accordingly, if a similar incident occurred after U.S. ratification of UNCLOS, the United States could use compulsory arbitration to resolve the dispute in conjunction with the other options it exercised in 2009, such as sanctions and diplomatic protest. The benefit to an arbitral award over sanctions alone is that an arbitral award demonstrates that the United States is not acting unilaterally in declaring China's actions illegal and lends the weight of an internationally-recognized legal proceeding under UNCLOS to the United States' position. This would complement the U.S. State Department's efforts to demonstrate that China is a rogue actor, while having the collateral benefit of weakening China's arguments for the legality of their interference with vessels in their EEZ.

In addition to providing legal support for the U.S. position regarding the incident, there is also the potential that a tribunal would find that it has jurisdiction over the dispute regarding the interpretation of UNCLOS and CIL as it relates to conducting military activities within an EEZ. The United States, however, would be able to claim the military activities exception if it did not want to risk raising that argument before the tribunal. As the South China Sea Arbitration demonstrated, the Tribunal was willing to make factual findings and interpret UNCLOS in categorizing rocks, islands, and low tide elevations. As the dispute over military activities within an EEZ is not really a dispute over sovereignty, but rather a dispute over the interpretation of what limitations UNCLOS and CIL place on high seas freedoms within an EEZ, it is potentially within an ad hoc tribunal's jurisdiction. That potential aside, at the very least, an award proclaiming that China violated the COLREGS can help shape international opinion regarding China's gray-zone tactics and excessive maritime claims. Tribunals can sidestep the question of sovereignty over the EEZ to resolve disputes under UNCLOS article 94; they have before and likely would do so again.

For incidents involving PLAN vessels, China would have the potential to claim the military activities exception; however, as the South China Sea Arbitration verified, the nature of a vessel does not exempt it from its obligation to follow the COLREGS. Further, the Tribunal was willing to find that the law enforcement exception did not apply in the South China Sea Arbitration even though the vessels claimed to be acting in a law enforcement capacity.[113] Accordingly, a future ad hoc tribunal may make the same finding regarding a PLAN vessel, although it is impossible to know since no party has initiated arbitration involving that matter yet. Regardless, ad hoc tribunals certainly have jurisdiction over any dispute involving PAFMM and CCG vessels operating

[113] South China Sea Arbitration Award, *supra* note 5, ¶¶ 1045, 1095.

beyond China's EEZ, making it harder for China to effectively use its gray-zone tactics.

If the United States and the ASEAN nations can curb China's prolific and illegal use of PAFMM and the CCG to harass vessels through unsafe navigation practices, China will lose a significant amount of leverage it has garnered over its smaller neighbors by using gray-zone tactics just shy of the use of force. Even if arbitration does not stop China from behaving poorly, arbitration can rally international support for the nations suffering with China's excessive maritime claims and harassment.

B. Current Arguments Against Ratification

While access to compulsory arbitration would benefit the United States if it ratified UNCLOS, it is important to look at the arguments against ratification to weigh the potential costs. The main remaining arguments fall largely into two categories after the United States' successful amendments to UNCLOS in 1994. The first category is a concern that UNCLOS would force the United States to cede some of its sovereignty to the International Seabed Authority (ISA) and expose the United States to international lawsuits for non-compliance with ISA policy.[114] The second category is a concern that article 82 would cost the United States significant amounts of money due to the revenue sharing requirement.[115] With regard to the first concern, legal experts have debunked that argument by pointing out that UNCLOS has no requirements for any country to adhere to any environmental laws and regulations other than the country's own domestic laws.[116] With regard to the second, many proponents of UNCLOS argue that this cost does not accrue for five years, begins at one percent of revenue, and rises only one percent each year thereafter until it is capped at seven percent of revenue indefinitely.[117] Similarly, the cost of leaving U.S. interests unprotected without the legal framework of UNCLOS outweighs that cost, particularly in light of the brewing sovereignty conflicts in the Arctic.[118] The United States can afford to bear this cost to gain access to the rest of the benefits of UNCLOS. Additionally, in the specific context of arbitration, a potential downside of UNCLOS is that other nations could initiate compulsory arbitration against the United States, rendering UNCLOS a double-edged sword. While the United States would risk the same

[114] Klaas Willaert, *Deep Sea Mining and the United States: Unbound Powerhouse or Odd Man Out?*, 124 MARINE POL'Y, Feb. 2021, at 9; Aditya Singh Verma, *A Case for the United States' Ratification of UNCLOS*, DIPLOMATIST (May 2, 2020), https://bit.ly/3y66bXL.
[115] Press Release, Rob Portman, U.S. Sen. (R-Ohio), Senators Portman and Ayotte Sink Law of the Sea Treaty (Jul. 16, 2012), https://bit.ly/3AlIYTw.
[116] Verma, *supra* note 114.
[117] *Id.*
[118] Willaert, *supra* note 114, at 7.

exposure as China, the United States has the advantage of the fact that as a nation, its policy, laws, and values require it to abide by international law. Accordingly, the United States already follows the majority of UNCLOS, and it is unlikely that exposure to arbitration under UNCLOS will harm its interests. Further, seabed mining and sovereignty questions are outside the scope of compulsory arbitration, so the issues that most concern the United States will be beyond the jurisdiction of an ad hoc tribunal. No international convention will ever be completely without tradeoffs but, in this case, the benefits of gaining access to UNCLOS's provisions and increasing the United States' ability to protect its interests under international law outweigh the potential costs.

VI. Conclusion

The ability to initiate compulsory arbitration against China for violations of the COLREGS would be a powerful tool for the U.S. to rally international opposition to China. China has sought to sow confusion and division in the South China Sea by refusing to state clear claims under UNCLOS and by engaging in coercive practices to enforce its excessive claims. The U.S. can use compulsory arbitration to highlight China's illegal gray-zone tactics and undermine China's efforts to appear as a lawful and stabilizing force in the South China Sea. While arbitration under UNCLOS cannot address questions of sovereignty, the South China Sea Arbitration demonstrated that a tribunal does not have to answer questions of sovereignty to resolve many of the disputes in the region. Joining UNCLOS will give the U.S. access to a critical tool it needs to combat China's rising influence in the interpretation international law and to build international consensus in the South China Sea. Access to the compulsory arbitration procedures of UNCLOS will allow the U.S. to influence international law while highlighting China's unlawful violations of the COLREGS and limiting China's legal options to support its excessive claims. These benefits far outweigh any potential cost to joining UNCLOS.

UNDISCIPLINED: THE CASE FOR A SEA SERVICE PERSONNEL LAW SUMMIT

Lieutenant Colonel Amelia Kays, USMCR*

As the military services have worked to professionalize the force, non-punitive adverse personnel actions have become "career killers" that significantly impact retention, promotion, and special assignments such as command. Despite the increasing significance of non-punitive personnel actions, the Due Process protections afforded to service members have not changed, leaving service members with "hollow" procedural protections that do not include legal review, review by a superior commander, or a burden of proof for commanding officers to apply when assessing if a personnel action is warranted. Further, the sea services provide different procedures for service members facing adverse personnel actions, resulting in disparate treatment within the Department of the Navy. This Article advocates for a summit of Personnel Law attorneys to create actionable recommendations to protect the due process rights of service members, align the sea services' personnel law systems, empower commanding officers, reduce petitions to the Board for Correction of Naval Records and Board for Correction of Military Records, and modernize the personnel law systems to take advantage of technological advancements.

> Due process in all procedures is democracy's method of insuring a legal, fair, just and reasonable result. It works to insure that the individual's rights are protected, but equally preserves the rights of all the people against the claims of an individual by providing procedures whereby the relative rights and duties can be fairly decided.[1]

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[1] Robert D. Powers, Jr., *Administrative Due Process in Military Proceedings*, 20 WASH. & LEE L. REV. 1, 33 (1963), https://bit.ly/3qwXTW9.

I. Introduction

The military cartoon series "Terminal Lance" memorialized how discipline in the military has evolved in cartoon #35 titled "How Things Have Changed." This cartoon contrasts the punishments received by Marines at Company level non-judicial punishment (NJP) in 1970 and 2010. The Vietnam-era Marine receives "30 days suspended bust" for a variety of offenses including "mailing home a kilo of pot and going UA for two months in Thailand" while the Global War on Terrorism-era Marine is reduced from Lance Corporal (E-3) to Private First Class (E-2) and restricted for 30 days for "being five minutes late to formation and giving the Sergeant Major attitude."[2] Although the cartoon is meant to be humorous, the increased focus on professionalizing the armed services, in part through counseling and disciplining service members for minor infractions, has real implications on service members' careers that are no joke.

The military services began to focus on adherence to "core values" and increased standards for behavior while transitioning to an all-volunteer force during the 1980s.[3] Although adverse personnel actions such as formal counseling have come to have a chilling effect on promotions, special assignments, and retention in the military, the due process protections afforded to service members do not reflect the outsized career impact of these entries in a service member's Official Military Personnel File (OMPF).[4]

Army Captain Mark Bojan acknowledged the significance of General Officer Memorandums of Reprimand (GOMORs), a type of non-punitive counseling issued by a General Officer that he called a "career-killer." Before a GOMOR can be filed, a soldier must be given notice and the opportunity to respond. Bojan asserted that is not sufficient due to the liberty interests a soldier has in his or her career. Bojan recommended legal review of all unfavorable information filed in a soldier's OMPF as well as a requirement that adverse material be supported by a preponderance of evidence. "Policy guidance should

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[2] Michael Fay, *Cartoon #35, How Things Have Changed*, TERMINAL LANCE (May 14, 2010), https://bit.ly/3qw2RCT.

[3] *See generally* Col. William J. Bowers, *Making Marines in the All-Volunteer Era: Recruiting, Core Values, and the Perpetuation of Our Ethos*, MARINE CORPS GAZETTE, Nov. 2018, https://bit.ly/2TfZzqS.

[4] The National Archives defines the Official Military Personnel File as "an administrative record, containing information about the subject's service history such as: date and type of enlistment/appointment; duty stations and assignments; training, qualifications, performance; awards and decorations received; disciplinary actions; insurance; emergency data; administrative remarks; date and type of separation/discharge/retirement (including DD Form 214, Report of Separation, or equivalent); and other personnel actions." *What is an Official Military Personnel File (OMPF)?*, NATIONAL ARCHIVES, May 26, 2020, https://bit.ly/3x2Gjfd.

emphasize that OMPF filing is a significant, potentially career-ending action, and that alternative options should be carefully considered."[5]

Similar to the analysis of the GOMOR that Captain Bojan undertakes in his article, this Article considers the personnel law systems within the sea services—the Navy, Marine Corps, and Coast Guard—and recommends increased procedural due process protections for Sailors, Marines, and Coast Guardsmen. Further, this Article advocates alignment of the sea services' personnel law systems through a collaborative Sea Service Personnel Law Summit. The changes to personnel policy proposed herein are designed to empower military leaders, eliminate unnecessary paperwork thereby reducing environmental impact, and provide greater due process protections for service members. Further, if the recommended policy changes are made, service members' records will be corrected by their service when evidence is available to consider alleged errors or injustices. This will ensure that service members' OMPFs are accurate and that the best and most fully qualified members are retained and promoted; the recommendations in this Article are talent management initiatives.

II. Documenting Performance and Conduct in the Sea Services

Every military service has a process to document the performance of its members. These performance counseling procedures range from informal verbal counselings to written punitive censures that are placed in the service member's OMPF. Each sea service also provides scheduled appraisals of performance for its Officers and Enlisted Members known as Proficiency and Conduct Marks for junior enlisted Marines and "Fitness Reports" for Marine Officers and Senior Enlisted members; Enlisted Evaluations for enlisted Sailors and Fitness Reports for Officers in the Navy; and the Officer or Enlisted Evaluation System in the Coast Guard.[6] Together, these types of counseling tools are used to document exceptional and adverse performance and conduct by service members. Ultimately, these "counselings" are used to select members for special assignments and promotions and may also be used to determine which members should be separated from military service. Within the sea services, the counseling process and the ability of members to "appeal" or rebut the administrative paperwork they receive is quite different.

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[5] Mark E. Bojan, *Bad Paper: Reforming the Army Reprimand Process*, 224 MIL. L. REV. 1150, 1152–53 (2016).

[6] *See* U.S. MARINE CORPS, ORDER 1610.7A, PERFORMANCE EVALUATION SYSTEM (PES) (2018) [hereinafter MCO], https://bit.ly/3jkzfGM; U.S. DEP'T OF NAVY, BUREAU OF NAVAL PERSONNEL INSTRUCTION (BUPERSINST) 1610.10E, NAVY PERFORMANCE EVALUATION SYSTEM, https://bit.ly/3qtR3Rr; U.S. COAST GUARD, COMMANDANT INSTR. M1000.3, OFFICER ACCESSIONS, EVALUATIONS, AND PROMOTIONS (2020), https://bit.ly/3jknct9.

The Navy utilizes a series of counseling tools including: NAVPERS 1070/613 Administrative Remarks; Letters of Instruction, Reprimand, and Caution (punitive or non-punitive); evaluation counseling; Letters of Intent to Revoke Security Clearance; and any other form of written counseling.[7] Positive, negative, or neutral performance can be documented on the NAVPERS 1070/613, Administrative Remarks or "Page 13." Page 13 matters may include administrative counseling such as mandatory counseling regarding the use of social media but can also be used to document substandard performance. Adverse Page 13 entries require acknowledgment by the service member. Letters of Instruction are considered counseling tools and are not punitive; they may be entered into a member's service record to create a permanent record of counseling and can be used to justify a detachment for cause. Best practice is to require a Sailor to acknowledge a Letter of Instruction and to allow the Sailor to write a written response upon receiving one. A Non-Punitive Letter of Caution is a non-punitive censure that is between the issuer and the recipient—it is not filed in the recipient's service record. A Punitive Letter of Reprimand generally follows NJP or a court-martial and would be part of a Sailor's service record.[8] Sailors who believe that they have received a counseling in error may request that his or her command correct the record in accordance with the Military Personnel Manual (MILPERSMAN) Section 1070-210.[9] Fitness Report correction requests must be submitted to the Board for Correction of Naval Records (BCNR).[10]

The Marine Corps utilizes administrative remarks or "Page 11" counseling, which is similar to the Navy's Page 13 remarks.[11] Additionally, the Marine Corps requires counseling in accordance with paragraph 6105 of the Marine Corps Separation and Retirement Manual (MARCORSEPMAN) prior to the initiation of administrative separation proceedings for enlisted Marines.[12] Page 11 and Paragraph 6105 counselings are filed in the Marine's OMPF. The Marine Corps also utilizes Non-Punitive Letters of Caution which are not filed in the

[7] U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL, art. 1910-202, COUNSELING AND REHABILITATION (Jun. 12, 2011) [hereinafter MILPERSMAN], https://bit.ly/35ZI6Ws.
[8] *Nonpunitive Letters of Caution and Letters of Instruction*, COUNSELOR (Region Legal Service Off. Naval Dist. Wash., D.C.), Nov. 2014, at 2, https://bit.ly/3dncRIW.
[9] MILPERSMAN, *supra* note 7, art. 1070-210, Correction of the Field Service Record (Aug. 22, 2002).
[10] The BCNR acts on behalf of the Secretary of the Navy to order or recommend the correction of naval records. Civilians from the executive part of the Department of the Navy meet as a quorum of not less than three members review each petition received by the BCNR and vote on whether a change should be made to a service member's record. The BCNR is empowered to retire or medically retire service members, award back pay, and even return members to an Active Duty status. *See* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTRUCTION 5420.193, BOARD OF CORRECTION OF NAVAL RECORDS [hereinafter SECNAVINST 5420.193], https://bit.ly/3hiJ6dP; 10 U.S.C. § 1552 (2012).
[11] *See* U.S. MARINE CORPS, ORDER P1070.12K w/CH1, MARINE CORPS INDIVIDUAL RECORDS, ADMINISTRATION MANUAL [hereinafter IRAM] § 4006, https://bit.ly/2TeyDrG.
[12] *See* U.S. MARINE CORPS, ORDER 1900.16 CH 2, MARINE CORPS SEPARATION AND RETIREMENT MANUAL [hereinafter MARCORSEPMAN], https://bit.ly/3jlekn9.

recipient's OMPF and Punitive Letters of Reprimand which are the result of NJP or a court-martial and are a part of the Marine's permanent record.[13] Marines who believe that they have received a counseling in error must petition the BCNR. Fitness Report correction requests are submitted to the Performance Evaluation Review Board (PERB), a group of Marine Corps leaders who act on behalf of the Commandant to change or remove Fitness Reports that have inaccuracies or injustices; if relief is not granted by the PERB, petitions are forwarded to the BCNR.[14]

The Coast Guard formally counsels its members using precise language tailored for each incident as authorized by Commandant Instruction (COMDTINST) 1000.14D[15] on a CG 3307, Administrative Remarks Form or "Page 7".[16] The Coast Guard also utilizes punitive letters of reprimand following NJP or court-martial, which are made a permanent part of a member's record. Coast Guardsmen who believe that they have received an erroneous counseling or Officer or Enlisted Evaluation may petition the Personnel Records Review Board (PRRB) in accordance with COMDTINST 1070.1.[17] Records that are not corrected at the service level are submitted to the Board for Correction of Military Records (BCMR).[18]

Service members in all three branches are able to utilize their chain of command to correct their records, using the following procedures: a request for mast process,[19] a Uniform Code of Military Justice Article 138 Complaint,[20] a

[13] *See* U.S. MARINE CORPS, ORDER 5800.16-V15, LEGAL SUPPORT AND ADMINISTRATION MANUAL, OFFICER MISCONDUCT AND SUBSTANDARD PERFORMANCE OF DUTY [hereinafter LSAM], https://bit.ly/2SAnelK. The LSAM describes punitive and non-punitive measures available for counseling and disciplining Marine Officers.
[14] MCO 1610.7A, Chapter 10, *supra* note 6.
[15] *See* U.S. COAST GUARD, COMMANDANT INSTRUCTION 1001.14D, ADMINISTRATIVE REMARKS, FORM CG-3307, https://bit.ly/3doz4Xr.
[16] *U.S. Coast Guard Pay & Personnel Center*, UNITED STATES COAST GUARD, https://bit.ly/2UO05Nq.
[17] The Personnel Records Review Board is a group of senior Coast Guard leaders who recommend corrections or relief from errors in personnel records. The board is managed by the Assistant Commandant for Human Resources. *See* U.S. COAST GUARD, COMMANDANT OF THE COAST GUARD INSTRUCTION 1070.1, CORRECTING MILITARY RECORDS (2011) [hereinafter COMDTINST 1070.1], https://bit.ly/3y4XFYW.
[18] *Board for Correction of Military Records of the Coast Guard*, U.S. COAST GUARD, https://bit.ly/3jp8voM.
[19] Request Mast is a formal request by a member to speak with his or her commanding officer. *See, e.g.*, *Inspector General of the Marine Corps*, HEADQUARTERS MARINE CORPS, https://bit.ly/2SwLVPS.
[20] A Uniform Code of Military Justice Article 138 complaint is a process for requesting redress of wrongs by a service member's commanding officer. Such complaints are addressed at the General Officer level with advice from senior judge advocates. *See, e.g.*, U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTRUCTION 5800.7G, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), Ch. 3 (2021) [hereinafter JAGMAN], https://bit.ly/2TapDUC.

Congressional Interest Letter,[21] or a complaint to the Inspector General's Office. However, in some instances, personnel policies may not allow the member's chain of command to correct an issue; for example, an Article 138 Complaint cannot address a matter for which there is an appeal process, such as NJP.[22] Issues involving errors or injustices in performance cases which cannot be, or are not, sufficiently handled at the service level may be submitted by the service member to the BCNR for Sailors or Marines or BCMR for Coast Guardsmen.

The BCNR categorizes requests to remove counselings, records of NJP, and fitness reports as "Performance Cases." Between 13 April 2019 and 13 April 2021, the BCNR received 237 Performance Cases from Marines and granted relief in 101 of these cases (42 percent); Sailors submitted 52 cases in which 16 were granted relief (30 percent). The average wait time for a decision from the BCNR is 13 months; the average wait in a performance case is eight months.[23] Despite the fact that the Navy has essentially twice the personnel of the Marine Corps,[24] during the past two years, Marines submitted four times more petitions to the BCNR to address "Performance" issues than Sailors did. This is due, in part, to a service policy that prohibits corrective action of Page 11 and paragraph 6105 counselings by Marine Corps commanders. Each of these granted petitions represents a Marine or Sailor who may have been denied opportunities such as promotion or special duty assignments due to errors or injustices in their records.

III. "Liberty Interests in a Military Career"

Each of the sea services has a tiered approach to documenting performance and conduct which requires notice at the lowest level—a Page 13, 11, or 7—and notice and an opportunity to rebut the allegations for more serious types of counseling such as the 6105 counseling in the Marine Corps or adverse performance evaluations. Adverse personnel actions that are considered punitive, such as NJP, allow the service member the additional procedural due process right of personal appearance. As Captain Bojan articulated in his article, "non-punitive"

[21] Congressional Interest letters are sent by members of Congress to a military service after a service member raises a grievance with his or her Congressional representative. Generally, these inquiries are responded to by the service promptly and in writing.
[22] JAGMAN, *supra* note 20, at 3-8.
[23] E-mail from Bradley Goode, Deputy Director of the BCNR, to author (Apr. 13, 2019) (on file with author).
[24] According to the reports of the Center for Strategic and International Studies (CSIS), the Navy has an Active Duty end strength of 347,800 and a Reserve strength of 58,800. Mark F. Cancian, *U.S. Military Forces in FY 2021: Navy*, CSIS (Nov. 9, 2020), https://bit.ly/2SJPXoa. The Marine Corps has an Active Duty end strength of 184,100 and a Reserve end strength of 38,500. Mark F. Cancian, *U.S. Military Forces in FY 2021: Marine Corps*, CSIS (Nov. 16, 2020), https://bit.ly/2SJPYse.

adverse measures are still "career-killers."[25] When a service member may lose an opportunity for promotion, retention, or competitive assignments such as command due to these "non-punitive" counselings, are they really only administrative in nature? [26] Or has our discipline system itself become undisciplined?[27]

Due process rights stem from the Fifth and Fourteenth Amendments to the Constitution, which state that a citizen may not be "deprived of life, liberty, or property without due process of law."[28] Due process protections are categorized as substantive or procedural. Substantive due process asks the question whether the government's deprivation of a person's life, liberty, or property is justified by a sufficient purpose, while procedural due process questions whether the government has used the proper procedures when it takes away life, liberty, or property.[29] Courts have repeatedly found that service members are protected by the due process clauses in the Constitution, but that they do not have a right to their military employment.

> Courts have held that an enlisted member of the armed forces does not have a property interest in his employment because he may be discharged "as prescribed by the Secretary" of his service. 10 U.S.C. § 1169. *See, e.g.*, *Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991). However, courts have held that an enlisted member of the armed forces has a liberty interest in his employment.[30]

So what due process protections are necessary to protect a liberty interest? Courts have held that "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[31] The sea service personnel law systems do

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[25] Bojan, *supra* note 5, at 170 (quoting Lee Lawson Stockdale, *Reprimands: The Army's Dirty Little Secret*, AVVO (Aug. 24, 2011), https://bit.ly/3xfATgZ).
[26] Marine Corps General Glenn Walters, who headed investigations into the Marines United scandal, stated of Marines who received a 6105 counseling due to social media misconduct, "They got a 6105 in their record, which means if you're a sergeant or below, you're probably not going to have the cutting score required. You know how tight the promotion boards are." He acknowledged that a 6105 administrative counseling is enough to end a Marine's career. Hope Hodge Seck, *11 Marines Booted from the Corps in the Wake of the 'Marines United' Scandal—So Far*, TASK AND PURPOSE (Sep. 13, 2018), https://bit.ly/3hvudoz.
[27] Synonyms for undisciplined include disorderly, disorganized, disruptive, uncontrollable, and unrestrained.
[28] U.S. CONST. amends. V, XIV.
[29] Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999).
[30] Canonica v. United States, 41 Fed. Cl. 516, 524 (1998).
[31] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

provide notice (counseling) and an opportunity to be heard (rebuttal). Yet, more procedural due process protections are warranted in the case of military members receiving adverse non-punitive counselings because the processes that are currently in place do not provide a meaningful opportunity to be "heard" and for corrective action to be taken at the service level once the member has sufficiently rebutted the adverse material.[32] The current counseling system provides the opportunity for a rebuttal to be written, but does not require rebuttals to be reviewed by judge advocates or superior commanders. Further, the policies regarding the standard of proof to give a counseling, or to remove or change it if circumstances warrant, is insufficient to guide commanding officers.

IV. Disparate Procedural Due Process Protections

One of the greatest challenges facing the sea service personnel law systems is justifying different procedural due process protections for service members within the same Department. Because the authority to ensure military discipline has been delegated to the Chief of Naval Personnel, the Commandant of the Marine Corps, and the Commandant of the Coast Guard, each sea service has shaped its adverse personnel actions process in its own image. This results in different administrative procedures for Sailors, Marines, and Coast Guardsmen in the same situation, perhaps even for members serving together.

First, consider the case of Sergeant (Sgt) Smith, a Marine who has been charged with Driving Under the Influence by a state court; Sgt Smith receives an administrative counseling in accordance with paragraph 6105 of the MARCORSEPMAN from the Commanding Officer regarding the alleged offense. Sgt Smith later challenges the case in civilian court and is acquitted by a civilian judge. Sgt Smith presents the Commanding Officer with the same evidence that was presented in court and proof of the acquittal and the Commander agrees that

[32] The Administrative Procedure Act (APA) provides basic procedures for use by federal administrative agencies in carrying out their functions. While the Act does apply to the military departments, it is not applicable in the case of adverse personnel actions, as discussed by Thomas R. Folk in his article *The Administrative Procedure Act and the Military Departments*. Folk identifies the right to counsel under 5 U.S. Code § 555 as potentially applying to the military departments. However, the right is triggered when one is "compelled" to appear before a higher authority, not when one has the right to appear such as at NJP or a counseling session. Folk also speculates that courts would apply a military exemption to the rule should service members demand the right to counsel for all administrative proceedings due to the impact such a right would have on the military services. The author searched WESTLAW for cases involving military persons asserting a right to counsel as part of an adverse personnel action under 5 U.S. Code § 555 but did not find any. The author concurs with Folk that it is unlikely such a right would be enforced with regard to adverse personnel matters that are not punitive. The author does not find that the APA requires any administrative procedures for performance counseling that is not punitive other than notice and the opportunity to be heard. Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 6 J. NAT'L ASS'N ADMIN. L. JUDGES, 109 (1986), https://bit.ly/3hfgq5k.

Sgt Smith is not guilty and that there should not be a 6105 counseling in Sgt Smith's OMPF. However, the Commander informs Sgt Smith that the counseling cannot be removed at the unit level, nor by any Commander within the Marine Corps, not even the Commandant himself. The only way that Sgt Smith can have the counseling removed is by submitting a petition to the BCNR.

Second, consider the case of Lieutenant Commander (LCDR) Lewis, an officer in the Navy who has received a Fitness Report which comments that while the LCDR served well during the COVID-19 Pandemic, there were times that LCDR Lewis was unavailable due to the LCDR's spouse's schedule as a physician. LCDR Lewis believes that the comment implies that dedication to performance of duties was lacking. LCDR Lewis reviews BUPERSINST 1610.10E, Navy Performance Evaluation System, and notes that section 13-5[33] prohibits discussing a member's spouse except when necessary to clarify other information in the report. LCDR Lewis believes the information about the spouse's occupation is not necessary to clarify performance in this case and will diminish the chance for future promotions. LCDR Lewis discusses the matter with the reporting senior, and who states that he believes the information clarifies LCDR Lewis' inability to take on certain projects that required physical presence in the office. He declines to submit an administrative change or any supplementary material. LCDR Lewis reviews chapter 17 of the BUPERSINST 1610.10E and realizes that the options are: to request mast, petition the BCNR, or file a Complaint of Wrongs. LCDR Lewis decides that Requesting Mast or filing a Complaint of Wrongs requires an allegation of abuse by the Reporting Senior, the person for whom LCDR Lewis continues to work and wants to have a collegial relationship. LCDR Lewis determines that the best option is to petition the BCNR.

Now consider this: if Sgt Smith was a Sailor, once Sgt Smith showed proof of the civilian acquittal, Sgt Smith's command would remove and destroy any reference of the trial by civilian authorities from Sgt Smith's Field Service Record in accordance with MILPERSMAN 1070-210.[34] If LCDR Lewis was a Marine, LCDR Lewis would be able to petition the PERB, a group of Marine Corps senior leaders, to have the Fitness Report amended or removed. LCDR Lewis would then have the opportunity to petition the BCNR if the PERB denied the request for relief. If Sgt Smith and LCDR Lewis were Coast Guardsmen, they would be able to petition the PRRB, a board of senior leaders within the Coast Guard, to review both the counseling and the Fitness Report.

These are just two examples of personnel actions that are handled differently within the same Department and which could be best handled by the

[33] BUPERSINST 1610.10E, *supra* note 6.
[34] MILPERSMAN 1070-210, *supra* note 7.

member's service but are not due to outdated and harmful personnel policies. This article advocates that the sea services undertake a thorough analysis of the appropriate procedural due process protections for adverse personnel actions and then align their personnel law systems to ensure that the sea service personnel law systems are designed to reach a "legal, fair, just and reasonable result."

V. Modernizing Marine Corps Personnel Policy

Before the sea services meet to discuss best practices, the Marine Corps needs to take steps to modernize its personnel policies. The administrative processes governing Marine Corps counseling have not been updated since 2000. These policies no longer reflect the service culture; despite being a service that respects a commander's discretion to counsel and discipline his or her Marines, Marine Corps policy does not provide any mechanism for commanders or military leadership at any level to correct or remove Page 11 or MARCORSEPMAN paragraph 6105 counselings from a Marine's OMPF, for any reason. This is not the policy in the Navy, as demonstrated by the example of Sgt Smith. MILPERSMAN 1070-210[35] gives specific instructions regarding how to correct errors within a service record before the erroneous paperwork is filed, after it is filed, and even if the error is discovered by a subsequent command. This same section also explains the process for removing or correcting specific documents such as references to a civilian trial that ended in an acquittal or erroneous information on the DD 214, Certificate of Release or Discharge from Active Duty.

The policy prohibiting changes to documents within a Marine's OMPF is found in section 1001(4) of the IRAM, which states "Marines may petition the Board for Correction of Naval Records (BCNR) to remove documents on file in the OMPF which they consider adverse, unjust, inaccurate, or not in compliance with Chapter 5, or the policies and procedures contained in other Marine Corps directives."[36] The MARCORSEPMAN states in paragraph 6105(3)(e)[37] "These entries,[38] once properly made, may not be removed by subsequent commanding officers based upon the passage of time or subsequent good performance." Actually, Commanders within the Marine Corps could not remove these documents for any reason, because there is no process for removal short of petitioning the BCNR. The inability of the service to correct or remove a Page 11 or paragraph 6105 counseling deprives commanders of discretion and burdens the

[35] *Id.*
[36] IRAM, *supra* note 11.
[37] MARCORSEPMAN, *supra* note 12, at para 6105.3.e.
[38] Referring to counselings given in accordance with paragraphs 6105(e)(1) and 6105(e)(2) of the MARCORSEPMAN. *Id.*

BCNR with addressing petitions to remove counselings that violate Marine Corps policies and therefore present no genuine issue in dispute for the BCNR to address.

The language of the IRAM should be changed to read as follows: "Marines whose records contain documents that are contrary to the policies and procedures contained in Marine Corps Orders and Directives may request removal or amendment of these documents in accordance with the provisions of this Manual. Marines who receive an administrative counseling in accordance with paragraph 6105 of the Marine Corps Separation and Retirement Manual that they believe is erroneous or unjust may rebut the counseling in accordance with the provisions of this Manual. Marines who are not granted relief by the Marine Corps may petition the BCNR to remove documents on file in their OMPF which they consider adverse, unjust, inaccurate, or not in compliance with the policies and procedures contained in this and other Marine Corps orders and directives." This change will allow the service to correct administrative counselings that are in violation of Marine Corps policies at the service level. Further, the proposed change will give Marines the opportunity to request legal review of a paragraph 6105 counseling through the rebuttal process, which will be discussed below.

When a document in a Marine's record violates Marine Corps policies, it does not present a genuine issue for resolution at the BCNR and it should be handled automatically by the service. A Marine should be able to obtain assistance with such matters from the Director of the Marine's Personnel Administration Center. The Director should forward creditable requests to Manpower Management Records and Performance (MMRP) with an official naval letter requesting that the record be removed or amended. Questions regarding removal or amendment of documents that violate Marine Corps policies and procedures should be directed to Judge Advocate Personnel Law. Instructions for requesting removal of material that violates Marine Corps policies should be incorporated into the next revision of the IRAM and MARCORSEPMAN.

A few examples of counselings that violate Marine Corps policies and therefore should be removed upon the request of a Director of a Personnel Law Center include: when the counseling is not given by a "Commanding Officer" as defined by the MARCORSEPMAN; when a Marine is counseled regarding a pending administrative separation hearing or competency review board and the Marine is either retained or not reduced by the board; when the counseling lacks a required component such as the signature of the Marine, the signature of the Commanding Officer, or indication that the Marine was given the opportunity to write a rebuttal; and when there are duplicative counselings.

Turning first to the definition of a Commanding Officer, the MARCORSEPMAN paragraph 1002 defines a Commanding Officer or Commander as:

> Commander/Commanding Officer. Interchangeable terms for a board-selected or duly appointed commissioned officer or warrant officer who, by virtue of rank and assignment and per reference (ao) United States Navy Regulations 1990 W/CH 1, exercises special court-martial convening authority and primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."[39]

Despite the fact that the current version of the MARCORSEPMAN was updated to clearly require that a Commanding Officer with Special Court-Martial Convening Authority sign a paragraph 6105 counseling, the BCNR confirmed that it continues to receive petitions regarding counselings signed by Commanding Officers who do not have this authority. Such counselings should be removed at the service level; they violate service policy and therefore do not present any genuine issue for resolution by the BCNR.

With regard to Marines who are retained or not reduced following an administrative hearing, the IRAM specifically states in section 4006.x(2)(a), "Do not make entries on page 11 which concern administrative discharge or competency review proceedings if they do not, upon final review, result in discharge or reduction."[40] In most cases, Marines have been counseled before these hearings and are required to petition the BCNR after they prevail at the hearing to have this paperwork removed. Again, these counselings violate service policy and there should be a simpler, nearly automatic, process to remove them.

Counselings that lack required components such as the signature of the Marine or in the case of a paragraph 6105 counseling the signature of the Commanding Officer and the opportunity to rebut the counseling do not have sufficient indicia of reliability that the Marine was actually advised of his or her deficiency and informed of the consequences of the counseling. Counselings that are not in the format required by the IRAM or MARCORSEPMAN should be rejected by the Marine's Personnel Administration Center. However, if they are accepted into a Marine's OMPF, they should be removable at the service level; these counselings do not need to be addressed by the BCNR.

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[39] MARCORSEPMAN, *supra* note 12, at para 1002.
[40] IRAM, *supra* note 11.

Finally, duplicative counselings should not be placed in a Marine's OMPF. For example, when a counseling indicating that a Marine is not recommended for promotion for the quarter consisting of the three month period of April to June is placed in a Marine's OMPF in accordance with Marine Corps Administrative Message (MARADMIN) 150/16,[41] if the Marine's command then places an additional counseling in the Marine's record stating that the Marine is not recommended for promotion in June, that Page 11 counseling is duplicative and should be removed at the service level. These and other types of duplicative counselings confuse promotion boards and unfairly exaggerate the Marine's conduct. They are inappropriate and MMRP should be empowered to remove them.

VI. Establishing New Personnel Law Protections for Service Members

The sea services should create a personnel law working group to discuss their current policies and compare the various policy documents that govern these administrative processes. Input from other services, particularly the Air Force, which has already established a burden of proof for adverse personnel actions, would also be valuable. The working group should consider the following issues: establishing a burden of proof for administrative counselings and a method for rebutting these counselings that triggers judge advocate review. Additionally, the Coast Guard's initiative to codify appropriate counseling topics and language in an online library should be adopted by the other sea services. The working group should recommend specific changes to personnel law policies that are designed to minimize petitions to the service Boards of Correction, provide guidance for Commanding Officers, eliminate unnecessary paperwork, and protect service members' rights.

A. Burden of Proof

First, the sea services need to adopt a "burden of proof" for taking adverse administrative action. This was advocated by Captain Bojan in his law review article as a critical step for protecting service member's due process rights.[42] The MARCORSEPMAN, IRAM, MILPERSMAN, and COMDTINST 1000.14D all fail to establish an evidentiary standard for adverse administrative personnel actions. However, there is a Congressionally mandated evidence standard for federal employees facing adverse administrative personnel actions. In the federal civilian employment system, there are two routes for disciplining an employee:

[41] Marine Corps Administrative Message, 150/16, 151216Z Mar. 16, Quarterly Page 11 Counseling for Not Recommended for Promotion to Corporal and Sergeant.
[42] Bojan, *supra* note 5 (advocating for a preponderance of the evidence standard).

Title 5 of the Code of Federal Regulations (5 C.F.R.) § 432 and 5 C.F.R. § 752. Section 432 covers reduction in grade or removal due to unacceptable performance[43] while section 752 addresses suspending an employee "for such cause as will promote the efficiency of the service."

Section 432 requires that an employee be counseled and then given a reasonable opportunity to improve their performance before the process of reduction in grade or removal can begin. This is similar to the Page 7, Page 11, and Page 13 counselings provided to service members. Action taken under 5 C.F.R. § 432 requires "substantial evidence," meaning a reasonable person might find the evidence supports the agency's findings regarding the poor performance, even though other reasonable persons might disagree. Courts have established that substantial evidence requires "more than a mere scintilla" but less than a preponderance.[44] It must be sufficient evidence that a reasonable mind might find the evidence adequate to support the conclusion.[45]

The Air Force has established an evidentiary standard for adverse personnel actions: a preponderance of the evidence. Air Force Instruction 36-2907 states: "The Standard of Proof for adverse administrative actions is the 'preponderance of the evidence.'"[46] The instruction defines a preponderance of the evidence as "when it is more likely than not that events occurred as alleged." Commanders are encouraged to consider whether the evidence supports the administrative action and reminded that if proof is lacking the adverse action may be deemed legally insufficient.[47] The Air Force's system is notably different from that of the sea services in that senior members of the Airman's chain of command may counsel the Airman, not solely the Commanding Officer. Airmen have three days after they receive a counseling to respond before the issuing authority finalizes the counseling. The written counseling and the Airman's response may then be forwarded to the Airman's Commander for the Commander's information, action, or approval to file the counseling in the Airman's permanent record. A counseling is not necessarily filed in a member's OMPF, hence the importance of providing clear guidance to commanders regarding when such a filing is appropriate.

Due to the similarities between the actions taken under 5 C.F.R. § 432 and counselings provided to military members, presumably the burden of proof for

[43] Unacceptable performance is defined in 5 CFR § 432.103 (2020) as performance that fails to meet established performance standards in one or more critical elements of an employee's position.
[44] N.L.R.B. v. International Broth. of Elec. Workers, Local 48, AFL-CIO, 345 F.3d 1049 (9th Cir. 2003).
[45] E. Blythe Stason, *'Substantial Evidence' in Administrative Law*, 89 U. PA. L. REV. 1026 (1941).
[46] U.S. DEP'T OF AIR FORCE, INSTR. 36-2907, ADVERSE ADMINISTRATIVE ACTIONS §2.2 (2020).
[47] *Id.*

counseling a service member is at least "substantial evidence." However, the sea services could follow the lead of the Air Force and establish "preponderance of the evidence" as the standard. Having an established evidentiary standard will help Commanding Officers to better understand when counseling is appropriate, will clarify the due process rights of service members, and will provide guidance to the BCNR and BCMR regarding the standard to be used when reviewing such counselings.

B. Judge Advocate Review

Further, all service members should have a method to challenge an adverse counseling that will trigger review by a judge advocate. This will change the hollow opportunity to be "heard" that currently exists in the sea services into a significant due process protection. Airmen may already petition a leader in their chain of command who is equal in rank or senior to the issuing authority to rescind a counseling based on new evidence, a violation of the Airman's due process rights, or a request for a less severe personnel action. A counseling can be rescinded even if it is already filed in an Airman's Unfavorable Information File (UIF).[48] Further, the Air Force has a process in place to remove UIF information in the case of a civilian acquittal or when a Commanding Officer, in consultation with a Judge Advocate, determines by a preponderance of the evidence that the underlying misconduct did not occur.[49]

Unlike the Air Force, which allows a Commanding Officer to remove UIF information after consultation with a Judge Advocate if the preponderance of the evidence does not establish that the misconduct occurred, the sea services do not have any provisions for Judge Advocate review of adverse personnel actions. Each of the services should incorporate a provision that will trigger legal review into their counseling "rebuttal" process. If the service member alleges that there was an error or injustice, the same standard used by the BCNR when petitions are reviewed, the counseling and rebuttal should be handled in the same manner that an appeal of NJP is addressed. Namely, the counseling and the rebuttal should be forwarded to a "superior authority," for review by both the authority and a Judge Advocate. Just as in an NJP appeal, "[w]hen the case is referred, the judge advocate or lawyer is not limited to an examination of any written matter comprising the record of proceedings and may make any inquiries and examine any additional matter deemed necessary."[50] If the "superior authority" determines

[48] The UIF is reviewed prior to performance evaluations, promotions, and reenlistments and can also be accessed by Commanding Officers at their discretion.
[49] U.S. DEP'T OF AIR FORCE, *supra* note 46 at § 3.4.
[50] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V § 7 (2019).

that a counseling is erroneous or unjust, he or she may allow for "additional proceedings," in this case, a second counseling.[51]

An example of how this could be established in policy follows. Marines are currently generally given five days to submit a written rebuttal for inclusion in their OMPF. Paragraph 6105(f) of the MARCORSEPMAN[52] should be adjusted to include the possibility of Judge Advocate review:

> If the individual Marine annotates their desire "not to" make a statement, the entry is appropriately annotated as such and no further administrative action is required. When the individual Marine desires to make a statement, the following guidance applies:
>
> (1) Complete the statement using white paper, preferably typewritten or printed, and ensure the statement is dated and signed.
>
> (2) The Marine's statement must conform to Article 1122, reference (ao) United States Navy Regulations 1990 W/CH 1, regarding temperate language, limited to pertinent facts concerning the deficiencies identified in the page 11 entry, and shall not question or impugn the motives of another person . . .
>
> (3) If the Marine alleges in the statement that the counseling is erroneous or unjust, the counseling and the rebuttal shall be forwarded to the same "superior authority" that reviews appeals of non-judicial punishment handled by the Marine's Commanding Officer. The superior authority and a judge advocate will review the counseling and may examine any appropriate matters and make any inquiries that they deem necessary. The appropriate authority may destroy or amend the counseling or may order that a subsequent counseling be given. Upon completion of action by the superior authority, the service member will be promptly notified of the result.

By inserting "superior authority" and judge advocate review for service members alleging an error or injustice, the services are requiring their members to raise concerns at the time of the counseling, when they can be best addressed.

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[51] *Id.*
[52] MARCORSEPMAN, *supra* note 12.

Further, this gives the services a chance to engage in "additional proceedings" if needed to correct an error. Introducing a mechanism to trigger Judge Advocate and senior commander review also makes the opportunity to be "heard" meaningful, as it allows review by an impartial military leader and an attorney. Finally, because the BCNR and BCMR require petitioners to "exhaust administrative remedies" prior to petitioning,[53] service members who do not write a rebuttal but only later allege an error or injustice could have their petitions for relief denied at the BCNR and BCMR based on a failure to address the alleged issue at the service level. This would provide the BCNR and BCMR with the option to quickly address petitions that lack merit.

C. Review Boards

The Navy should establish a Performance Evaluation Review Board (PERB) and the Navy and Marine Corps should both consider expanding the jurisdiction of their new and existing, respectively, review boards to mirror the Coast Guard's PRRB. In our second example, LCDR Lewis, the Naval Officer who wanted to have a Fitness Report corrected so that it would no longer reference the career of the spouse, LCDR Lewis did not have an option of petitioning an unbiased board of senior leaders within his service. If LCDR Lewis were a Marine or Coast Guardsman, the PERB or PRRB,[54] respectively, would review the LCDR's petition to change or remove the Fitness Report; the petition would then be forwarded on to the BCNR or BCMR if relief was not granted.

The advantage of having a board like the PERB and PRRB is that the board members have expertise in performance evaluation and review the petitions objectively; they cannot serve as a member for any case in which they have played a role. If the Navy had a PERB, Sailors would have three chances for correction of their performance evaluations—the chain of command, the PERB, and the BCNR—and this would create greater parity between Marines, Sailors, and Coast Guardsmen. Further, if the Navy had a PERB, corrections that could be more appropriately handled at the service level would not be submitted to the BCNR, thereby reducing the BCNR case load.

Additionally, the Marine Corps should consider whether it wishes to expand the power of its existing Review Board. The Coast Guard PRRB is not limited to reviewing only Performance Evaluations, but may review "all applications for correction of error contained in Coast Guard personnel records, except . . . types of records that are already the subject of separate internal review

[53] SECNAVINST 5420.193, *supra* note 10, § 3(c); COMDTINST 1070.1, *supra* note 17.
[54] COMDTINST 1070.1, *supra* note 17, § c.

processes,"[55] such as records of courts-martial proceedings, NJP, and enlisted marks. The PRRB's duty is "to protect both the interests of the Coast Guard and the applicant by ensuring accurate and reliable personnel records."[56] The PRRB forwards unresolved matters to the BCMR. This system would allow for more corrections at the service level and reduce the number of cases flowing to the service Correction Boards.

D. Electronic Record Keeping

The Coast Guard has also taken an important step to minimize paperwork and thereby decrease the environmental impact of adverse personnel actions. Coast Guard counselings are available electronically and can be signed electronically. As modern technology such as Microsoft Teams is increasingly utilized for military leadership responsibilities, creating electronic forms will allow Commanding Officers to counsel their service members even in geographically dispersed units such as Reserve units, Recruiting Duty, and Embassy Security Guard assignments. Finally, the Personnel Law Summit should update the personnel law system so that it is modern and meets other goals of the sea services including paperwork reduction and Privacy Act concerns.

VII. Conclusion

As the services have focused on discipline and administrative correction of even minor infractions, the due process protections afforded to service members prior to receiving non-punitive adverse counselings are no longer sufficient to protect their interests. Service members have a "liberty" interest in their military careers; when their reputation, integrity, or honor are in question, service members must be given notice and the opportunity to be heard. The military personnel law systems do provide these protections; however, the opportunity to be "heard" is hollow, in that rebuttals written by service members are not elevated through the chain of command, nor do they receive legal review.

This Article recommends a summit of Personnel Law experts from each of the services. Such a meeting would generate actionable recommendations that would allow personnel law in the sea services to better protect the due process rights of service members, reduce cases flowing to the BCNR and BCMR, and empower military Commanders to take care of their service members. The Article recommends considering four areas: burden of proof, judge advocate and superior commander review of rebuttals, service level review boards, and electronic

[55] *Id.* at § c(2).
[56] *Id.* at § c(3)(b).

records. The Article also makes specific recommendations for the Marine Corps due to the service's unnecessarily burdensome correction process for administrative records. A Personnel Law Summit is an opportunity to align and modernize the sea services by adopting standardized electronic forms and establishing shared due process protections such as a burden of proof for adverse personnel actions. Now is the time to protect service members and the services by "providing procedures whereby the relative rights and duties can be fairly decided."[57] The initiatives recommended in this article will ensure that the best and most fully qualified service members are retained, promoted, and selected for assignments of increased responsibility.

[57] Powers, *supra* note 1, at 33.

MILITARY ACTIVITY IN THE EXCLUSIVE ECONOMIC ZONE: PREVENTING CREEPING SOVEREIGNTY

Lieutenant Commander Parker S. Carlisle, JAGC, USN*

Neither customary international law nor the United Convention on the Law of the Sea (UNCLOS) clearly states whether coastal State permission is required to conduct military activities in the Exclusive Economic Zone (EEZ), or whether all data collection in the EEZ constitutes maritime scientific research (MSR). This article reviews State practice, the drafting history of UNCLOS, and the text of UNCLOS. It concludes that although a minority of States hold the view that coastal State permission is required for military activities in the EEZ, and that all data collection in the EEZ constitutes MSR, the text of UNCLOS does not support this position, and customary international law is unsettled. The article then proposes that the United States and its allies continue to exercise their rights in order to prevent the minority view from becoming customary international law.

I. Introduction

Opened for signature in 1982, the United Nations Convention on the Law of the Sea (UNCLOS), boldly attempted to "settle . . . all issues relating to the law of the sea."[1] To a large degree, UNCLOS succeeded in that goal. Hailed as a

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[1] U.N. Convention on the Law of the Sea pmbl., Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], https://bit.ly/3fnltjX.

"Constitution for the Oceans,"[2] UNCLOS settled disputes among States by establishing a standard limit on territorial seas[3] and establishing a balance between freedom of navigation and the interests of coastal States.[4] Additionally, UNCLOS established the exclusive economic zone (EEZ), a regime that is neither territorial sea nor high seas. Within the EEZ, the coastal State has some sovereign rights and jurisdiction but does not possess full sovereignty.[5] Although UNCLOS was careful to spell out certain rights held by coastal States within their EEZ,[6] as well as certain rights held by other States within the coastal State's EEZ,[7] it is silent as to the assignment of residual rights. Among the residual rights, the right of a State to conduct military activities and data collection in the EEZ without the coastal State's permission is unsettled and disputed.[8] This question is of significant consequence as EEZs constitutes 38% of the world's oceans and the entirety of some strategic waters such as the Persian Gulf and South China Sea.[9] Limitations on military activities in the EEZ may reduce the ability of maritime States to operate and train their naval forces. Effective use of naval force in support of national security requires the ability to operate globally as well as dynamically with regard to the location and activities of naval force.[10]

Although the United States has not ratified UNCLOS, it recognizes the UNCLOS regimes of territorial sea, contiguous zone, EEZ, and high seas as reflecting customary international law.[11] Customary international law exists when States consistently engage in specific practices because they believe those practices to be "obligatory or permitted."[12] Customary international law may

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[2] *E.g.*, Erik Franckx, *The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage? Some Law of the Sea Considerations from Professor Louis Sohn's Former LL.M. Student*, 39 GEO. WASH. INT'L L. REV. 467, 481 (2007).
[3] *See* Tommy T.B. Koh, A Constitution for the Oceans, Remarks at the Conference at Montego Bay (Dec. 10, 1982), https://bit.ly/3wtMt6Z.
[4] *Id.*
[5] UNCLOS, *supra* note 1, art. 56.
[6] *Id.*
[7] *Id.* art. 58.
[8] *E.g.*, Raul (Pete) Pedrozo, *Military Activities in the Exclusive Economic Zone: East Asia Focus*, 90 INT'L L. STUD. 514, 524 (2014), https://bit.ly/3j5WS4g.
[9] Boleslaw Adam Boczek, *Peacetime Military Activities in the Exclusive Economic Zone of Third Countries*, 19 OCEAN DEV. & INT'L L. 445, 447 (1988).
[10] *See* Robert C. Rubel, *Straight Talk on Forward Presence*, U.S. NAVAL INST. PROC. (Mar. 2015), https://bit.ly/3xAQMyX.
[11] *See* RONALD O'ROURKE, U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS: BACKGROUND AND ISSUES FOR CONGRESS 57 (2021) [hereinafter U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS], https://bit.ly/3ykVaCz.
[12] Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 237, 242 (2016), https://bit.ly/3flz23f.

become binding on all States, unless a State specifically opts out through persistent objection.[13]

Under the UNCLOS regimes, a coastal State's territorial sea extends up to 12 nautical miles from its baseline.[14] A coastal State exercises sovereignty over its territorial seas and the resources and activities within those seas.[15] UNCLOS limits other States to innocent passage within the coastal State's territorial sea. UNCLOS limits military activities during innocent passage by restricting "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State."[16] UNCLOS also limits data collection during innocent passage by restricting "the carrying out of research or survey activities."[17] A coastal State's contiguous zone extends up to 24 nautical miles from its baseline. Within its contiguous zone, a coastal State "exercise[s] the control necessary to [enforce] customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea."[18] A State's EEZ extends up to 200 nautical miles from its baseline. Within its EEZ, a coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" and jurisdiction "with regard to: (i) the establishment and use of artificial islands, installations, and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment."[19] UNCLOS grants other States specific rights and duties when operating within the coastal State's EEZ, to include the right of "navigation and overflight . . . and other internationally lawful uses of the sea related to these freedoms."[20] All waters beyond the EEZ are high seas, which no State may subject to its sovereignty.[21]

States differ in their interpretation of UNCLOS as to whether a State has the right to conduct military activities in the EEZ without the coastal State's permission.[22] States also differ on their interpretations as to whether all data collection in the EEZ constitutes marine scientific research (MSR), which requires coastal State permission in the EEZ, or whether there are some forms of data

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[13] *Id.* at 286.
[14] UNCLOS, *supra* note 1, art. 3. *See generally id.* art. 5 (defining the normal baseline as the low-water line).
[15] *See* Samuel M. Makinda, *Sovereignty and International Security: Challenges for the United Nations*, 2 GLOB. GOVERNANCE 149, 150 (1996) (defining sovereignty as existing when "the government of any state has supremacy over the people, resources, and all other authorities within the territory it controls").
[16] UNCLOS, *supra* note 1, art. 19.
[17] *Id.*
[18] *Id.* art. 33.
[19] *Id.* art. 56.
[20] *Id.* art. 58.
[21] *Id.* art. 89.
[22] *See* Jing Geng, *The Legality of Foreign Military Activities in the Exclusive Economic Zone Under UNCLOS*, 28 MERKOURIOS UTRECHT J. INT'L & EUR. L. 22, 25-26 (2012), https://bit.ly/2TN2MP4.

collection that are military activities.[23] Due to the ambiguity of UNCLOS, both sides to this dispute have attempted to lay some claim to a textual argument supporting their positions.[24] However, an analysis of the text taken in context of the history that preceded the drafting of UNCLOS, along with the positions of the parties during the convention, supports the interpretation that UNCLOS allows for military activities within a coastal State's EEZ without the coastal State's permission. The text of UNCLOS also supports the interpretation that not all forms of data collection constitute MSR.

Because States differ in their interpretation of UNCLOS, and some States are not party to UNCLOS, it is helpful to look at customary international law. Customary international law can help interpret ambiguous treaty terms[25] and may be binding on all States, even non-parties to UNCLOS.[26] Almost 40 years of the existence of the EEZ regime has produced varied positions enshrined in domestic law, declarations and statements, and State practice.[27] Due to the varied State practices, there is no clear consensus in customary international law as to whether coastal State permission is required for military activities. There is also no clear consensus as to whether all data collection in the EEZ constitutes MSR.

Part II describes the history leading up to the drafting and adoption of UNCLOS, including State practices prior to the adoption of UNCLOS, and the various positions of States during the convention sessions. As defined for the purpose of the present paper, "maritime States" refers to States with a navy that regularly operates outside of that State's territorial sea and EEZ. "Coastal state" refers to the State exercising control over a given territorial sea or EEZ. Part III analyzes the UNCLOS text, exploring the textual arguments supporting various positions on obtaining prior permission before engaging in military activities in the EEZ, and on data collection within the EEZ. Part IV describes the current status of UNCLOS consistent with customary international law, and surveys State practice on military activities and data collection within the EEZ. Finally, part V concludes that while the regime of the EEZ has crystalized into customary international law, the legal status of requiring coastal State permission for military activities or data collection within the EEZ has not yet crystalized. However, States taking either of these positions may try to use customary international law to make this position binding. Therefore, the United States, and allies should continue to maintain a robust freedom of navigation program. This program will

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[23] *See* Zhang Haiwen, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, 9 CHINESE J. INT'L L. 31, 35 (2010).
[24] *See* Boleslaw, *supra* note 9, at 450–52.
[25] *See* Crootof, *supra* note 12, at 246.
[26] *Id.* at 242 n.19.
[27] *See* U.S. DEP'T OF DEF. REPRESENTATIVE FOR OCEAN POL'Y AFF., MARITIME CLAIMS REFERENCE MANUAL, https://bit.ly/36tQvBV (compiling the maritime claims of coastal states around the world).

prevent the position that coastal State permission is required for military activities and all data collection in the EEZ from becoming customary international law. If this position does become customary international law, this program will allow the United States and allies to maintain a status as persistent objectors.

II. Creation and Development of the EEZ

A. History of State Practice Prior to UNCLOS

UNCLOS was not born in a vacuum. It was the culmination of a series of actions by States and reactions by the United Nations. In 1945, the United States "opened the floodgates for claims of State sovereignty over the high seas"[28] by declaring jurisdiction and control over "natural resources . . . beneath the high seas but contiguous to the coasts of the United States" and by regulating certain areas of fishing activities in "areas of the high seas contiguous to the coasts of the United States."[29] From 1947 to 1951, five Central and South American States, and 10 Arab States claimed varying degrees of control over natural resources in waters adjacent to their territorial seas. These claims extended up to 200 nautical miles from their coasts.[30] In 1952, Chile, Ecuador, and Peru signed the Santiago Declaration, becoming the first States to claim exclusive sovereignty over seas 200 nautical miles from their coast.[31] Although the signatories to the Santiago Declaration claimed "exclusive sovereignty and jurisdiction over the sea," they based their claim on a need to preserve economic resources rather than on security.[32] In response to these developments, the United Nations requested that the International Law Commission study the problem and issue a report and draft articles for a law of the sea convention.[33] Following this report, the United Nations convened the 1958 Geneva Conventions on the Law of the Sea. These conventions did not settle the limits over which a State could exercise sovereign rights. However, they did recognize that a State may have some sovereign interest in waters adjacent to their territorial sea and in fisheries on the high seas.[34] The United Nations convened a second convention in 1958 to address "breadth of the territorial sea and fishery limits."[35] The second convention adjourned in 1960 after

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[28] George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, 32 CAL. W. INT'L L.J. 253, 255 (2002).
[29] Proclamation No. 2667, 10 Fed. Reg. 12, 305 (Oct. 2, 1945), https://bit.ly/2VnHYhI; Proclamation No. 2668, 10 Fed. Reg. 12, 304 (Oct. 2, 1945), https://bit.ly/2VhHee2.
[30] Galdorisi & Kaufman, *supra* note 28, at 259-60.
[31] *Id.*
[32] Declaration on the Maritime Zone ¶ 3, Aug. 18, 1952, 1006 U.N.T.S. 326.
[33] G.A. Res. 1105 (XI) (Feb. 21, 1957).
[34] *See* Tullio Treves, *1958 Geneva Conventions on the Law of the Sea*, U.N. AUDIOVISUAL LIBR. OF INT'L L. 1-3 (2008), https://bit.ly/3hwQh3e.
[35] G.A. Res. 1307 (XIII) (Dec. 10, 1958).

failing to reach a consensus.[36] Following the second convention, the number of States claiming some sovereign rights in waters up to 200 nautical miles from their coasts increased significantly.[37] Each declaration was accompanied by findings rationalizing that control over the seas was needed, not for expansion or security, but to sustain economic interests and protect the environment of the State.[38] In 1972, the Asian-African Legal Consultative Committee met at Lagos, Nigeria, and for the first time proposed the concept of an EEZ. Under this concept, coastal States would have a 12 nautical miles territorial sea but exclusive jurisdiction of a 200 nautical miles zone for the purpose of controlling, regulating, and exploiting natural resources.[39] What started as a few States holding a minority position was now beginning to crystalize into customary international law recognized by a growing number of States.

B. Drafting History of UNCLOS

Recognizing that the law of the sea is so interrelated that it must be dealt with in its entirety, the United Nations convened a third convention to codify the law of the sea.[40] This convention opened in 1973 and succeed in its goal.[41] The scope of the convention was so great, that the issues to be considered were divided between three committees. The second committee considered the creation and assignment of rights within the EEZ.[42] As early as the second session of the convention, States began to align their positions on the EEZ between maritime, land-locked, and geographically disadvantaged States on the one side and most developing States on the other side.[43] Mr. Igor Kolosovsky, a representative from the Soviet Union, articulated the position of the maritime States in stating that "granting of sovereign rights in the economic zone to the coastal State . . . must in

[36] UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, OCEANS: THE SOURCE OF LIFE: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 20TH ANNIVERSARY (1982–2002) 9 (2002), https://bit.ly/3xzLeol [hereinafter OCEANS].

[37] Tommy T.B. Koh, *The Exclusive Economic Zone*, 30 MALAYA L. REV. 1, 6–7 (1988) (discussing the Montevideo Declaration on the Law of the Sea, signed by nine South and Central American States in 1970, the Declaration of the Latin American States on the Law of the Sea, signed by twenty-two South and Central American and Caribbean States in 1970, and the Declaration of Santo Domingo, signed by ten South and Central American, and Caribbean States in 1972, all of which declared the right of States to exercise some sovereign control over waters up to 200 nautical miles from their coast).

[38] Galdorisi & Kaufman, *supra* note 28, at 262. *See* UNITED NATIONS, THE LAW OF THE SEA: EXCLUSIVE ECONOMIC ZONE: LEGISLATIVE HISTORY OF ARTICLES 56, 58, AND 59 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 88–89 (1992) [hereinafter LEGISLATIVE HISTORY] (citing the language of the declarations).

[39] Koh, *supra* note 37, at 7–8.

[40] G.A. Res. 2750 (XXV) (Dec. 17, 1970).

[41] OCEANS, *supra* note 36, at 9.

[42] Galdorisi & Kaufman, *supra* note 28, at 269.

[43] JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA: EXPEDITIONARY OPERATIONS IN WORLD POLITICS 237–38 (2011).

no way interfere with the other lawful activities of States on the high seas . . . the rights of the coastal State in the economic zone must be exercised without prejudice to the rights of any other State."[44] Land-locked and geographically disadvantaged States aligned their interests with that of maritime States in seeking to maximize their rights within the EEZ of other States.[45] During the third session, a group of juridical experts, known as the Evensen Group (named after Mr. Jens Evensen from Norway) proposed language granting all States in the EEZ "freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication."[46] During the fifth and sixth sessions, a group of land-locked and geographically disadvantaged States proposed removing the words "related to navigation and communication" but otherwise concurred with the Evensen Group's proposal. [47] In response, representatives from Mexico and Norway created the informal Castañeda-Vindenes group to seek a compromise between the developing States on the one hand, and maritime, land-locked, and geographically disadvantaged States on the other hand. The goal of the compromise was to "avoid assimilating the [EEZ] in any way to the territorial sea or the high seas."[48] Ultimately, the representatives reached a compromise by changing the language to read "freedoms . . . of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines."[49] The article neither directly permitted, nor directly prohibited military activities in the EEZ without the permission of the coastal State. While the second committee discussed economic interests in early sessions, it was not until the seventh session that they discussed military activities in the EEZ. During this session, a representative from Brazil proposed text to make it clear that military activities within the EEZ "should not be carried out . . . without the consent of the Coastal State."[50] Prior to this proposal, the United States responded to a proposal by Ecuador that the "peaceful purposes" article of UNCLOS required demilitarization of the high seas, by stating that the purpose of

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[44] Third United Nations Conference on the Law of the Sea, *Summary Records of the Second Comm. 28th mtg.*, ¶ 51–54, U.N. Doc. A/CONF.62/C.2/SR.28 (Dec. 10, 1982).
[45] KRASKA, *supra* note 43, at 237–38; *e.g.*, Third United Nations Conference on the Law of the Sea, 11th Sess., 186th plen. mtg., ¶ 94, U.N. Doc. A/CONF.62/SR.186 (Dec. 10 1982) (citing the representative from Morocco in recognizing that the "resources and use of the neighbouring seas or oceans have become a vital factor in the development strategy" of some States); Third United Nations Conference on the Law of the Sea, 11th Sess., 188th plen. mtg., ¶ 171, U.N. Doc. A/CONF.62/SR.188 (Dec. 10 1982) [hereinafter 188th Plenary] (citing the representative from Paraguay's expression that land-locked States desire to exercise the fullness of their rights in the exclusive economic zone).
[46] LEGISLATIVE HISTORY, *supra* note 38, at 89.
[47] KRASKA, *supra* note 43, at 238.
[48] LEGISLATIVE HISTORY, *supra* note 38, at 94.
[49] UNCLOS, *supra* note 1, art. 58.
[50] LEGISLATIVE HISTORY, *supra* note 38, at 94.

the Convention was to negotiate the law of the sea, and not to serve as an arms control agreement.[51] The committee did not accept Brazil's proposal. The final version of the articles reached a compromise by listing freedom of navigation as just one of many in a non-exhaustive list of rights within the EEZ. The drafters left all residual rights, including the right to conduct military activities without prior permission of the coastal State in the EEZ, unassigned.

III. Textual Interpretation of UNCLOS

A. Assignment of Rights and Responsibilities Within the EEZ

UNCLOS does not grant either the coastal State, or other States a presumption of rights within the EEZ. Rather it assigns specific rights, leaving assignment of residual rights an open question. Article 58 grants all States within the EEZ "the freedoms referred to in article 87 of navigation and overflight . . . and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of this Convention."[52]

States that claim the right to conduct military activities within the EEZ without coastal State permission rely on the freedom of navigation and other internationally lawful uses of the sea related to these freedoms.[53] Article 58 specifically links the freedom of navigation in the EEZ to the freedom of navigation enjoyed on the high seas through incorporation of article 87. Furthermore, the use of the phrase "other internationally lawful uses of the sea related to these freedoms" incorporated then existing customary international law into these rights.[54] At the time UNCLOS was drafted, high seas freedom of navigation included the right to conduct military activities.[55] Article 58 applies "[a]rticles 88 to 115 and other pertinent rules of international law . . . to the [EEZ] in so far as they are not incompatible with this Part."[56] Included in these articles

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[51] Third United Nations Conference on the Law of the Sea, 67th plen. mtg., ¶ 80–81, U.N. Doc. A/CONF.62/SR.67 (Dec. 10 1982) [hereinafter 67th Plenary] (statement of Mr. Learson, representative from the United States) ("Any specific limitation on military activities would require the negotiation of a detailed arms control agreement. The Conference was not charged with such a purpose . . . . Any attempt to turn the Conference's attention to such a complex task could quickly bring to an end current efforts to negotiate a law of the sea convention.").

[52] UNCLOS, *supra* note 1, art. 58.

[53] U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS, *supra* note 11, at 88 (quoting Robert Scher, then Deputy Assistant Secretary of Defense, Asian and Pacific Security Affairs, in citing to "[c]ustomary international law, as reflected in articles 58 and 87 [of UNCLOS]" as allowing military activities within the EEZ without the prior permission of the coastal State).

[54] Galdorisi & Kaufman, *supra* note 28, at 271–72.

[55] *Id.*

[56] UNCLOS, *supra* note 1, art. 58.

are several rights that are only applicable to military vessels, some of which imply the use of force by military vessels.[57] These rights include the immunity of warships,[58] the right to seize a pirate ship or aircraft,[59] the right of visit,[60] and the right of hot pursuit.[61] These articles also include the limitation that "[n]o State may . . . subject any part of the high seas to its sovereignty."[62] Article 58 incorporates this limitation into the EEZ.[63] As a result, the coastal State may not subject the EEZ to its sovereignty outside of the sovereign rights and jurisdictions granted to the coastal State in article 56. Article 56 grants the coastal States specific rights in the EEZ but does not grant the right to impose any limits or requirements on military activities.[64]

States claiming that coastal State permission is required for military activities within the EEZ also cite to UNCLOS in support of their position. A State may cite to article 88, which requires that high seas, and by incorporation, the EEZ, be reserved for peaceful purposes.[65] Some States and academics claim that military activities in the EEZ without coastal State permission is a violation of the peaceful purposes requirement, as it threatens the security and sovereignty of the coastal State.[66] However, while "peaceful purposes" is not defined in the text, most commentators maintain that the determination of "whether an activity is 'peaceful' is made under Article 2(4) of the UN Charter."[67] This interpretation is internally consistent within the text of UNCLOS. Article 301, titled "peaceful uses of the sea," takes its language and its limitations on State actions directly from Article 2(4) of the UN Charter.[68] Military activities off of the coast of a State are

[57] *See, e.g.*, Geng, *supra* note 22, at 25.
[58] UNCLOS, *supra* note 1, art. 95.
[59] *Id.* art. 107.
[60] *Id.* art. 110.
[61] *Id.* art. 111.
[62] *Id.* art. 89.
[63] Koh, *supra* note 37, at 37.
[64] UNCLOS, *supra* note 1, art. 56.
[65] *See* Third United Nations Conference on the Law of the Sea, 187th plen. mtg. ¶ 28, U.N. Doc. A/CONF.62/SR.187 (Dec. 10 1982) (citing the representative from Brazil's interpretation of the conventions as prohibiting military activity in the EEZ without coastal State permission); Victor Alencar Mayer Feitosa Ventura, *Revisiting the Critique Against Territorialism in the Law of the Sea: Brazilian State Practice in Light of the Concepts of Creeping Jurisdiction and Spoliative Jurisdiction*, 15 BRAZ. J. INT'L L. 161, 172 (2018) (describing Brazil's interpretation as being based on the "peaceful purposes" provision of the convention).
[66] *See* Haiwen, *supra* note *23*, at 37; Peng Guangqian, *Chapter One: China's Maritime Rights and Interests, in* MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS 15, 20 (Peter Dutton ed., 2010).
[67] Pedrozo, *supra* note 8, at 534.
[68] UNCLOS, *supra* note 1, art. 301; U.N. Charter art. 2, ¶ 4.

not inherently a violation of the UN Charter,[69] and therefore they are not inherently a violation of the "peaceful purpose" requirement.

Accepting the position that military activities are inherently "non-peaceful" could lead to the interpretation that States may not conduct military activities on the high seas as well as the EEZ.[70] Because no State can exercise sovereignty over the high seas, no State would be able to grant permission to conduct military activities on the high seas. This interpretation of UNCLOS would limit States to conducting military activities only within their own territorial sea and EEZs, or within the territorial sea and EEZ of other States with their permission. This would effectively turn UNCLOS into an arms control agreement.[71] Such a reading is inconsistent with the purpose of UNCLOS and State practice. As previously discussed, several articles of UNCLOS apply only to warships, anticipating the presence and use of warships on the high seas and within other State's EEZs. Additionally UNCLOS limits ships traveling in another State's territorial waters to innocent passage and prohibits "any exercise or practice with weapons," and "the launching, landing or taking on board of any military device."[72] By limiting these military activities only in certain circumstances, a plain reading infers that these activities are otherwise permissible in other areas including the EEZ.[73]

In addition to relying on the "peaceful purposes" provision, a State may argue that the EEZ is a new regime and therefore the customary international law permitting military activities on the high seas cannot be incorporated into the freedom of navigation assigned to States in the EEZ.[74] It is true that UNCLOS created the new regime of the EEZ, intended neither to be territorial sea, nor the high seas. However, the history of the EEZ's development, along with the weight of the UNCLOS text, supports the position that military activities in the EEZ is not only permissible, but expected. The history of State practices and statements leading to the development of the EEZ clearly tied the regime to the preservation

[69] Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgment, 1986 I.C.J. 14, ¶ 227 (June 27).
[70] Pedrozo, *supra* note 8, at 534.
[71] 67th Plenary, *supra* note 51, ¶ 81.
[72] UNCLOS, *supra* note 1, art. 19
[73] *See* Pedrozo, *supra* note 8, at 519.
[74] Haiwen, *supra* note 23, at 37. *See also* 188th Plenary, *supra* note 45, ¶ 126 (Dec. 10 1982) (citing the representative from Cabo Verde's interpretation of the conventions as creating a *sui generis* zone in the EEZ, wherein regulation of activities "related to the sovereign rights and the jurisdiction of the coastal State in its exclusive economic zone falls within the competence of that State"); Third United Nations Conference on the Law of the Sea, 192nd plen. mtg. ¶ 56, U.N. Doc. A/CONF.62/SR.192 (Dec. 10 1982) (citing the representative from Uruguay's interpretation of the conventions as creating a *sui generis* zone in the EEZ wherein the coastal State may exclude "non-peaceful uses by third States").

of sovereign rights over natural resources, as opposed to security of the coastal State. The drafters of UNCLOS included limitations on military activities in territorial waters, international straits, and archipelagic waters.[75] In contrast, the drafters chose not to create any such limitations in the EEZ, electing instead to incorporate high seas freedom of navigation.[76] UNCLOS created a new regime with a purpose and intent that did not preclude military activities within the EEZ by third party States.

UNCLOS anticipates the conflict between sovereign rights and jurisdiction of the coastal State and the rights of other States. Article 59 provides that

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the [EEZ], and a conflict arises . . . the conflict should be resolved on the basis of equity and in the light of the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.[77]

This provision provides some textual basis for resolving the conflict and assigning residual rights. States with a conflict within the EEZ should first turn to article 59 to resolve their conflict. However, States holding either position on prior permission for military activities in the EEZ can cite to important interests of the individual State, as well as to the international community. A State's interest in security is important, as is the right of the international community to exploit the seas as "the common heritage of mankind."[78] Indeed, both of these interests are specifically cited in the UNCLOS preamble as being a basis for the creation of UNCLOS.[79] While both interests are important, the limitations within the territorial sea protects the equities of the coastal State. The entirety of the UNCLOS text, along with the history of its drafting, supports the position that the right to conduct military activities within another State's EEZ is the right of all States.

[75] UNCLOS, *supra* note 1, arts. 39, 53, 56.
[76] Pedrozo, *supra* note 8, at 519.
[77] UNCLOS, *supra* note 1, art. 50.
[78] *Id.* pmbl.
[79] *Id.*

B. Maritime Scientific Research Within the EEZ

In addition to disputes about the permissibility of military activities in the EEZ of another State, there are also differing views as to what constitutes maritime scientific research (MSR). MSR requires coastal State permission within the EEZ.[80] This is relevant, as navies often conduct data collection in support of their military activities. A broad definition of what constitutes MSR would preclude this data collection within the EEZ without coastal State permission. Some academics take the position that UNCLOS does not define what activities constitute MSR, and that modern ocean research technology and equipment is of such a nature that it is difficult to distinguish between different types of data collection. As a result, no data collection may be undertaken without coastal State permission.[81] Others take the position, practiced by the United States, that MSR is distinct from hydrographic surveys and military data collection, and as such, is not subject to regulation by the coastal State.[82] While UNCLOS may not define what qualifies as MSR, it does distinguish in the text between MSR and other types of data collecting activities. UNCLOS prohibits ships engaged in innocent passage, straits transit, and transiting in archipelagic waters from conducting "research or survey activities."[83] The text clearly distinguishes survey activity, which is a form of data collection, from MSR.[84] There may be room to disagree on how to distinguish between MSR and other types of data collection conducted by States. However, it is contrary to a plain reading of UNCLOS to state that all forms of data collection are MSR, and thus require costal State permission within the EEZ.

IV. Customary International Law

A. Importance of State Practice

Customary international law, as developed by State practice, may become the means for interpreting the ambiguities present in UNCLOS. These ambiguities are not an oversight. They are "the result of compromise" between various parties in the drafting of UNCLOS.[85] For parties to UNCLOS, subsequent State practice

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[80] *Id.* art. 56.
[81] Haiwen, *supra* note 23, at 36.
[82] Raul (Pete) Pedrozo, *Chapter Two: Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: U.S. Views*, *in* MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS 23, 27 (Peter Dutton ed., 2010).
[83] UNCLOS, *supra* note 1, arts. 19, 40, 44.
[84] Raul (Pete) Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, 9 CHINESE J. INT'L L. 9, 22–23 (2010).
[85] Tullio Treves, *Coastal States' Rights in the Maritime Areas under UNCLOS*, 12 BRAZ. J. INT'L L. 40, 43 (2015).

may help interpret ambiguities in the treaty and can lead to binding interpretations of those ambiguities.[86] For non-parties to UNCLOS, State practice may create customary international law, which may become binding on all States, unless they maintain status as persistent objectors.[87] The risk of State practice leading to increased coastal State sovereignty in the EEZ is not an abstract concept. This would be the continuation of a historic trend of developing States expanding their jurisdiction and sovereignty over time.[88] Some proponents of requiring coastal State permission for military activities and limiting data collection within the EEZ compare their position to that of States prior to UNCLOS who helped create the EEZ through State practice.[89] State practice, left unchallenged, may lead to developing States accomplishing through customary international law what they could not accomplish through negotiation.

B. State Practice of States Requiring Prior Permission

Currently, twenty-four States have declared some form of limitation on military activities or data collection within their EEZ.[90] States exercise their perceived right to limit activities in their EEZ in various ways. Some States made a declaration upon ratification of UNCLOS to the effect that they interpret UNCLOS as requiring coastal State permission for military activities within the EEZ.[91] Some States require prior permission for military activities or data collection within their EEZ through their constitution, statute, or proclamation.[92] Some States have taken military action, using force against other States within their EEZ.[93] Even amongst States that impose some limitation on military activities or data collection within their EEZ, State practices vary with regard to

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[86] Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331; Crootof, *supra* note 12, at 256–59 (describing historical examples of treaties being interpreted by subsequent State practice).
[87] Crootof, *supra* note 12, at 242.
[88] *See supra* Part II.
[89] *See* Haiwen, *supra* note 23, at 45 (claiming that many regimes adopted by UNCLOS were originally "the national practice of a few States, and . . . later recognized and accepted by other countries"); Ventura, *supra* note 65, at 176 (claiming that "Brazilian practice prior to the adoption of the UNCLOS were instrumental to the emergence of the 'new law of the sea'").
[90] U.S. DEP'T OF DEF. REPRESENTATIVE FOR OCEAN POL'Y AFF., *supra* note 27 (noting that states with declared limitations within their EEZ are Bangladesh, Benin, Brazil, Burma, Cabo Verde, China, Congo, Ecuador, India, Iran, Kenya, North Korea, Malaysia, Maldives, Nicaragua, Pakistan, Peru, Philippines, Somalia, Thailand, Togo, Uruguay, Venezuela, and Vietnam).
[91] U.N. TREATY COLLECTION, https://bit.ly/3r1lGOv (Bangladesh, Brazil, Cabo Verde, Ecuador, India, Malaysia, Pakistan, Thailand, and Uruguay).
[92] U.S. DEP'T OF DEF. REPRESENTATIVE FOR OCEAN POL'Y AFF., *supra* note 27 (Brazil, China, Ecuador, Iran, Kenya, North Korea, Maldives, Nicaragua, Uruguay, Venezuela, and Vietnam).
[93] Eugene Robinson, *Peru Defends Firing on U.S. C-130*, WASH. POST (Apr. 28, 1992), https://wapo.st/3e6ATsn; Ankit Panda, *Report: Indian Navy Ejected Chinese Research Ship from Indian Exclusive Economic Zone*, DIPLOMAT (Dec. 4, 2019), https://bit.ly/3k6z42g; U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS, *supra* note 11, at 49.

what they are limiting. Four States claim a territorial sea up to 200 nautical miles from their baseline.[94] While this claim of territorial sea is excessive, UNCLOS allows States to limit military activities and surveying within their territorial seas. These States' limitations on military activities and data collection within 200 nautical miles of their baseline are not the result of claiming excessive rights within the EEZ. Rather they are the result of claiming rights that are legitimate within a territorial sea, while improperly extending the boundary of their territorial sea. Vietnam only requires permission for military activities conducted within their contiguous zone.[95] Nicaragua does not require States to obtain permission prior to military activities, but only that they notify Nicaragua fifteen days in advance, and only for military activities within 25 nautical miles of their baseline.[96] North Korea prohibits military vessels from entering their "military zone" which extends up to 50 nautical miles from their territorial sea.[97] North Korea is the only State to specifically prohibit survey activity and photography within their EEZ.[98] China prohibits MSR by statute and interprets all data collection as falling within MSR.[99]

At least three States have asserted their perceived rights within the EEZ through some form of military force or show of military presence against third party States. Peru shot down a U.S. Air Force plane that was within 200 nautical miles of its baseline in 1992.[100] However, Peru claims a 200 nautical miles territorial sea. Their actions, from the perspective of the Peruvian government, may be a State practice of defending territorial seas (albeit an improperly claimed one), rather than asserting rights within their EEZ. In 2019, the Indian Navy ejected a Chinese research ship from the Indian EEZ, on the ground that "the vessel could have been used to monitor all underwater and surface vessels of the Indian Navy stationed in the region."[101] China has used force on multiple occasions to prevent the United States from conducting military activities and data collection within their EEZ. In the 21st century alone, China used force on four occasions to harass U.S. Navy Ships which were conducting survey and surveillance operations in the Chinese EEZ and has shouldered a U.S. Navy Cruiser operating in the Chinese EEZ.[102]

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[94] U.S. DEP'T OF DEF. REPRESENTATIVE FOR OCEAN POL'Y AFF., *supra* note 27 (Benin, Congo, Peru, and Somalia).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Robinson, *supra* note 93.
[101] Panda, *supra* note 93.
[102] U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS, *supra* note 11, at 41.

Finally, some States have registered their opposition to military activities and data collection within their EEZ through the use of diplomatic protests. India, Pakistan, and Brazil have sent diplomatic protests in response to other States conducting military surveys within their EEZ.[103]

There are twenty-four States exercising some form of State action to assert their claimed rights within their EEZs. These State practices help interpret UNCLOS and create customary international law. However, these States vary both in how they are asserting their rights, as well as the scope of rights they are claiming. Additionally, these States generally do not issue official policy statements explaining the rationale of their interpretations. These positions are only held by a minority of States, many of whom have taken no action to set forth their position other than declare it upon ratification of UNCLOS. As a result, this minority view cannot be said to have crystalized into customary international law.

C. State Practice of States Not Requiring Prior Permission

States taking the position that military activities and data collection within the EEZ are permissible without coastal State permission assert their rights in a variety of ways. These include declarations, diplomatic protests, an absence of diplomatic protests, and exercising their rights in opposition to the coastal States position. Assertions of their rights are important, as persistent objection against a forming customary international law may allow a state to "opt out" and not be bound by the newly formed international law.[104]

Upon ratification of UNCLOS, Italy, Germany, and the Netherlands expressly declared their interpretation of UNCLOS as permitting military activities within the EEZ without coastal State permission.[105] Belgium made a similar declaration in response to Ecuador's declaration of their right to limit military activities within their EEZ.[106]

States taking the position that prior permission is not required for military activities or data collection within the EEZ may take action through official protest of States making excessive claims of jurisdiction within their EEZ. The United

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[103] *Id.*; GEORGE J. GILBOY & ERIC HEGINBOTHAM, CHINESE AND INDIAN STRATEGIC BEHAVIOR: GROWING POWER AND ALARM 91 (2012).
[104] Crootof, *supra* note 12, at 286.
[105] U.N. TREATY COLLECTION, *supra* note 91.
[106] *Id.* (declaring that "Ecuador seems also to be claiming residual rights in the exclusive economic zone, which is inconsistent with article 59").

States has made sixteen such protests.[107] While not as direct as a diplomatic protest, a lack of diplomatic protest also sends a message with regard to how a State interprets UNCLOS, or their obligations and rights in international law. In 2014, the United States observed a Chinese intelligence gathering ship operating in the United States' EEZ during the bi-annual RIMPAC exercises.[108] Despite the military activities and intelligence gathering within the EEZ, the United States did not protest this action. Instead, the United States spoke positively of China acting within their rights in the United States' EEZ.[109] Similarly, the United States, the Soviet Union, and Russia have a long history both before and after the adoption of UNCLOS of conducting military activities within each other's EEZs without objection.[110]

Finally, State action may be taken through operational assertion of rights. The United States exercises its rights through the Freedom of Navigation (FON) Program, run by the Department of State. Under this program, the United States "exercise[s] and assert[s] its rights, freedoms, and uses of the sea on a worldwide basis."[111] Specifically, the United States exercises rights that other States are attempting to restrain through excessive maritime claims.[112] Since 1981 the United States has exercised its rights under customary international law in the EEZs of fifteen States that claim excessive jurisdiction in their EEZs.[113] FON exercises consist of operating in a manner that is consistent with international law, but inconsistent with an excessive maritime claim made by another State.[114] The FON program is a tool in the United States foreign policy to preserve the freedom of navigation in the face of threats by "unilateral acts of other [S]tates."[115] The United States does not always conduct these operations alone, but often involves allies.[116]

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[107] U.S. DEP'T OF DEF. REPRESENTATIVE FOR OCEAN POL'Y AFF., *supra* note 27 (Bangladesh, Barbados, Benin, Brazil, Burma, China, Congo, India, Iran, North Korea, Malaysia, Maldives, Pakistan, Peru, Thailand, Uruguay, Venezuela, and Vietnam).
[108] U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS, *supra* note 11, at 109–10.
[109] *Id.*
[110] William Cole, *Russian Spy Ship Lurks Off Hawaii, Monitoring RIMPAC*, HONOLULU STAR ADVERTISER (July 6, 2016), https://bit.ly/3hYiSNT; Pedrozo, *supra* note 8, at 528-29.
[111] U.S. DEP'T DEF., FREEDOM OF NAVIGATION PROGRAM 1, https://bit.ly/3AV06zx (citing to U.S. Oceans Policy).
[112] *Id.*
[113] *See* U.S. DEP'T OF DEF. REPRESENTATIVE FOR OCEAN POL'Y AFF., *supra* note 27 (Benin, Brazil, China, Congo, Ecuador, India, Iran, North Korea, Malaysia, Maldives, Nicaragua, Pakistan, Peru, Philippines, Venezuela).
[114] FREEDOM OF NAVIGATION PROGRAM, *supra* note 111, at 2.
[115] *Id.* at 1.
[116] Thomas Nilsen, *In a Controversial Move, Norway Sails Frigate Into Russian Arctic EEZ Together with UK, US Navy Ships*, ARCTICTODAY (Sep. 9, 2020), https://bit.ly/3rfEda1 (describing Norway's exercises with the United States and United Kingdom in the Russian EEZ without requesting Russian permission); Ben Werner, *Future South China Sea FONOPS Will Include Allies, Partners*, USNI NEWS (Feb. 12, 2019), https://bit.ly/3ASbufG (discussing involvement of the United Kingdom, Japan, Australia, New Zealand, Canada, and France in future FONOPS within the South China Sea).

Additionally, many other States and organizations operate freely in the EEZ and in opposition of excessive claims of jurisdiction without requesting permission.[117]

It is worth noting that China regularly conducts military activities in the EEZ of other States without their permission.[118] This activity seems to contradict China's position with regard to the permissibility of this activity. China has not attempted to resolve the seeming contradiction, but may distinguish between States that have enacted domestic law placing restrictions on military activities within the EEZ, and those that have not.[119]

D. State Practice Moving Forward

Prior permission of the coastal State for military activities is currently not required under customary international law.[120] Neither is all data collection in the EEZ considered a form of MSR under customary international law.[121] However, international law is not static. What is currently the position of minority States could become the prevailing position, and even become customary international law. As discussed above, there is precedence for a position originating with developing States, and unpopular with maritime States becoming the prevailing position and emerging as customary international law.[122] Already, States that maintain the minority position are geographically diverse, and include some States that can easily be reckoned as regional, and global powers.

The consequences of this position on military activities could be far reaching, both to United States' interests, as well as to global security. With 38% of the world's oceans covered by territorial seas and EEZs, this position would limit maritime States ability to forward deploy naval forces. Even when coastal States allow navies to operate in their waters, the prior permission requirement would reduce the ability to operate dynamically. For the United States, forward deployability and dynamic force employment in operations is part of the national

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[117] Raul Pedrozo, *Responding to Ms. Zhang's Talking Points on the EEZ*, 10 CHINESE J. INT'L L. 207, 208–09 (2011) (including Russia, Japan, Australia, South Africa, NATO, the United Kingdom, and China).

[118] OFF. SEC'Y DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2018 69 (2018), https://bit.ly/2UIsmVp (documenting China's military activities in the EEZs of Australia, Indonesia, Japan, Malaysia, the Philippines, and the United States without coastal State permission between 2014 and 2017).

[119] U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS, *supra* note 11, at 92–93.

[120] *See* Alan M. Wachman, *Chapter Eight: Playing by or Playing with the Rules of UNCLOS?*, *in* MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS 107, 108–09 (Peter Dutton ed., 2010), https://bit.ly/3AQAAvm; Galdorisi & Kaufman, *supra* note 28, at 283.

[121] *Id.*

[122] *See supra* Part II.

defense strategy against China and Russia as a strategic competitors.[123] The consequences will not only be felt by the United States and other maritime States, but by global security as a whole. Studies have shown that United States troop presence is associated with a lower likelihood of interstate war.[124] Therefore the inability of the United States and other maritime States to forward deploy navies quickly and dynamically could have a destabilizing effect on global security.

The United States FON program is a powerful tool to maintain the current state of international law. United States FON operations maintain a persistent State practice of conducting military activities and data collection in the EEZ without coastal State permission. Continuing these operations, with a variety of allies in the EEZs of every State that makes unlawful restrictions in their EEZ shows a continued State practice by a variety of States. Furthermore, even if the minority view prevails, the FON operations will maintain the United States, and allies status as persistent objectors. Even if the coastal States prevail, the newly established customary international law will likely not apply to the persistent objectors.[125]

V. Conclusion

The position taken by the United States and the majority of States, is that prior permission is not required for military activities within the EEZ of a coastal State, and that some forms of data collection within the EEZ are not MSR. This position is consistent with the text of UNCLOS. However, a minority of States take the position that coastal State permission is required for military activity within the EEZ, and that all forms of data collection within the EEZ are MSR. These States are geographically diverse, and vary from global powers, such as China, to developing States. While the position taken by minority States is not supported by the history and text of UNCLOS, there is enough ambiguity in the text to provide some support to this position. As a result, customary international law may step in to fill the gaps of the UNCLOS text, and create binding law for those States that are not party to UNCLOS. Currently, customary international law is unsettled with regard to the question of prior permission in the EEZ, and the status of data collection in the EEZ. In order to prevent the minority view from prevailing and becoming customary international law, the United States and allies should continue a FON program and exercise their rights openly in the EEZ of coastal States.

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[123] JIM MATTIS, SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE 5–6 (2018), https://bit.ly/36rXcEu.

[124] ANGELA O'MAHONY, MIRANDA PRIEBE, BRYAN FREDERICK, JENNIFER KAVANAGH, MATTHEW LANE, TREVOR JOHNSTON, THOMAS S. SZAYNA, JAKUB P. HLÁVKA, STEPHEN WATTS, & MATTHEW POVLOCK, U.S. PRESENCE AND THE INCIDENCE OF CONFLICT (2018), https://bit.ly/37cjkmy.

[125] Crootof, *supra* note 12, at 286.