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NAVAL LAW REVIEW

VOL. 70

NAVAL LAW REVIEW

2024



VOL. 70

2024

NAVAL LAW REVIEW

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MILITARY SENTENCING PARAMETERS AND CRITERIA OFFENSES: A FIRST STEP TO REDUCING “NOISE” IN COURT- MARTIAL SENTENCING

Captain Stephen C. Reyes, JAGC, USN*

I. THE PROBLEM WITH NOISE

Whenever there is judgment, there is likely noise. Noise is a term used to describe the variability between judgments within a set.¹ For example, if you were to ask a group of friends to guess how many jellybeans are in a glass jar and the answers were 500, 300, 800, 1200, 10, then the variability in those answers is noise. In that circumstance, noise is benign because estimating jellybeans is a trivial matter.² But what about in complex, non-trivial matters of judgment, like the appropriate sentence for an accused convicted at a court-martial of aggravated assault? Suppose the answers to that question were: thirty days confinement and a bad conduct discharge from the service; two years confinement and no discharge; reduction to E-1 and a letter of reprimand; and five years confinement and a dishonorable discharge. In those instances, how should one view noise?

Indeed, disparate sentences awarded to similarly situated accused seem unjust and erode the public’s trust in the criminal justice system; decreasing disparity creates consistency in sentencing that may “serve to increase deterrence, predictability, and public confidence in criminal sentences.”³ In both the civilian⁴ and military systems,⁵ the calls for sentencing reform have been based on

* Currently the Chief Trial Judge, Navy-Marine Corps Trial Judiciary and Chair of the Military Sentencing Parameters and Criteria Board. This article is adapted from a presentation delivered by the author at the Continuing Legal Education and Training Program of the Court of Appeals for the Armed Forces on 15 May 2024. The positions and opinions expressed in this article are those of the author and do not represent the views of the U.S. Government, the U.S. Department of Defense, the U.S. Navy or the Military Sentencing Parameters and Criteria Board.

¹ See Daniel Kahneman, Olivier Sibony & Cass Sunstein, *Bias Is a Big Problem. But So Is ‘Noise,’* N.Y. TIMES (May 17, 2021), <http://bit.ly/45U6iYA>.

² Notably, in non-complex tasks such as guessing the number of jellybeans in a jar or the weight of a fat ox at the state fair, the average guess from a crowd can be surprisingly accurate. See JAMES A. SUROWIECKI, *THE WISDOM OF CROWDS* xi–xii (Doubleday ed., 2005).

³ MIL. JUST. REV. GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 511 (2015) [herein after MJRG REPORT].

⁴ See generally MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (Hill & Wang ed., 1973) (seminal work advocating the need for guided sentencing in the federal system).

⁵ See Colin Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009); Captain Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You:*

decreasing disparity and the corresponding effort to constrain the sentencer's discretion. In the National Defense Authorization Act of 2022 (NDAA), Congress enacted changes to military sentencing in an effort to decrease "inappropriate disparity" or noise.⁶ These changes occurred in two major areas: one, Congress mandated military judge alone sentencing for all non-capital offenses, thus removing the accused's option of being sentenced by members (jurors); and two, Congress placed limits on the military judge's discretion through the establishment of sentencing parameters and criteria.⁷

It is easy to endorse efforts of this kind when one encounters situations wherein one accused is sentenced to thirty days confinement and another accused is sentenced to ten years confinement for the same offense.⁸ This seems inherently wrong. However, arguments can be won by the extremes but lost by the particulars.⁹ To guard against knee-jerk reactions, it is important to go beyond the proverbial noise, examine the root cause of the variability, and assess what is the best way to remove this noise without removing what is good about the system. This Article attempts to answer these questions. Part II will examine the causes of noise in military sentencing; Part III will outline the initial call for sentencing reform by the Military Justice Review Group; and Part IV will analyze the development of military sentencing parameters and criteria and will compare them to the Federal Guidelines and the District of Columbia Guidelines.

Highlighted below are three aspects of military sentencing and sentencing reform: first, noise has been an attribute of the system that is produced

Problems with Court Member Sentencing in the Military and Proposed Solutions, 67 A.F. L. REV. 245 (2011); Major James Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1994); Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL L. REV. 159 (2000).

⁶ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81 (2021) [hereinafter NDAA]. The NDAA did not specifically state the aim of sentencing parameters and criteria. *But see* MJRG REPORT, *supra* note 3, at 32 (Proposed the creation of sentencing parameters and criteria in order to limit "inappropriate disparity").

⁷ NDAA, *supra* note 6.

⁸ See Kisor, *supra* note 5.

⁹ James E. Baker, *Is Military Justice Sentencing on the March? Should it be? And if so, Where should it Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT'G REP. 72 (2014). In his article, Judge Baker summed up this point in the following passage:

Policymakers should take special care when addressing sentencing in the military context to avoid making decisions based on anecdotal evidence, such as the case where the rapist or child pornographer received no confinement or the first-time drug user received thirty years. This is a subject for which empirical data can especially bring truth to power. But the data must be accurate and complete. Better statistics are needed.

Id. at 80.

by myriad causes, each with its own unique purpose, advantage, and disadvantage. Second, these causes are distinct from the causes of noise in the civilian system. Consequently, civilian sentencing reforms are not readily adaptable to the military. Third, considering the unique attributes of military sentencing, the initial sentencing parameters and criteria established by the President provide a reasonable first step to build upon; nevertheless, more can be done.

II. NOISE BY DESIGN

A. *Individualized Sentencing*

Military sentencing has been historically noisy.¹⁰ But military sentencing has also been historically discretionary. Except for a few offenses with mandated minimum sentences, the sentencer is given broad discretion to determine an appropriate sentence, ranging from no punishment to the maximum authorized punishment.¹¹ Additionally, the sentencer's discretion has been largely unguided. For example, the sentencer is informed of the five recognized principles behind military sentencing¹² and instructed to “impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline” taking into consideration factors such as the “nature and circumstances of the offense” and the “history and characteristics of the accused.”¹³

Given this wide discretion, it is foreseeable that the system would produce variability. Whenever there is judgment, there is likely noise. In other words, noise has been by design. But why countenance such discretion? The short answer is that “military sentencing is predicated on the principle of individualized

¹⁰ See Immel, *supra* note 5, at 186–93; Kisor, *supra* note 5, at 54–55 (comparing the sentencing disparity between various accused convicted of rape); Schmid, *supra* note 5; Colonel James A. Young, *Revising the Court Member Selection Process*, 163 MIL L. REV. 91 (2000).

¹¹ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 1002(a) (2019) [hereinafter 2019 MCM] (“[T]he sentence to be adjudged is a matter within the discretion of the court-martial.”).

¹² U.S. DEP’T OF ARMY, PAM. 27-9, MIL. JUDGE’S BENCHBOOK para. 2-6-9 (29 Feb. 2020) [hereinafter BENCHBOOK]. The principles are: rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crime and his sentence from committing the same or similar offenses, i.e., specific and general deterrence.

¹³ See 2019 MCM, *supra* note 11, R.C.M. 1002(f). The full list of factors that the sentencer should consider are: (1) the nature and circumstances of the offense and the history and characteristics of the accused; (2) the impact of the offense on—(A) the financial, social, psychological, or medical well-being of any victim of the offense; and (B) the mission, discipline, or efficiency of the command of the accused and any victim of the offense; (3) the need for the sentence to—(A) reflect the seriousness of the offense; (B) promote respect for the law; (C) provide just punishment for the offense; (D) promote adequate deterrence of misconduct; (E) protect others from further crimes by the accused; (F) rehabilitate the accused; and (G) provide, in appropriate cases, the opportunity for retraining and returning to duty to meet the needs of the service; and (4) the sentences available under these rules.

sentencing.”¹⁴ It is grounded on the belief that “offenses can present a wide range of disparities in gravity and culpability, as well as a wide breadth of extenuating and mitigating factors”¹⁵ and that judgment must be given wide latitude to navigate these facts as applied to the accused.¹⁶ Whether a sentence promotes justice and maintains good order and discipline is, in part, a normative question that does not fit conveniently into a set formula or a standard equation. The meaning of life may very well be forty-two,¹⁷ but the answer to what is a sufficient but not greater than necessary sentence requires judgment.

Another rationale is the role that the principle of rehabilitation has played in military sentencing. Unlike the principles of general deterrence and retribution, rehabilitation is based on the accused’s character and unique circumstances. In the military, rehabilitation takes on the added dimension of ascertaining whether the accused could return to service.¹⁸ Thus, rehabilitation requires an individualized approach.¹⁹ That is, the sentence must be relevant to the accused’s conduct and meaningful to him. An appropriate sentence for one accused may not be an appropriate sentence for another accused, even where both are convicted of the same offense. As noted by the Court of Military Appeals in *United States v. Mamaluy*, “accused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment.”²⁰

Moreover, while the goal of individualized sentencing has been widely promoted in the military system, the goal of sentence uniformity at the trial level has been outright rejected. Until the first half of the 20th century, the principle of uniformity was listed as a sentencing goal and the members were instructed on

¹⁴ Baker, *supra* note 9; see also *United States v. McNutt*, 62 M.J. 16, 19–20 (C.A.A.F. 2005) (“Each accused deserves individualized consideration on punishment.”).

¹⁵ Baker, *supra* note 9.

¹⁶ See KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 82 (1998) (“But it is in the nature of moral and juridical principles that [judgment] must be informed by a particular set of facts before they can be applied. Only a person can perform this task.”).

¹⁷ DOUGLAS ADAMS, *THE HITCHHIKER’S GUIDE TO THE GALAXY* (Del Ray ed., 2007).

¹⁸ 2019 MCM, *supra* note 11, R.C.M. 1002(f)(3)(G). See General William C. Westmoreland, *Military Justice—A Commander’s Viewpoint*, 10 AM. CRIM. L. REV. 5, 22 (1971) (“Military justice must provide a method for the rehabilitation of as many offenders as possible[.] Because manpower is our most precious asset in the Army, conservation of human resources is of primary concern.”).

¹⁹ See *Misretta v. United States*, 488 U.S. 361, 362–67 (1989) (discussing rehabilitation as the philosophical support behind the pre-guideline indeterminate system and creation of parole).

²⁰ 27 C.M.R. 176, 180 (C.M.A. 1959).

it.²¹ However, the court in *Mamaluy* criticized this practice,²² and the principle of uniformity was eventually removed from the 1969 MCM.²³

In addition to this discretionary framework, there are three other unique attributes about military sentencing that contribute to the noise: multiple sentencing principles, multiple sentencing options, and multiple sentencing authorities. Each of these is discussed below.

B. Multiple Sentencing Principles

Military sentencing is based on the following five principles:

(1) Rehabilitation of the wrongdoer; (2) Punishment of the wrongdoer; (3) Protection of society from the wrongdoer; (4) Preservation of good order and discipline in the military, and (5) Deterrence of the wrongdoer and those who know of his crime and his sentence from committing the same or similar offenses (specific and general deterrence).²⁴

These five principles are all worthy aims, and none can be criticized as being unnecessary. But the principles, at times, conflict with one another. For example, general deterrence is based on the idea of instilling fear of punishment in the general population; thus, unlike rehabilitation, which focuses on what sentence should apply to the individual, general deterrence looks to what sentence would influence this population.²⁵ The Court of Military Appeals recognized this conflict in *United States v. Lania* when it held that general deterrence, although a proper principle of sentencing, cannot be the sole basis for a sentence; the sentencer must still “take into account the circumstances surrounding that case together with the character and propensities of the accused.”²⁶ In essence, despite the conflicting nature, the sentencer must still balance all the principles as applied to the case.

Yet, how to balance these principles is completely discretionary and leaves open the additional question of whether one principle should be prioritized over another. If a sentencer chooses deterrence as the primary purpose for a sentence, a particular factor may be relevant. But if the sentencer instead chooses rehabilitation as its primary purpose, that same factor may be irrelevant. Simply

²¹ See Captain Denise K. Vowell, *To Determine an Appropriate Sentence in the Military Justice System*, 114 MIL. L. REV. 87, 118 (1986).

²² 27 C.M.R. at 180.

²³ Vowell, *supra* note 21, at 118.

²⁴ See BENCHBOOK, *supra* note 12, at para. 2-6-9.

²⁵ See *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

²⁶ *Id.* at 104.

put, the sentencing philosophy determines the relevancy and weight of the sentencing evidence. In a system with five distinct and sometimes conflicting sentencing philosophies, what may be relevant and weighty evidence is too numerous to list. Ultimately, how the sentencer decides to strike the balance influences the sentence that is awarded: for “[o]ne path was followed, another closed, because of the conviction in the . . . mind that the one selected led to justice.”²⁷

C. *Multiple Sentencing Options to Make an Appropriate Sentence*

Military sentencing offers numerous punishments from which to craft an appropriate sentence, several of which are unique to the military. First, absent a mandatory minimum, the sentencer could choose no punishment. Second, the sentencer may adjudge any of the following punishments, individually or in certain combinations: confinement; hard labor without confinement; a punitive discharge; a reduction in paygrade for enlisted accused; restriction; forfeiture of pay; a fine; or a letter of reprimand.²⁸ This breadth is a major distinction from the civilian system where the appropriateness and gravamen of the sentence is largely associated with prison time.²⁹

Furthermore, the meaning and effect of any combination of punishments are greatly influenced by the individual circumstances. Upon balancing those circumstances, the ultimate combination may not even include confinement. For example, for a service member in the highest enlisted paygrade of E-9 with 30 years of service, a bad conduct discharge and reduction to E-1 may be an appropriate sentence depending on the offense. Nonetheless, each of the above options are meaningful forms of punishment which, standing alone or in multiple combinations, can constitute an appropriate sentence in a given case.

Moreover, these multiple sentencing options present an obstacle in crafting parameters. Namely, it is impossible to disaggregate non-confinement punishments into a term of confinement in a non-prescriptive, non-arbitrary, and meaningful manner. In other words, what confinement term relates to a bad-conduct discharge? This disaggregation problem is unique to the military and is one factor that prevents the wholesale adoption of civilian-type sentencing reforms.

²⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 41 (Yale Univ. Press 3d ed., 1964).

²⁸ See 2019 MCM, *supra* note 11, R.C.M. 1003.

²⁹ See U.S. SENT’G COMM’N, *ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* (2015) (giving federal judges the option to sentence a defendant to a mixture of prison time, stand-alone probation, mixed confinement and probation, and in-home detention).

D. The Military's Three-Body Problem

Who decides the accused's sentence?

Prior to the changes in the NDAA, there would be two possible answers: a panel of members or a military judge. However, when examining the question under the rubric of noise, this answer is incomplete. Once again, noise is a measurement of judgment or discretion. Thus, we are looking for areas where there are judgments being made about sentencing. To that end, in the military, there are three possible answers: the judgment of the members, the judgment by the military judge, or the agreed upon judgment of the convening authority and the accused by way of a plea agreement.

1. Members for Sentencing

The appellate record is replete with examples of highly disparate sentences by members, which have led some scholars to call for the end of member sentencing.³⁰ But just as there are multiple combinations of punishments that can be awarded, there are just as many combinations of members that can compose a panel. The members can be of various ranks and occupations. They can hold different professional degrees or have distinct life experiences and sentencing philosophies. Moreover, the members are given wide discretion on how to determine an appropriate sentence, but they receive little guidance on how to exercise this discretion and no guidance toward ensuring uniformity in sentencing.³¹

2. Military Judge Sentencing and Plea Agreements

Indeed, the majority of courts-martial are tried before a military judge alone. For example, the data presented by the services in their Article 146a, Uniform Code of Military Justice (UCMJ), reports from 2021 to 2023 revealed the following percentages of military judge alone cases for all completed general and special courts-martial: Army—60 percent (1029/1073); Navy—79 percent (413/520); Marine Corps—86 percent (497/574); and, Air Force—56 percent (496/874).³² However, most of these cases are guilty pleas, which are done pursuant to a plea agreement between the government and the accused. The data compiled by the 2021–2023 Army report best illustrates this point.³³ From that

³⁰ See Schmid, *supra* note 5; see also Lovejoy, *supra* note 5.

³¹ See *Mamaluy*, 27 C.M.R. at 180.

³² The Service reports pursuant to Article 146, UCMJ, are available at <https://bit.ly/3LdggqIO>.

³³ *Id.* The Army provided a breakdown of how many guilty pleas were done. However, the other services did not provide similar data.

period, 85 percent of the general and special courts-martial tried by a military judge alone were guilty pleas (879/1029).³⁴

Prior to 2019, the military had what has come to be known as a “beat the deal” plea bargaining practice.³⁵ In this practice, the military judge was not informed of the terms of the plea agreement until after she announced the sentence.³⁶ Thus, these pre-2019 sentences are—with some caveats—a fair approximation of military judge sentencing in cases involving a plea.³⁷ Nevertheless, counsel could implicitly signal to the judge the terms of the deal in their sentencing argument. Despite this, plea agreements still influence a military judge’s sentence by dictating to what offenses the accused will plead guilty. For example, the agreement may allow the accused to plead guilty to a less severe offense; however, the government may still introduce relevant sentencing evidence about the greater offense.³⁸ In this scenario, it is likely that the adjudged sentence for the less severe offense would reflect the true seriousness of the accused’s conduct and be greater than what would be awarded for a typical violation of that offense.

In 2019, Congress enacted changes that allowed plea agreements to set the specific sentence that the military judge must award.³⁹ Therefore, this Article references the data from 2021-2023 as this time period more accurately reflects current practice. Under current practice, the military judge is aware of the terms of the deal prior to sentencing. Most significantly, a plea agreement can now require the military judge to award a specific sentence such as a set amount of confinement or other punishment like a bad conduct discharge.⁴⁰ Granted, the rules allow for the plea agreement to establish a range of punishment—for example, six to nine months confinement—but the military judge cannot deviate from that range.⁴¹ Hence, under the terms of the plea agreement, the military judge can be left with little or no discretion.

³⁴ *Id.*

³⁵ See MJRG REPORT, *supra* note 3, at 484.

³⁶ Prior to 2019, the term “pre-trial agreement” was used instead of “plea agreements.” Compare 2016 MCM, R.C.M. 705, with 2019 MCM, *supra* note 11, R.C.M. 705.

³⁷ For cases prior to 2019, the accused could only be tried and sentenced by one forum of his own selection—members or military judge alone. So, in contested courts-martial that do not involve a plea, in order to get a true sense of military judge sentencing one would have to look to situations wherein the accused elected to be tried and sentenced by a military judge alone.

³⁸ See *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001).

³⁹ UCMJ art. 53a (2019); 2019 MCM, *supra* note 11, R.C.M. 705.

⁴⁰ See 2019 MCM, *supra* note 11, R.C.M. 705(d); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 1002(a) (2019) [hereinafter 2024 MCM], R.C.M. 705(d)(1)–(2).

⁴¹ *Id.*

Lastly, with respect to noise, there is generally a tension between increasing uniformity and plea bargaining. This tension increases when the system lacks a focal point, like a guideline or parameter, from which to base the terms of a plea agreement. Simply put, the parties engaged in plea bargaining are not concerned with advancing sentencing uniformity; instead, they are concerned with making a fair deal. What was considered fair in military plea bargaining used to be influenced by local practice, as well as the individual views of the convening authority, the prosecuting attorney, and the accused, creating considerable variability in plea agreement terms. Although this environment produced noise, it ensured relative parity in plea bargaining power since the sentence that would have been awarded absent a plea agreement was relatively unknown. Now, with a focal point imposed by parameters, the question remains whether this parity will be disrupted.

In the military, the three-body framework—members, military judge, and plea agreements—represents the corpus of military sentencing. Contrast this to the federal sentencing system where sentencing has been exclusively the duty of the judge.⁴² There, the historical record reflects the sentencing trends and patterns of the judiciary. It was an examination of that record—and the variability therein—that provided the bases for sentencing reform in the federal system as well as the foundation from which to build the Federal Guidelines. Conversely, the three bodies in the military are unique entities with different components, different experiences, and, in some respects, different aims. Hence, one is not an accurate reflection of the other. Yet, the historical record consists of an amalgamation of the sentences awarded by each of them. Said differently, the noise comes from a cacophony of instruments as opposed to the crash and bang from a single drum. This noise presents complications with how to develop sentencing parameters. In the military, there is a three-body problem.

III. THE CALL FOR NOISE REDUCTION IN THE MILITARY: MILITARY JUSTICE REVIEW GROUP

There have been repeated calls for sentencing reform in the military for some time.⁴³ But the first comprehensive review which resulted in statutory change was done by the Military Justice Review Group (MJRG), led by Judge Andrew Effron of the Court of Appeals for the Armed Forces.⁴⁴ In 2005, the MJRG issued a report outlining numerous proposals to modify the UCMJ, to include changes to sentencing.⁴⁵ The MJRG made three recommendations that are

⁴² STITH & CABRANES, *supra* note 16, at 9.

⁴³ See Kisor, *supra* note 5; see also Lovejoy, *supra* note 5.

⁴⁴ The MJRG was established by the Department of Defense General Counsel's Office, and Judge Effron was not acting in his judicial capacity as the Chair. See MJRG REPORT, *supra* note 3, at 5.

⁴⁵ MJRG REPORT, *supra* note 3.

relevant to our discussion about noise: (1) the use of segmented sentencing for confinement and fines instead of unitary sentencing;⁴⁶ (2) military judge alone sentencing for all non-capital offenses—thus, removing the issues related to member sentencing;⁴⁷ and (3) the phased introduction of sentencing parameters that would provide a boundary to the military judge’s discretion by providing upper and lower limits and sentencing criteria that set out factors to guide the military judge in fashioning an appropriate sentence.⁴⁸

These proposed reforms dealt with some of the aforementioned causes of noise: the introduction of segmented sentencing for confinement and fines assuages the problems with disaggregated sentencing; and, limiting sentencing to military judge alone resolves the three-body problem. Although the MJRG recognized the need to modify plea agreements, it did not advocate for additional limitations to the plea agreement terms other than the authority for a military judge to reject a plea agreement as “plainly unreasonable”.⁴⁹

A. *Sentencing Parameters and Criteria.*

Notably, with respect to sentencing parameters and criteria, the MJRG made several crucial points. First, the MJRG recognized that to serve the dual purpose of justice and discipline, these reforms must be designed around the key principle of flexibility.

A military sentencing scheme must be flexible enough to adjudge any lawful sentence when appropriate. Crimes committed in combat, for example, may severely aggravate an offense if the accused put the unit or mission at risk, or may mitigate an offense committed during or after intense operations. Courts-martial, while often trying crimes similar to those in civilian courts, need to have the flexibility to impose an appropriate sentence stemming from extreme situations (or unique military contexts).⁵⁰

Second, the MJRG asserted that the aim of this reform was “to limit inappropriate disparity within a system that will largely maintain individualized sentencing and judicial discretion in sentencing.”⁵¹ This desire to balance these interests was also reflected in the MJRG’s recommendation that the parameters consist of no more than twelve offense categories since this limitation ensured

⁴⁶ *Id.* at 509.

⁴⁷ *Id.* at 475–76.

⁴⁸ *Id.* at 505.

⁴⁹ *Id.* at 514.

⁵⁰ *Id.* at 512.

⁵¹ *Id.* at 31.

that the categories would be sufficiently broad to account for various circumstances that the military judge may face.⁵²

Third, the MJRG recognized that given the unique circumstances found in the military, not all offenses should be subjected to the limitations placed by sentencing parameters. Instead, there are unique offenses—that is, criteria offenses—that are unsuitable for parameters.

Fourth, the MJRG recommended against the direct application of the Federal Sentencing Guidelines for several reasons. For our purposes, the most salient reason was that “federal sentencing guidelines were developed for federal crimes.”⁵³

Lastly, and perhaps most significantly, the MJRG recommended a phased approach to implementing the reforms. The MJRG proposed that the reforms take effect within four years of enactment. Additionally, the MJRG proposed the creation of a Military Sentencing Parameters and Criteria Board consisting of the Chief Trial Judges of each service and ex officio members from other relevant areas in the federal government.⁵⁴ The Board would use the interim four-year period to “collect and analyze sentencing data, propose sentencing parameters and criteria, and submit the proposals to the President for approval.”⁵⁵ Ultimately, the MJRG believed that these two reforms would “retain flexibility in sentences, recognizing the unique offenses and circumstances of military justice; [they] would continue the current emphasis on rehabilitation of an accused; and it would alter current practice by providing guidance to the judge on how to fashion an appropriate sentence.”⁵⁶

In the Military Justice Act of 2016, Congress enacted a number of MJRG’s proposed reforms, to include segmented sentencing for fines and confinement in military judge sentencing; however, the act did not include sentencing parameters and criteria or military judge alone sentencing for all non-capital offenses.⁵⁷ Instead, it was not until the 2022 NDAA that these two reforms were enacted.⁵⁸

⁵² *Id.* at 512.

⁵³ *Id.* at 511.

⁵⁴ *Id.* at 513. The MJRG also recommended that the Department of Defense should provide the Board with a full-time staff to assist with the study to collect and analyze data. Unfortunately, when the NDAA was enacted, it did not provide for staff to assist the Board.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Pub. L. No. 114–328, div. E, §§ 5001–5542, 130 Stat. 2000, 2894 (2016), codified at 10 U.S.C. §§ 801–946a (2024).

⁵⁸ NDAA, *supra* note 6.

IV. SENTENCING PARAMETERS AND CRITERIA

In the 2022 NDAA, Congress adopted most of the MJRG's recommended sentencing reforms. Congress required the use of military judge alone sentencing for all non-capital offenses and created the Military Sentencing Parameters and Criteria Board with the mandate to make recommendations to the President on sentencing parameters and criteria offenses.⁵⁹ But most pointedly, missing from the statute was the MJRG's recommendation that the parameters and criteria be introduced through a four-year phased approach.

A. Statutory Directive

Another facet missing from the NDAA was an explicit statutory directive outlining the purpose of the sentencing reforms. However, one can easily discern from the nature of the reforms and the explicit goal outlined by the MJRG that its purpose was to "limit inappropriate disparity" and to promote greater uniformity and predictability in sentencing while largely retaining "individualized sentencing and judicial discretion in sentencing."⁶⁰ However, it is worth comparing this implicit purpose with the explicit one outlined in the Sentencing Reform Act, which was the basis for the federal guidelines:

provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct* while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.⁶¹

Under this statute, the "unwarranted disparity" is viewed with respect to "defendants with similar records who have been found guilty of similar conduct." In other words, the disparate treatment of similarly situated defendants is what makes the disparity unwarranted. This statement merely recognizes the non-controversial maxim to treat like cases alike and different cases differently.⁶² But this leads to the inevitable question: in sentencing, what is a "like" case? In the civilian system, grouping cases may be easier since distinguishing defendants for sentencing is limited. For instance, the Federal Sentencing Statute outlines a number of specific offender characteristics that are generally inappropriate to

⁵⁹ *Id.*

⁶⁰ MJRG REPORT, *supra* note 3, at 31.

⁶¹ 28 U.S.C. § 991(b)(1)(B) (emphasis added).

⁶² H.L.A. HART, THE CONCEPT OF LAW 159 (3d ed., Oxford Univ. Press 2012).

consider in sentencing, such as, “the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”⁶³

But in the military, we intentionally differentiate a person in numerous ways that are indeed relevant to sentencing, such as rank, responsibilities, relationships within the chain-of-command, and duties to one another.⁶⁴ And the weight, impact, and meaning of the punishment may be tied directly to those differences. For example, in the Navy, the Chiefs Mess is a prized club; thus, a single reduction in rank from a Chief Petty Officer to a Petty Officer First Class can be impactful. In the military, the issue is not distinguishing amongst accused; the issue is how to group different accused into reasonably similar categories for purposes of sentencing parameters.

Furthermore, it is safe to say that the NDAA was attempting to cancel out the noise from member sentencing since it removed member sentencing as an option for all non-capital offenses. But was there a corresponding noisy problem with sentencing by a military judge that needed to be solved through parameters? The Federal Guidelines were enacted after a comprehensive study of sentencing by federal judges with respect to confinement.⁶⁵ In other words, there was a noise audit of judicial sentencing that demonstrated significant disparity in sentencing. However, no similar audit has been conducted in the military. Indeed, several studies, such as the one conducted by the Internal Review Team, have found issues with race in some discretionary functions of military justice; but sentencing did not appear to be one of them.⁶⁶ Further, this result is more an indication of bias in the system rather than a commentary about noise. It stands to reason that some of the noise could be solved by limiting sentencing to a legally trained cadre of professionals. Albeit the decision to enact parameters and criteria can be simply born from observing over years of practice that judges—federal, state, or military—are not immune from noise.

B. Military Sentencing Parameters and Criteria Board

The NDAA created the Military Sentencing Parameters and Criteria Board with the mandate to develop and recommend sentencing parameters and criteria for the President’s consideration. The Board consists of the Chief Trial Judges from each service and one additional judge from the Department of the

⁶³ 28 U.S.C. § 994(e) (2006).

⁶⁴ See, e.g., 2019 MCM, *supra* note 11, R.C.M. 1001(b)(1)–(2) (permitting the use of service data from the charge sheet and the introduction of personal data and character of prior service of the accused for sentencing).

⁶⁵ U.S. SENT’G GUIDELINES MANUAL § 1A3 (U.S. SENT’G COMM’N 2021) [hereinafter *FEDERAL GUIDELINES*].

⁶⁶ U.S. DEP’T OF DEFENSE, INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS (2022).

Navy as voting members; non-voting ex officio members from the Court of Appeals for the Armed Forces, the Joint Chiefs of Staff, and the Office of General Counsel for the Department of Defense; and an additional non-voting member designated at the discretion of the Secretary of Defense.⁶⁷ In fulfilling its responsibilities, the Board was required to consider “the sentencing data collected by the Military Justice Review Panel” and “consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system.”⁶⁸ Most notably, the Board is a standing board with the obligation to review and propose revisions to the sentencing parameters and criteria regularly; any proposed revision must be accompanied by a statement outlining the basis for the revision.⁶⁹ Consequently, the parameters and criteria system was meant to be evolutionary.

On July 28, 2023, the President signed Executive Order 14103 (EO) which implemented the Sentencing Parameters and Criteria system proposed by the Board, and additional changes to the Manual for Courts-Martial that were required considering the new sentencing scheme.⁷⁰

C. Sentencing Parameters

1. Typical Violation of an Offense

In setting out sentencing parameters, the NDAA required that the parameters represent a delineated sentencing range for a “typical violation of the offense”.⁷¹ In ascertaining a “typical violation” the following factors were to be considered:

(i) the severity of the offense; (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court; (iii) any military-specific sentencing factors; (iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and (v) any other relevant sentencing guideline.⁷²

⁶⁷ NDAA, *supra* note 6, § 539E(e)(4).

⁶⁸ *Id.* § 539E(e)(4)(F)(iii).

⁶⁹ *See id.* § 539E(4)(F)(v).

⁷⁰ Exec. Order No. 14,103, 88 Fed. Reg. 50535 (Jul. 28, 2023).

⁷¹ NDAA, *supra* note 6, § 539E(e)(2)(A).

⁷² *Id.* § 539E(e)(2)(A)(i)-(v).

Further, the NDAA required that the ranges consist of no fewer than five and no more than 12 offense categories.⁷³ Lastly, the parameters were to apply to both special and general courts-martial.⁷⁴

Though the NDAA established the above factors to consider, it did not provide specific direction on what method should be taken in designing sentencing parameters: whether the sentencing ranges should be based on an empirical, or descriptive, method—as was used for the Federal Guidelines. Additionally, the NDAA provided no direction on whether the sentencing parameters should reflect more of a real offense or charge offense system. How one answers these two questions largely determines how the system is designed and how it develops.

2. Empirical Method

An empirical method is an attempt to track past sentencing practice through a review of the available record. This method can be labeled as a “descriptive approach” since its aim is to describe the existing state of affairs.⁷⁵ Although the Federal Guidelines were not adopted for the military, it is worth noting that the empirical method was used by the U.S. Sentencing Commission (Sentencing Commission) in creating them. The Sentencing Commission conducted a review of over 10,000 cases and the corresponding presentencing reports to come up with pre-guideline confinement averages for each offense.⁷⁶ Through this review, the Sentencing Commission also discerned what it thought were several commonly occurring characteristics that influenced how judges had sentenced in the past. The Sentencing Commission then based the sentencing ranges for the offense on these pre-guideline averages, as well as derived from these commonly occurring characteristics several delineated factors, such as offense characteristics, that affect how the sentencing range would be calculated. Simply put, this empirical method provided a ready-made answer to the question of why an offense was given a specific offense level: “this was how federal judges, on average, sentenced these sorts of cases in the past.”⁷⁷

Yet the Sentencing Commission did not take an exclusively empirical approach. In cases where the Sentencing Commission believed that past sentences were inadequate, it departed from those average sentences for policy reasons. For

⁷³ *Id.* § 539E(e)(2)(B).

⁷⁴ *Id.* § 539E(e)(1).

⁷⁵ STITH & CABRANES, *supra* note 16, at 51–60; *see also* Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1365 (1998).

⁷⁶ FEDERAL GUIDELINES, *supra* note 63, § 1A3.

⁷⁷ Wright, *supra* note 72, at 1364–65; *see also* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 289 (1989) (criticizing the guidelines use of a descriptive approach).

example, in white-collar crimes, the data revealed that judges were punishing “economic crimes less severely than other apparently equivalent behavior.”⁷⁸ Also, the Sentencing Commission lengthened the prison sentence for certain drug offenses to account for the increased mandatory minimum sentences imposed by subsequent drug statutes.⁷⁹

The NDAA includes language that calls for an empirical review of past sentencing practice. Specifically, the NDAA requires that sentencing parameters reflect a “typical violation of the offense” and that “the sentencing data collected by the Military Justice Review Panel” be considered when designing the sentencing parameters.⁸⁰ However, in general, there are multiple issues with military sentencing data which make it impractical to conduct a comprehensive empirical review like the one conducted by the Sentencing Commission. In sum, it is not possible to describe the existing state of affairs of the military sentencing system in an accurate manner. The most significant and overriding issue is that it is exceedingly difficult in the military to collect specific, meaningful information from which to base conclusions.⁸¹ Moreover, the military does not have reports like the federal presentencing reports which outline the relevant sentencing information presented to the sentencer. Although one could deduce what sentencing evidence was introduced at the presentencing hearing from reviewing numerous court-martial records of trial. But not only is this an “intricate, labor-intensive task”⁸² that requires the support of a fulltime staff,⁸³ it still would not reveal what the sentencer thought was relevant for the sentence. In essence, sentencing data only reflect the adjudged sentence and not the reasoning for it. “[S]entencing decisions are so complex and there are so many variables, including the philosophy of the sentencing judge, that it is impossible to explain sentences without getting into the head of the sentencing judge.”⁸⁴ Yet in the military, the sentencer is neither permitted nor required to outline on the record its basis for a sentence.⁸⁵

Further, unlike the federal system where the 10,000 reviewed cases reflected the past practice of a single body (judges), the military’s historical record reflects the judgment of three separate bodies: members, judges, and plea agreements. Moreover, unlike the federal system where the punishment awarded

⁷⁸ FEDERAL GUIDELINES, *supra* note 64, § 1A3.

⁷⁹ *Id.*

⁸⁰ See NDAA, *supra* note 6, §§ 539E(e)(2)(A), (4)(F)(iii).

⁸¹ See, e.g., U.S. Gov’t Accountability Off., GAO-19-344, *DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities* (2019), <http://bit.ly/4bGAZSh>.

⁸² *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

⁸³ See MJRG REPORT, *supra* note 3, at 513 (recommending the Board be provided with full-time staff).

⁸⁴ ANNUAL REPORT, DISTRICT OF COLUMBIA ADVISORY COMM’N ON SENT’G, 2 (2003) [hereinafter D.C. ADVISORY COMMISSION REPORT].

⁸⁵ See, e.g., *United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013).

is centered around prison time, the inclusion of other meaningful sentencing options in the military—for example, a punitive discharge—undoubtedly influences the overall sentence, which may or may not include confinement. Thus, it is impossible to transform these constituent parts of the sentence into a reliable and non-arbitrary confinement amount.

Notwithstanding these inherent difficulties with military data collection and analysis, the NDAA did not contemplate that the parameters be developed solely using an empirical approach. Indeed, in defining what constitutes a “typical violation”, the NDAA included various other factors, such as the severity of the offense and the broad nature of the ranges. With that said, it is worth discussing the differences between a real offense and a charge offense system.

3. Real Offenses versus Charge Offense

A real offense system considers the conduct of the accused and all relevant aggravating, extenuating, and mitigating circumstances, to include the accused’s personal and professional history. The difficulty with this system is that the amount of sentencing information that can be relevant is potentially limitless and therefore results in variability in sentencing. To use a loose analogy: “Happy families are all alike; every unhappy family is unhappy in its own way.”⁸⁶ Conversely, a charged offense system is based on the “conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted.”⁸⁷ In a pure charge offense system, the sentence or the sentencing range is determined entirely by the offense of conviction; thus, two defendants convicted for the same offense would receive the same punishment regardless of individual circumstances. Consequently, a pure charge offense system promotes uniformity but at the expense of individuality.⁸⁸ Many factors that are relevant to sentencing are not included as elements of the offense and a charge offense system would exclude that information from being considered. Another critique with a charge offense system is that it increases the prosecutor’s influence on sentencing since the prosecutor has broad discretion to select what charges are brought against a defendant.⁸⁹

It is important to distinguish between a real and charge offense system because ultimately a successful system is one that strikes the appropriate balance between uniformity and proportionality.⁹⁰ As noted above, each of those systems

⁸⁶ LEO TOLSTOY, *ANNA KARENINA* 1 (Constance Garnett trans., Project Gutenberg, 1998) (1878).

⁸⁷ FEDERAL GUIDELINES, *supra* note 64, § 1A4.

⁸⁸ See David N. Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 413 (1993).

⁸⁹ See David N. Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 270 (2005).

⁹⁰ Yellen, *Illusion*, *supra* note 86.

inherently promotes one principle above the other: a real offense system promotes proportionality at the expense of uniformity, and a charge offense system does the reverse. However, the NDAA includes elements of both a real offense and a charge offense system. The NDAA's criterion to look to "military-specific sentencing factors" has one go beyond the elements and definitions of the offense, and the requirement for the ranges to be "sufficiently broad to allow for individualized consideration of the offense and the accused" are attributes of a real offense system.⁹¹ Conversely, the phrase "severity of the offense" has one look at the terms of the offense and to the statutory elements that may increase the seriousness of the offense, such as the accused's *mens rea* (for example, by neglect or by design),⁹² the conduct of the accused (for example, unlawful force),⁹³ or the amount of harm involved (for example, value greater than \$1,000).⁹⁴ Since the NDAA includes both elements of a charge offense and a real offense system, the overriding question is how to create a system that incorporates both approaches.

The Federal Guidelines attempt to combine real and charge offense elements in what has been called a compromise approach.⁹⁵ As noted above, the Sentencing Commission determined the range of offenses based on a review of 10,000 pre-guideline cases as well as the corresponding presentencing reports. The Sentencing Commission also derived a list of common sentencing factors that it thought made a significant difference in sentencing and incorporated those real offense factors into how the ranges are ultimately calculated.⁹⁶ Using this approach, the Sentencing Commission created the following sentencing table:⁹⁷

⁹¹ NDAA, *supra* note 6, §§ 539E(e)(2)(A)(i)–(v).

⁹² *See, e.g.*, 10 U.S.C. § 887 (2016) (discussing missing movement).

⁹³ *See, e.g.*, 10 U.S.C. § 920 (2017) (discussing rape).

⁹⁴ *See, e.g.*, 10 U.S.C. § 921 (2016) (discussing larceny and wrongful appropriation).

⁹⁵ *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

⁹⁶ *See* FEDERAL GUIDELINES, *supra* note 64, § 1A3.

⁹⁷ *Id.* § 5A.

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

The vertical axis of the table lists 43 offense levels which correspond to the severity of the offense. Notably, the confinement ranges are limited by what is commonly referred to as the “25 percent rule”, which states that the maximum of the range “shall not exceed the minimum of the range by more than the greater of 25 percent or six months”⁹⁸ Each offense is assigned a base offense level, which can be increased or decreased depending on various offense characteristics and adjustments. For example, an assault that involved physical contact has a base offense level of seven.⁹⁹ However, if the victim of the assault sustained bodily injury, then the offense level is increased by two.¹⁰⁰ Further, if the defendant accepts responsibility and pleads guilty by truthfully admitting his conduct, then the offense level is decreased by two.¹⁰¹ Thus, in this basic scenario, the final offense level will be seven (7 + 2 - 2).

⁹⁸ 28 U.S.C. § 994(b)(2) (2006).

⁹⁹ FEDERAL GUIDELINES, *supra* note 64, § 2A2.3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 3E1.1.

The horizontal axis of the table lists the defendant's criminal history in a graduated scale. The higher the criminal history, the greater the potential punishment depending on the offense level. The sentencing range for a case is calculated by matching the base level with the appropriate criminal history level on the table. In our above hypothetical, a defendant with a criminal history score of one can be sentenced within a range of zero to six months of confinement. Further, a judge may depart from this calculated range if there are aggravating or mitigating circumstances beyond what was initially considered by the Sentencing Commission.¹⁰²

Although the Federal Guidelines were not adopted by the NDAA, the NDAA requires that the Board consider the offense category that would apply to the offense under the Federal Guidelines.¹⁰³ Nonetheless, the Federal Guidelines are not readily transferable to military offenses because they reflect either the historical averages for sentences by federal judges for federal crimes or intentional policy departures from those averages based on reasons not relevant to the military. Notwithstanding this objection, the question remains whether the military could adopt this structure that uses base levels, offense characteristics, and adjustments. At present, the answer is no. The problems identified with the empirical approach make it difficult to recreate the historical sentencing record in the military. Thus, there is no practical way to discern either a reliable base average or the common sentencing factors that made a significant difference in sentencing. Without these two pillars, a system like the Federal Guidelines cannot be properly constructed.

Moreover, the Federal Guidelines is a complex system that has been fairly criticized for its complexity.¹⁰⁴ And because the offense level can be increased or decreased by specific offense characteristics and adjustments, this creates additional litigation to determine the correct calculation. However, it must be remembered that a military sentencing scheme is meant to be deployed in a military environment. To that end, the system must be workable both in a garrison as well as in a foreign and hostile setting. Accordingly, a complex system that may increase litigation or is overly complex may not be sufficiently flexible enough to be used in the military. A simpler, more deployable system is required. For that, we must survey another jurisdiction.

¹⁰² *Id.* § 1A4(b).

¹⁰³ NDAA, *supra* note 6, § 539E(e)(2)(A)(ii).

¹⁰⁴ See Yellen, *Illusion*, *supra* note 88; see also Keven R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN L. REV. 523 (1993); STITH & CABRANES, *supra* note 16.

4. Other Relevant Sentencing Guidelines

In addition to the Federal Guidelines, the Board was required to look at “other relevant sentencing guidelines.”¹⁰⁵ This Article will not attempt an exhaustive analysis of other relevant sentencing guidelines but will instead focus on the District of Columbia Voluntary Sentencing Guidelines (D.C. Guidelines) since the D.C. Guidelines provide a good contrast to the Federal Guidelines. Simply put, it is a far simpler system;¹⁰⁶ and in contrast to the Federal Guidelines, the D.C. Guidelines reflect a charge offense system that uses real offense characteristics as a basis for the judge’s departure.¹⁰⁷ Further, the D.C. Guidelines group the offenses into nine groups with broad sentencing ranges, as opposed to the 43 offense levels listed in the Federal Guidelines.¹⁰⁸

The D.C. guidelines were created by the Advisory Commission on Sentencing (D.C. Commission) after an extensive four-year study of sentencing practice in the District of Columbia.¹⁰⁹ The D.C. Commission conducted a review of cases from 1996–2003 to set the baseline ranges.¹¹⁰ In creating these ranges, the D.C. Commission set out to ensure that “the amount of time-served under a sentence in the new system should approximate the amount of time-served in the old system.”¹¹¹ The eventual base ranges that were produced were meant to capture the middle 50 percent of historical sentences. As noted below, the ranges are broad, but this is intentional.

Another aspect of fairness is promoting warranted disparity, that is, treating different offenses and offenders differently. Relatively wide ranges permit the court to take into account factors other than offense severity and criminal history in fashioning an appropriate sentence Judges need discretion to account for this kind of variation, and the [D.C.] Commission concludes that relatively wide ranges, including the option of probation for low-end crimes, will promote fairness and make it more likely that judges will elect to depart only in a relatively small percentage of truly extraordinary cases.¹¹²

¹⁰⁵ NDAA, *supra* note 6, §§ 539E(e)(2)(A)(i)–(v).

¹⁰⁶ See VOLUNTARY SENT’G GUIDELINES MANUAL (DISTRICT OF COLUMBIA SENT’G COMM’N, 2023) [hereinafter D.C. GUIDELINES].

¹⁰⁷ D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 30 (“Sentences will be based on the offense of conviction, not on the real offense behavior.”).

¹⁰⁸ D.C. GUIDELINES, *supra* note 106, at app. 1 (illustrating the master grid).

¹⁰⁹ D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at iii.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 29.

¹¹² *Id.* at 21.

The overall goal was to cabin the judge's discretion and to move all typical offenses into a "sentencing corral."¹¹³ According to the D.C. Commission, the corraling was meant to indicate that the "goal of reducing unwarranted disparity by drawing in the mavericks is balanced against the goal of maximizing judicial discretion to achieve a just result in a particular typical case."¹¹⁴

The D.C. Commission adopted a grid or table approach like the Federal Guidelines that contains vertical and horizontal axes. The D.C. Commission also separated offenses into two grids: a master grid and a drug grid. For our purposes, we will focus on the master grid.¹¹⁵

¹¹³ *Id.* at 34.

¹¹⁴ *Id.* at 34–35.

¹¹⁵ D.C. GUIDELINES, *supra* note 106, app. 1.

APPENDIX A – MASTER GRID

August 2023 -- Sentencing Ranges Listed in Months

		Criminal History Score				
	Ranking Group	0 to ½ A	¾ to 1¼ B	2 to 3¼ C	4 to 5¼ D	6 + E
	Most Common Offenses					
3 Points*	Group 1 1st degree murder w/armed 1st degree murder	360 - 720	360 - 720	360 - 720	360 - 720	360 +
	Group 2 2nd degree murder w/armed 2nd degree murder 1st degree sex abuse 1st degree sex abuse w/armed	144 - 288	156 - 300	168 - 312	180 - 324	192 +
	Group 3 Voluntary manslaughter w/armed 1st degree child sex abuse Carjacking while armed Assault with intent to kill w/armed Armed burglary I	90 - 180	102 - 192	114 - 204	126 - 216	138 +
	Group 4 Aggravated assault w/armed Voluntary manslaughter	48 - 120	60 - 132	72 - 144	84 - 156	96 +
	Group 5 PFCOV Armed robbery Burglary I Obstruction of justice Assault with intent to kill	36 - 84	48 - 96	60 - 108	72 - 120	84 +
	Group 6 ADW Robbery Aggravated assault 2nd degree child sex abuse Assault with intent to rob	18 - 60	24 - 66	30 - 72	36 - 78	42 +
2 Points*	Group 7 Burglary II 3rd degree sex abuse UPF-PCOV Negligent homicide Attempt 2nd degree sex abuse	12 - 36	18 - 42	24 - 48	30 - 54	36 +
	Group 8 Carrying a pistol (CPWL) UUV Attempt robbery/burglary UPF ⁴³ 1st degree theft Assault w/significant bodily injury	6 - 24	10 - 28	14 - 32	18 - 36	22 +
1 Point*	Group 9 Escape/prison breach BRA Receiving stolen property Forgery/uttering Fraud	1 - 12	3 - 16	5 - 20	7 - 24	9 +
*Criminal History Points for prior convictions in these groups.						
White/unshaded boxes – prison or compliant long split only.						
Green/Dark shaded boxes – prison, compliant long split, or short split permissible.						
Yellow/Light shaded boxes – prison, compliant long split, short split, or probation permissible.						

The vertical axis of the master grid is separated into nine groups that represent the severity of the offense. The horizontal axis of the grid denotes the defendant's criminal history score. Like the Federal Guidelines, the judge must find the box where the offense category and criminal history connect to determine the range of punishment for the offense. Unlike the Federal Guidelines, the D.C. Guidelines exclude the use of offense characteristics or other adjustments in favor of a simpler system. The D.C. Commission believed that this system would be easy to operate and be easily understood yet be responsive to individual factors in each case. The D.C. Commission favored simplicity to avoid excessive and time-consuming litigation over the guidelines.¹¹⁶

Under the D.C. Guidelines, the judge may depart from the sentencing range if there is a "substantial and compelling" reason to sentence outside of the range.¹¹⁷ The D.C. Guidelines include a non-exclusive list of mitigating and aggravating factors that may support a departure.¹¹⁸

There are several attributes about the D.C. Guidelines that are adaptable for the military. First, the D.C. Guidelines ranges are broad and are reflected in only nine groups, thus meeting the NDAA's requirement of no less than five and no more than 12 categories. Second, the D.C. Guidelines are simple and easy to navigate. They do not rely on an intricate system to determine the sentencing range; therefore, the scheme is more readily deployable. Third, unlike the Federal Guidelines, there are no limits to the type of sentencing evidence that the judge may use as a basis for a sentence or for a departure, in keeping with the military's sentencing rules and philosophies. Nevertheless, these attributes allow for the D.C. Guidelines to be mimicked, but for several reasons discussed below, they cannot be directly adopted for use in the military.

D. Parameters Applied

For offenses occurring after December 27, 2023, the following sentencing parameters table applies to six offense categories:¹¹⁹

¹¹⁶ D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 26.

¹¹⁷ *Id.* at 43; *see also* D.C. GUIDELINES, *supra* note 106, at 34.

¹¹⁸ *See* D.C. GUIDELINES, *supra* note 106, at 33–34.

¹¹⁹ 2024 MCM, *supra* note 40, app. 12B.

Offense Category	Months
1	0–12
2	1–36
3	30–120
4	120–240
5	240–480
6	Confinement for life with eligibility for parole

The above sentencing table, when combined with the applicable sentencing rules, reflects a hybrid system that includes elements of both a charge offense and real offense system. The offenses are placed into offense categories that correspond to their severity with a range of punishment that is proportional to a typical violation of those offenses. Additionally, the rules on sentencing remain largely unchanged and the military judge retains the same discretion that she had prior to the NDAA to look at both the offense of conviction and the offense and offender characteristics that she deems are legally and logically relevant to her sentencing decision.

There are two obvious differences between the military sentencing parameter table and both the Federal Sentencing Table and the D.C. Master Grid: (1) there is no horizontal axis; and (2) the ranges are broader.

E. Horizontal Axis

For both the Federal Guideline and the D.C. Guidelines, the inclusion of criminal history as a horizontal axis is based on the principle that a “defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”¹²⁰ There is no reason to challenge this logic, but hardly any empirical proof for it. Notably, when deciding to include a horizontal access in its grid, the D.C. Commission did so out of acceptance of the

¹²⁰ FEDERAL GUIDELINES, *supra* note 64, § 4A1.1.

principle as opposed to evidence supporting its conclusion.¹²¹ Even though the Sentencing Commission reviewed over 10,000 cases, the same can be said for the Federal Guidelines.¹²² The significance of this point is that the horizontal axis is based on a prescriptive approach. In other words, it reflects judgment, not averages.

Putting this aside, there are reasons to exclude a criminal history axis from a military sentencing scheme. Firstly, it is rare to encounter an accused at court-martial with a prior criminal history since the military is an all-volunteer force with imposed entry requirements. Prospective service members with prior civilian convictions are normally deselected. Further, a court-martial conviction can (and typically does) sever personal jurisdiction over a convicted service member either through a punitive discharge or subsequent administrative actions taken to remove the member from the service.

Granted, even though encountering an accused with prior convictions is rare, it does happen. In fact, the presentencing rules for courts-martial account for this scenario.¹²³ Although possible, there is no pressing need to build a rule for the exception. The parameter ranges are broad enough to give the military judge flexibility to account for these occasions, and the military judge may depart outside of the range for various reasons, to include criminal history. Furthermore, the graduated steps and corresponding increase in punishment associated with the criminal history axis are ultimately policy judgments and, given the various nuances and difficulties with military sentencing mentioned above and the rarity of the occurrence, it does not seem sensible to take a prescriptive approach at this time.

F. Broad Nature

Another marked difference with the parameters is that the ranges are broader than the Federal Guidelines and D.C. Guidelines. Unlike the 25 percent limit imposed by the Federal Guidelines, the NDAA took the opposite approach and required that the ranges be “sufficiently broad to allow for individualized consideration of the offense and the accused.”¹²⁴ This raises the question: what does sufficiently broad mean? The answer to this question is further complicated by the fact that under the NDAA there can be no less than five and no more than 12 categories. As a result, the ranges could never be as narrow as those found in

¹²¹ D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 32 (“[S]entencing ranges increase by increments as criminal history of the offender increases. The progressiveness of sentences on the grids from cell to cell was followed in developing these increments, despite the fact that available historical data were not consistent in demonstrating that principle as part of historical practice.”).

¹²² STITH & CABRANES, *supra* note 16, at 72.

¹²³ See 2024 MCM, *supra* note 40, R.C.M. 1001(a)(3).

¹²⁴ NDAA, *supra* note 6, § 539E(e)(2)(A)(iv).

the Federal Guidelines' 43 offense levels. However, the nine groups found in the D.C. Guidelines fall within the NDAA's limitations. So, could the parameter ranges mirror those imposed by the D.C. Guidelines? It is worth remembering that the Federal Guidelines and D.C. Guidelines were products of a comprehensive review of judicial sentencing as it relates to prison time for civilian criminal offenses.

Further, in defining what is sufficiently broad it is best to guard against conclusions that may have unintended consequences, leading down a path that becomes increasingly difficult to navigate, especially since the historical record is inconclusive. The parameter table evinces an effort to strike a balance between proportionality and uniformity that is most appropriate at this juncture. Indeed, what can be deduced from the table is that the balance tilts in favor of proportionality. Given the NDAA's requirement that the ranges be sufficiently broad and the legal requirement that the military judge award a sentence that is sufficient but no greater than necessary, the military sentencing writ large tilts in favor of proportionality.¹²⁵ However, the goal of increasing uniformity can be met through the collection of better sentencing data as well as a more comprehensive understanding of judicial sentencing and the relevant common sentencing factors that influence sentences.

The ranges also reflect the fact that the sentencing rules at courts-martial remain largely unchanged¹²⁶ and that the military judge must still: balance sometimes conflicting sentencing principles; consider numerous sentencing factors; face accused with various ranks, responsibilities, and life histories; understand the vagaries of the then-existing military environment; and, decide amongst multiple sentencing options in order to craft a sentence "that is sufficient, but no greater than necessary, to promote justice and to maintain good order and discipline in the armed forces."¹²⁷ Given this, judicial discretion is a benefit to the system. Not discretion for the sake of discretion, but discretion that is exercised under reasonable guidance and established principles as a means to give the judge the freedom to navigate the individualized and adjudicatory process that still applies at courts-martial.¹²⁸ In essence, we should not cower in fear of judging; instead, we should use it to help refine and shape the system.

To that end, the ranges cannot be so narrow that they are unworkable. The more restrictive the ranges, the less space the military judge has to craft an

¹²⁵ See 2024 MCM, *supra* note 40, R.C.M. 1002.

¹²⁶ See 10 U.S.C. § 856 (2021); *see also* 2024 MCM, *supra* note 39, R.C.M. 1001.

¹²⁷ 2024 MCM, *supra* note 40, R.C.M. 1002(c).

¹²⁸ See, e.g., *United States v. Ballard*, 20 M.J. 282, 286 (C.M.A. 1985) ("We are, of course, well aware that the experienced and professional military lawyers who find themselves appointed as trial judges and judges on the courts of military review have a solid feel for the range of punishments typically meted out in courts-martial.").

appropriate sentence. In those circumstances, the military judge is more apt to sentence outside of the range than within it. The range becomes the exception instead of the norm, which is contrary to the aim of increasing uniformity and predictability in sentencing. When crafting its guidelines, the D.C. Commission believed that the broad ranges would have a “corralling” effect that would eventually bring the sentences into a more refined group.¹²⁹ However, an overly restrictive range could cause a stampede.

Moreover, whenever the actual sentence (or sentencing range) for an offense is known beforehand, the government’s ability to influence sentencing and plea bargaining is increased because the government controls what offenses to bring to trial. Prior to the NDAA, sentencing in the military was not directly coupled to the offense, but to the circumstances surrounding the offense and the accused. The terms of the plea agreement were predominantly set at the local level to reflect local practice and expectations. Under the NDAA, ranges that drastically diverge from the historical practice may have unintended consequences by placing the parties in a significantly worse position than existed prior to the use of parameters. Additionally, an overly restrictive confinement range—not descriptive of existing practice—may exacerbate the government’s influence and have an inadvertent, deleterious effect on plea agreements.

The ranges reflect the collective input and judgment from stakeholders and practitioners in the field¹³⁰ and a good-faith effort to approximate current practice given limited and imperfect sentencing data. Lastly, and more importantly, sentencing parameters and criteria are meant to evolve as the practice develops.¹³¹ The Military Sentencing Parameters and Criteria Board is a standing board with the requirement to evaluate the changes and to make recommendations on future modifications to the parameters. There was wisdom in the MJRG’s proposal to establish parameters through a phased approach. The parameters recognize this wisdom. Foundations are being laid down now; the current parameters are the cornerstone of the new sentencing system.

G. Offense Category

Each designated parameter offense under the UCMJ (as distinct from a criteria offense) is given a corresponding offense category.¹³² The offenses are categorized by their seriousness, as determined by: their elements and definitions; the type of harm involved; the corresponding maximum punishments; limited

¹²⁹ D.C. ADVISORY COMMISSION REPORT, *supra* note 84, at 34–35.

¹³⁰ NDAA, *supra* note 6, § 539E(e)(4)(F)(vii) (“In fulfilling its duties . . . the Board shall consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system.”).

¹³¹ *Id.* § 539E(e)(4)(v)(I)-(II).

¹³² 2024 MCM, *supra* note 40, app. 12C.

historical record; the type of court-martial that the offenses would historically be tried in; collective input from current stakeholders and practitioners in the field; and, how the offenses compare with like offenses in the UCMJ and other criminal jurisdictions. In other words, the offenses were placed in the punishment range that was proportional to its severity. For example, possession of marijuana in violation of Article 112a, UCMJ, is a Category 1 offense. This offense—if prosecuted at a court-martial at all—is normally tried at a special court-martial, which is akin to the misdemeanor level in civilian jurisdictions, and is punished accordingly.

Category 1 Offenses. The sentencing range for Category 1 offenses mirrors the jurisdictional limits of a special court-martial and this category reflects the type of offenses that would normally be tried in this forum because of the nature of the offense (or the maximum authorized punishment is either at or less than the jurisdictional maximum).

Category 2 Offenses. Category 2 offenses are what some civilian jurisdictions label as “wobbler” offenses.¹³³ These are offenses that are either tried as a felony or a misdemeanor (at a general or special court-martial) depending on the circumstances surrounding the offense. For example, drug distribution in violation of Article 112a, UCMJ, is a Category 2 offense that encompasses conduct ranging from a sailor giving his shipmates ecstasy pills one night during a party to the soldier selling pills on multiple occasions for profit. Both acts fit the statutory definition of drug distribution, but they range in severity of conduct. These offenses could be separated by commonly occurring offense characteristics that go beyond the statutory elements, as done by the Federal Guidelines—for example, the amount of drugs distributed.¹³⁴ However, as noted above, without the appropriate data, this precise gradation cannot presently be done in a reliable, non-prescriptive manner with meaningful specificity.

Category 3 Offenses. Category 3 offenses are clear felony-level offenses that cannot be appropriately classified as “wobbler” offenses. The gravity of the offenses is demonstrated by the aforementioned factors, such as the elements and definitions, the resulting harm, a comparison to similar crimes, and the maximum punishments. For example, aggravated arson in violation of Article 126, UCMJ, a Category 3 offense, involves a willful and malicious act of setting fire to a dwelling or structure that was occupied by a person.¹³⁵ The mens rea (“willful and malicious”) and the potential or actual harm resulting from this crime (harm to a person and harm to a person’s “home”) adds a particular weight to the offense. Further, a review of the maximum punishment of 25 years for aggravated arson

¹³³ See, e.g., *Davis v. Municipal Court*, 46 Cal. 3d 64 (Cal. 1988).

¹³⁴ See FEDERAL GUIDELINES, *supra* note 64, § 2D1.1.

¹³⁵ 10 U.S.C. § 926 (2019).

and a comparison with the offense of simple arson adds support to how aggravated arson should be categorized.

Category 4 and 5 Offenses. Category 4 and 5 offenses represent a continued gradation using the aforementioned factors and are reserved for what is commonly believed to be the most egregious felony offenses or offenses that have been historically labeled as *malum in se*. Category 4 consists of only five offenses: solicitation of espionage; voluntary manslaughter; rape; sexual assault of a child; and production of child pornography. Category 5 consists of only four offenses: spying, espionage, rape of a child, and murder.

Category 6 Offenses. There are only two Category 6 offenses: premeditated murder and felony-murder. Both offenses have a mandatory minimum life sentence, which can be either with or without the eligibility for parole. The parameter for a Category 6 offense is life with the eligibility for parole. Thus, if the military judge departs from the range and sentences the accused to life without the eligibility for parole, she must provide a written factual basis on the record for her departure.

H. Departures

As illustrated in the table above, the offense category establishes an upper and lower limit for confinement. The sentencing ranges were intended to “anchor[] the discretion of a military judge within a specified range, but allow[] the military judge to exercise discretion in deviating from the established parameter.”¹³⁶ The military judge must sentence an accused within the confinement range of the offense category.¹³⁷ However, the military judge may sentence the accused above or below the confinement range if the record warrants such a departure and she outlines her factual basis for the departure in a written statement.¹³⁸ Neither the NDAA nor the EO provides a definition on what constitutes a factual basis for a departure from the range. The law only requires that the military judge “find specific facts that warrant a sentence outside the applicable parameter” and place a written statement outlining her factual basis on the record.¹³⁹

This general guidance is contrary to the Federal Guidelines, which state that the judge may depart from the guideline if there exists “an aggravating or mitigating circumstance of a kind, or to a degree, **not adequately taken into consideration** by the Sentencing Commission in formulating the guidelines that

¹³⁶ MJRG REPORT, *supra* note 3, at 513.

¹³⁷ 10 U.S.C. § 856(c)(2)(A).

¹³⁸ 10 U.S.C. § 856(c)(2)(B).

¹³⁹ *Id.*; see also 2024 MCM, *supra* note 39, R.C.M. 1002.

should result in a sentence different from that described.”¹⁴⁰ To assist the judge, the Federal Guidelines lists prohibited factors that a judge may never consider—for example, race, religion, or nationality¹⁴¹—as well as encouraged and discouraged factors for departure.¹⁴² According to the Sentencing Commission, each guideline carves out a “heartland” that represents a set of typical cases for that offense.¹⁴³ Thus, “when a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether departure is warranted.”¹⁴⁴ Under the Federal Guidelines, the most appropriate use of offense and offender characteristics of a kind that a judge would normally see in a presentencing report is not as a basis for departure but as a basis for other finding such as determining a sentence within the range.¹⁴⁵

The D.C. Guidelines take a similar approach toward departures. The D.C. Guidelines were designed with “broad ranges with the typical conduct for the offense in mind.” Therefore, departures are reserved for atypical cases wherein the judge finds a “substantial and compelling” basis to depart.¹⁴⁶ Unlike the Federal Guidelines, the D.C. Guidelines were not required by statute to delineate which factors were “encouraged” or “discouraged”. Instead, the D.C. Guidelines include a non-exclusive list of aggravating and mitigating factors that the judge may use as reasons for a departure. If the judge finds an enumerated factor is present in the case, and is substantial and compelling, the judge may depart from the range of punishment and must place the reasons for departure on the record.¹⁴⁷

Neither the NDAA nor the *Manual for Courts-Martial (MCM)* place requirements and restrictions on the military judge’s authority to depart from the sentencing parameter. In that respect, the military’s parameter system is distinguishable from civilian systems.¹⁴⁸ Furthermore, as noted above, the NDAA neither limits departures to facts that fall outside of the “heartland” of cases nor enumerates a set of encouraged or discouraged factors.¹⁴⁹ Instead, the NDAA and the MCM have essentially left it to the military judge’s discretion to determine

¹⁴⁰ 18 U.S.C. § 3553(b)(1) (emphasis added).

¹⁴¹ See FEDERAL GUIDELINES, *supra* note 64, § 5H1.10

¹⁴² See *Koon v. United States*, 518 U.S. 81, 95–96 (1996).

¹⁴³ See FEDERAL GUIDELINES, *supra* note 64, § 1A4(b); see also *Koon*, 518 U.S. at 98 (1996).

¹⁴⁴ See FEDERAL GUIDELINES, *supra* note 64, § 1A.

¹⁴⁵ See FEDERAL GUIDELINES, *supra* note 64, § 5.h (introductory comments).

¹⁴⁶ D.C. GUIDELINES, *supra* note 206, at 32.

¹⁴⁷ *Id.*

¹⁴⁸ *Cf.* *United States v. Booker*, 543 U.S. 220, 234 (2005). In *Booker*, the Supreme Court held that the Federal Guidelines were unconstitutional under the Sixth Amendment’s right to a jury trial. The Court based its holding in part on the fact that the judge’s discretion to depart from the range was severely limited by the guidelines. Conversely, under the sentencing parameter system, there are no similar limits placed on the military judge’s discretion.

¹⁴⁹ See *Koon*, 518 U.S. at 95–96.

what factors warrant a departure. Nonetheless, there are practical reasons to limit the use of departures. First, the NDAA requires that the parameters delineate a range for “a typical violation of the offense.”¹⁵⁰ Thus, consistent with the terms of the NDAA, departures should be reserved for atypical cases. Second, the ranges are sufficiently broad enough to allow the military judge to weigh the relevant extenuating, mitigating, and aggravating evidence and fashion an appropriate sentence to confinement that is within the parameters, while considering the other punishments that may accompany such a sentence.

The Military Judge’s Benchbook (Benchbook) provides a non-exhaustive and illustrative list of types of aggravating, extenuating, and mitigating factors that a judge may consider when determining if a departure is warranted.¹⁵¹ The list is non-binding and the Benchbook clearly notes that a military judge “may instead articulate other specific facts that aggravate, extenuate, or mitigate the seriousness of the offense or the accused’s culpability.”¹⁵² Conversely, the Benchbook notes—consistent with the NDAA’s requirement—that the parameters outline the “typical conduct for the offense in mind.”¹⁵³ As such, the mere existence of a listed factor in a typical case does not automatically trigger a departure from the range. Indeed, relevant sentencing evidence¹⁵⁴ plays a crucial role in the military judge’s sentencing decision, but in most cases, that role should normally be played out within the boundaries of the applicable range.

Moreover, a major critique of a sentencing scheme that permits departures based on real offense characteristics is that an accused may be sentenced based on facts not proved at trial or admitted to in the plea inquiry. However, in the military this has been historically the case for both military judge and member sentencing under Rule for Courts-Martial (RCM) 1001. But the difference is that in the military there are measures that ensure reliability and alleviate due process concerns. First, sentencing evidence in support of a departure, as with all sentencing evidence, must comport with the requirements of RCM 1001 and the Military Rules of Evidence. For instance, to be admissible, the evidence must be relevant and its probative value may not be substantially outweighed by the danger of unfair prejudice.¹⁵⁵ Further, RCM 1001 limits aggravating evidence to “aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty”¹⁵⁶ and victim impact evidence “directly relating to or arising from the offense of which

¹⁵⁰ NDAA, *supra* note 6, § 539E(e)(2)(A).

¹⁵¹ BENCHBOOK, *supra* note 12, app. J.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See 2024 MCM, *supra* note 40, R.C.M. 1001.

¹⁵⁵ *Id.* M.R.E. 401; see also *id.* M.R.E. 403.

¹⁵⁶ See *id.* R.C.M. 1001(b)(4).

the accused has been found guilty.”¹⁵⁷ However, the definition of extenuating and mitigating evidence is relatively broad.

I. Multiple Offenses

In cases involving more than one offense, the military judge is required to sentence the accused for each offense within the applicable parameter.¹⁵⁸ This is distinct from the Federal Guidelines process of grouping together common offenses into a single offense with one offense level.¹⁵⁹ The military’s sentencing parameter system does not incorporate grouping; however, the rules concerning concurrent and consecutive terms of confinement and the legal concept of unreasonable multiplication of charges for sentencing provide equitable solutions similar to that of civilian systems.

1. Concurrent versus Consecutive Sentences

Pursuant to Article 56, UCMJ, if the accused is sentenced to confinement for more than one offense, the military judge must state whether the terms of confinement are to run consecutively or concurrently.¹⁶⁰ Prior to the EO, RCM 1002 included language that dictated when sentences must run consecutively.¹⁶¹ However, this language has been omitted from the current rule.¹⁶² Despite this, the omitted language from the prior rule provides useful guidance: namely, it required concurrent sentences for specifications involving the same victim and the same transaction, or when the charges or specifications were unreasonably multiplied.¹⁶³ In other words, it provided reasons to “group” offenses.

Under the current RCM 1002, except in cases involving plea agreements that mandate a consecutive or concurrent sentence, the decision to impose such terms of confinement is left to the military judge.¹⁶⁴ Furthermore, because a sentencing parameter is based on the specific offense, it is more appropriate to decide the terms of confinement—to include whether a departure is justified—for each offense before the decision to run the confinement concurrently or consecutively is made. For instance, after considering the sentencing case, the military judge may find that no confinement should be awarded for one offense,

¹⁵⁷ See *id.* R.C.M. 1001(c)(2)(B).

¹⁵⁸ See *id.* R.C.M. 1002(a)(2)(B) (“When an offense is subject to sentencing parameters, the military judge shall sentence the accused for that offense within the applicable parameter.”).

¹⁵⁹ See FEDERAL GUIDELINES, *supra* note 64, § 3D1.2.

¹⁶⁰ 10 U.S.C. § 856(c)(4).

¹⁶¹ See 2019 MCM, *supra* note 11, R.C.M. 1002(d)(2)(B).

¹⁶² See 2024 MCM, *supra* note 40, R.C.M. 1002(d).

¹⁶³ See 2019 MCM, *supra* note 11, R.C.M. 1002(d)(2)(B).

¹⁶⁴ 2024 MCM, *supra* note 40, R.C.M. 705(c)(2)(F).

either as a sentence within the range¹⁶⁵ or a departure.¹⁶⁶ Given this, it would be unnecessary to assess whether the terms should run concurrently. Moreover, factors that are relevant in determining concurrent or consecutive terms may not be relevant to a determination regarding range or departure. For instance, whether the offenses involved the same victim or were unreasonably multiplied do not seem to be reasons to depart from the category range for that specific offense, but rather reasons to group the offenses together for sentencing.

2. Unreasonable Multiplication of Charges for Sentencing

The doctrine of unreasonable multiplication of charges (UMC) for sentencing provides an additional method in which offenses can be ‘grouped.’ UMC is a rule that is intended to countermand the “potential for overreaching in the exercise of prosecutorial discretion” and to prevent an exaggeration of the accused’s criminality.¹⁶⁷ To determine if multiple offenses constitute an unreasonable multiplication of charges for sentencing, the military judge must conduct an analysis of the facts using the factors outlined in *United States v. Quiroz*.¹⁶⁸ Under the previous RCM 1002, in a military judge alone sentencing hearing where the military judge finds that UMC for sentencing applies, the remedy is to run the terms of confinement concurrently.¹⁶⁹ This provision was omitted from the current RCM 1002. Nonetheless, concurrent sentencing is still a justified way for the military judge to remedy UMC for sentencing.

3. Plea Agreements and Parameters

The military judge is required to sentence the accused per the terms of a plea agreement, regardless of whether the terms of confinement depart from the parameter range. But if the plea agreement does depart from the range, the military judge may reject the plea agreement if the sentence is plainly unreasonable.¹⁷⁰ Further, as noted earlier, plea agreements can now dictate the exact terms of the sentence that the military judge must award, thus leaving the military judge with no discretion.¹⁷¹ Add this non-discretionary framework to the fact that under a

¹⁶⁵ The range for category 1 offenses is 0 to 12 months. *Id.* app. 12B.

¹⁶⁶ The range for category 2 offenses is 1 to 36 months. *Id.*

¹⁶⁷ *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001); *see also* 2024 MCM, *supra* note 40, R.C.M. 307(c)(4).

¹⁶⁸ *Quiroz*, 55 M.J. at 338.

¹⁶⁹ *See* 2024 MCM, *supra* note 40, R.C.M. 1002(d)(2)(B)(iii). Further, under R.C.M. 906(b)(12)(B), the UMC remedy of merging the offenses into one offense for sentencing applies to members for sentencing and not military judge alone sentencing. *See also* *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012).

¹⁷⁰ *See* 2024 MCM, *supra* note 40, R.C.M. 1002(a)(3)(B).

¹⁷¹ Indeed, a military judge may still reject a plea agreement if the term of confinement departs from the parameter range and the military judge finds that the terms are plainly unreasonable. *See* 10 U.S.C. § 853a.

sentencing guideline or parameter scheme where the sentence or sentencing range is known in advance, the government can greatly influence the sentence by exercising its discretion on what offenses to charge. Thus, under the current law, discretion has moved away from military judges and toward the government, but with no corresponding limits to that discretion. Given this, it is important that the sentencing parameters are not applied in a manner that may lead to plea bargaining inequities.

J. Sentencing Criteria

Under the NDAA, criteria offenses have two requirements: (1) the nature of the offense is indeterminate and unsuitable for categorization, and (2) there is no similar Federal or District of Columbia offense.¹⁷² Although much space has been spent in this Article analyzing sentencing parameters, conceptually, the more interesting reform in the NDAA is sentencing criteria. They are interesting because they represent a class of offenses in which the military judge's discretion is not cabined by a range of punishment. Essentially, for criteria offense, the military judge maintains the wide discretion that she had pre-parameters.

However, in light of the call for greater uniformity and the desire to avoid inappropriate disparity, why is there an exception for cases that will undoubtedly lead to variability in sentencing? In other words, why is noise acceptable here? To answer this, we should first refer back to the MJRG Report. There, the MJRG noted that:

[s]ome military offenses are so varied in their nature that they escape any reasonable categorization. The effect of disobeying an order ranges from the trivial to the perilous, and this fact is reflected in the range of lawful punishment.¹⁷³

The first sentence echoes the sentiment expressed in the following NDAA language: "the nature of the offense is indeterminate and unsuitable for categorization." Namely, the circumstances of where the act could be committed and how it could be committed, viewed in the context of a dynamic military environment, are so varied that placing limitations on a military judge's discretion would undermine the purpose of sentencing. As noted in the MJRG Report: "Crimes committed in combat, for example, may severely aggravate an offense if the accused put the unit or mission at risk, or may mitigate an offense committed during or after intense operations."

¹⁷² NDAA, *supra* note 6.

¹⁷³ MJRG REPORT, *supra* note 3, at 512 (noting that Article 90, UCMJ—willful disobeying an order during a time of war—is a criteria offense; however, non-wartime Article 90, UCMJ, offenses and willfully disobeying an officer not in the time of war are parameter offenses).

The second criterion for a criteria offense is that there be no similar offense under Federal or D.C. law. To that end, there are several unique military offenses in the UCMJ that do not have a similar civilian counterpart—for example, mutiny, aiding the enemy, or improper use of a countersign.¹⁷⁴ Nevertheless, some of these unique military offenses can be fairly categorized, thus failing the first criterion. For example, a civilian is not criminally liable for failing to show up to work when required, but in the military, a service member can be charged under Article 86, UCMJ, for an unauthorized absence.¹⁷⁵ However, Article 86, UCMJ, offenses can be categorized by looking at both the charged offense and common practice. Specifically, the severity of the offense is increased by the length of the absence and the circumstances of how it ended: by apprehension or a voluntary return. It is through these distinctions—validated by some historical record—that the offense can be categorized.

Conversely, there are other unique military offenses that do not have these elemental distinctions and cannot be fairly categorized because the circumstances from which they arise are unknown and too varied. Offenses committed during a time of war or offenses that only become relevant when encountering combat situations come to mind.

¹⁷⁴ See 2024 MCM, *supra* note 40, app. 12D.

¹⁷⁵ 10 U.S.C. § 886 (1956).

The President approved the following criteria offenses:¹⁷⁶

UCMJ Article	Title
82	Solicitation to desert (in time of war)
83	Malingering (in time of war or in hostile fire pay zone)
85	Desertion (in time of war)
89	Striking, drawing, or lifting up a weapon or offering any violence to superior commissioned officer in execution of office (in time of war)
90	Willfully disobeying a lawful order of superior commissioned officer (in time of war)
94	Mutiny or sedition
95	Offenses by sentinel or lookout (in time of war or while receiving special pay under 37 U.S.C. 310)
98	Misconduct as prisoner
99	Misbehavior before the enemy
100	Subordinate compelling surrender
101	Improper use of countersign
102	Forcing a safeguard
103b	Aiding the enemy
108a	Captured or abandoned property (looting or pillaging)
110	Improper hazarding of vessel or aircraft (willfully and wrongfully)
133	Conduct unbecoming an officer
134	General article
134	Self-injury without intent to avoid service (in time of war or in a hostile fire pay zone)

As noted above, for criteria offenses, the military judge's discretion is not limited by the offense categories listed for parameter offenses. Instead, the military judge is provided with a set of sentencing criteria for each offense that she must consider when deciding an appropriate sentence.¹⁷⁷ These sentencing criteria used by the military judge are in addition to the factors outlined in R.C.M. 1001 and the relevant evidence that is presented during a presentencing hearing.¹⁷⁸

¹⁷⁶ See 2024 MCM, *supra* note 40, app. 12D.

¹⁷⁷ *Id.*

¹⁷⁸ See 2024 MCM, *supra* note 40, R.C.M. 1001.

V. CONCLUSION.

The implementation of sentencing parameters and criteria is but one of the numerous changes that have been made to the military justice system in recent history. Indeed, change can be noisy. But the hope is that each change will further instill trust and confidence in the system. In this endeavor, it is up to military justice practitioners to find the signal from the noise.

HARDY TARS AND TALL MARINES: SERVICE MEMBER ARMED GUARDS IN THE STRAIT OF HORMUZ

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*“Guard them well, admirals and captains, hardy tars and tall marines;
guard them well and guide them true.”¹*

I. INTRODUCTION

At 0100 on July 5, 2023, an Iranian vessel approached the TRF MOSS, a civilian oil/chemical tanker sailing in the Gulf of Oman under the flag of the Marshall Islands.² TRF MOSS had just transited the Strait of Hormuz (SOH) and was bound for the Arabian Sea.³ A U.S. warship, sailing nearby, intervened and the Iranian vessel fled.⁴ Hours later, the Iranian warship IRINS BAYANDOR (81) approached the Bahamian-flagged crude oil tanker RICHMOND VOYAGER near Muscat, Oman.⁵ RICHMOND VOYAGER was heading

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¹ WINSTON S. CHURCHILL, *THE WORLD CRISIS: 1911–1914* at 132 (2007) (Winston Churchill, recalling his first impressions of the British Fleet. As First Lord of the Admiralty during World War I, Churchill drove the British strategy (and subsequently the American strategy) to arm merchant vessels with service member armed guard teams.).

² Lisa Barrington & Jonathan Saul, *U.S. Navy Says it Prevented Iran from Seizing Tankers in Gulf of Oman*, REUTERS (Jul. 6, 2023, 4:11 AM), <https://reut.rs/4fjbLfR>.

³ *Malbec Legacy*, MARINE TRAFFIC, <https://bit.ly/4c20o9a>; see also Oren Liebermann, *US Navy Intervened to Stop Iran Seizing Two Tankers in Gulf of Oman*, US Defense Official Says, CNN (Jul. 5, 2023, 4:10 PM), <https://bit.ly/3Ym5euD>.

⁴ U.S. Naval Forces Cent. Command Public Affairs, *U.S. Prevents Iran from Seizing Two Merchant Tankers in Gulf of Oman*, U.S. NAVY (July 5, 2023), <https://bit.ly/4dkPpsm> [hereinafter *Tankers in Gulf of Oman*] (“Additionally, the U.S. Navy deployed surveillance assets, including MQ-9 Reaper and P-8 Poseidon maritime patrol aircraft.”).

⁵ *Id.*; see also Sam LaGrone, *Iranian Navy Says they had Court Order to Seize Tanker Richmond Voyager*, USNI NEWS (Jul. 6, 2023, 5:46 PM), <https://bit.ly/3y4gJfS>.

towards the SOH when the Iranians ordered her to stop and attempted to board.⁶ The tanker refused boarding, and the Iranian warship fired “multiple, long bursts from both small arms and crew-served weapons” at the civilian vessel.⁷ The U.S. warship again arrived on the scene, and the Iranians dispersed.⁸ These incidents are dramatic, but not uncommon.⁹

Vessel harassment in the SOH is a persistent problem, made worse on April 19, 2019, when the U.S. Secretary of State designated the Islamic Revolutionary Guard Corps (IRGC) a Foreign Terrorist Organization (FTO).¹⁰ The United States had never before given such a designation to part of another state’s government, and increased harassment in the SOH was Iran’s way of retaliating.¹¹

The SOH, which connects the Arabian Gulf to the Gulf of Oman, is frequently referred to as “the world’s most important oil chokepoint.”¹² Up to 21 million barrels of oil pass through per day, in addition to large quantities of merchant cargo and liquid natural gas.¹³ The SOH is both economically significant and legally complex.¹⁴ It is home to disputes over territorial seas, the applicability of United Nations Convention on the Law of the Sea (UNCLOS), and the rights of U.S. vessels transiting the strait.¹⁵

⁶ LaGrone, *supra* note 5.

⁷ *Tankers in Gulf of Oman*, *supra* note 4.

⁸ LaGrone, *supra* note 5 (Iran originally denied the attempted seizure, but after U.S. Fifth Fleet released video of the incident, Iranian search and rescue services asserted that RICHMOND VOYAGER had previously “collided with an Iranian vessel injuring five crew members. . . .” Iran claimed to have “acted under a court order” to seize RICHMOND VOYAGER.).

⁹ *Id.* (noting since 2021, Iranian forces have harassed, attacked, or seized twenty non-Iranian flagged ships).

¹⁰ *Foreign Terrorist Organizations: Bureau of Counterterrorism*, U.S. DEP’T STATE, <https://bit.ly/3WGskeo>; see also Michael R. Pompeo, U.S. Sec’y of State, Remarks to the Press, Secretary Pompeo Announces Intent to Designate IRGC as a Foreign Terrorist Organization (Apr. 8, 2019).

¹¹ Pompeo, *supra* note 10; see also CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN, Dec. 3, 1979 (amended 1989) (providing for two military forces: the Islamic Republic of Iran Regular Forces [Artesh] and the IRGC); *Iran*, WORLD FACTBOOK, <https://bit.ly/4d5kZLm>; Natasha Turak, ‘They Want to Hit Where it Hurts’: Here’s Why Iran Could Want to Attack Foreign Tankers, CNBC (Jun. 20, 2019, 3:12 AM), <https://cnb.cx/3WHbcVG>; Samuel Granados, *The Strait of Hormuz: Tensions Rise in the World’s Most Strategic Oil Chokepoint*, REUTERS (Jul. 19, 2019), <https://reut.rs/3YIHC8>.

¹² *The Strait of Hormuz is the World’s Most Important Oil Transit Chokepoint*, U.S. ENERGY INFO. ADMIN.: Today in Energy (Nov. 21, 2023), <https://bit.ly/4fkk3nH>.

¹³ *Id.*

¹⁴ See generally James Kraska, *Legal Vortex in the Strait of Hormuz*, 54 VA. J. INT’L. L. 323 (2014).

¹⁵ U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, 34 [hereinafter UNCLOS]; see also Kraska, *supra* note 14, at 327–29 (discussing the disagreement between Iran and the United States on the proper mode of transit in the Strait of Hormuz—Iran argues that

In May and June 2019, Iran attacked “[s]ix oil tankers and a United States spy drone” transiting the SOH.¹⁶ The U.S. response was restrained, with the U.S. Central Command (CENTCOM) Commander describing the situation as “not a United States problem”¹⁷ The United States would only provide “reconnaissance and other special tools” for “maritime domain awareness.”¹⁸ However, when Iran seized a British-flagged oil tanker less than a week later, the United States escorted a U.S.-flagged merchant through the SOH with fighter jets and drones.¹⁹ The United States also stationed two warships at the ends of the strait to conduct surveillance.²⁰ By July 19, 2019, CENTCOM announced “Operation Sentinel,” a “U.S.-led” initiative to “increase surveillance” of the area and “ensure freedom of navigation” through the Strait.²¹ They continued to escort some U.S. vessels during transit, and in October of the same year embarked a limited number of armed escort teams for security.²²

By 2020, incidents in the strait declined in frequency, but the lull was short-lived.²³ In early 2021, the IRGC conducted “unsafe and unprofessional maneuvers” near U.S. warships in or near the SOH.²⁴ Throughout 2021 and 2022 the IRGC “harassed, attacked or interfered with the navigational rights” of at least 15 merchant vessels with varying flag states transiting the SOH.²⁵ In April

because the United States is not a signatory to UNCLOS, the United States is only entitled to “nonsuspendable innocent passage through those parts of the Strait of Hormuz overlapped by its three nautical mile territorial sea”).

¹⁶ Weiyei Cai et al., *Three Attacks in the World’s Oil Chokepoint*, N.Y. TIMES (Jun. 21, 2019), <https://nyti.ms/4dkIVK9>.

¹⁷ David Ignatius, *The U.S. is Trying to Let Iran Punch Itself Out*, WASH. POST (Jul. 16, 2019, 4:30 PM), <https://bit.ly/46sBC10>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; David Ignatius, *Why the United States is Playing Rope-a-Dope with Iran in the Persian Gulf*, WASH. POST (Jul. 20, 2019, 1:27 PM), <https://bit.ly/3CeGz2J> (“The United States expects that soon, nations whose ships transit the strait into the gulf will begin escorting them with their own warships, aided by U.S. surveillance and other intelligence and military support.”).

²¹ Patrick Reeve & Julia Macfarlane, *Iran’s Islamic Revolutionary Guard Corps Seizes British-flagged Liberian-flagged Tankers in Strait of Hormuz*, ABC NEWS (Jul. 20, 2019, 5:55 AM), <https://bit.ly/3YmjPqc> (“The initiative, according to CENTCOM, ‘will [missing word] nations to provide escorts to their flagged vessels while taking advantage of the cooperation of participating nations for coordination and enhanced maritime domain awareness and surveillance.’”).

²² Statement, U.S. Cent. Command, U.S. Central Command Statement on Operation Sentinel (Jul. 19, 2019), <https://bit.ly/3SsrMq2>; see also Dana Merkel, *New U.S. Effort in Strait of Hormuz Echoes Past Clashes with Iran*, USNI NEWS (Aug. 1, 2019, 4:04 PM), <https://bit.ly/46uPt6X>; Press Release, U.S. Cent. Command, U.S. Marines Embark Merchant Vessel to Provide Security During Strait of Hormuz Transit (Nov. 1, 2019), <https://bit.ly/3LVri32>.

²³ Eric Schmitt, *U.S. Vessel Fires Warning Shots at Iranian Patrol Boats*, N.Y. TIMES (May 10, 2021), <https://nyti.ms/3Ysm5Mr>.

²⁴ *Id.*

²⁵ Gidget Fuentes, *100 Marines, Sailors Ready to Ride Commercial Ships in Zone Defense Against Iran*, USNI NEWS (Aug. 11, 2023, 7:20 PM), <https://bit.ly/4fJfEj>.

2023, Iranian forces seized two oil tankers in less than a week.²⁶ This harassment trend continued its climb, and the summer of 2023 produced a large number of distress calls from civilian merchant vessels transiting the strait.²⁷ In response, in August 2023, 100 U.S. Marines were sent to Bahrain to comprise defense teams intended to “travel briefly with commercial ships through and near the Strait of Hormuz. . . .”²⁸ These U.S. Marine armed guards were not intended solely to provide protection for U.S.-flagged vessels, but for *foreign-flagged* vessels as well.²⁹

Merchant traffic defense is not a new concern—in fact, for as long as they have been used to move goods, merchant vessels have been in danger from enemy forces during times of conflict, or the ongoing scourge of piracy.³⁰ To protect its merchants, the United States historically used two defensive tactics: armed guards and convoy.³¹ The armed guards operate in teams, composed of members of the U.S. military, and are stationed aboard U.S. commercial vessels to protect them from seaborne attack.³² In a convoy, merchant vessels are shepherded across dangerous waters, typically in groups, flanked by U.S. warships for protection.³³

The first vessel protection strategy used by the United States was convoy.³⁴ Although some of the vessels carried defensive arms, those arms were

²⁶ Heather Mongilio, *VIDEO: Iran Seizes Second Oil Tanker in Less than a Week*, USNI (May 3, 2023, 1:14 PM), <https://bit.ly/3WNggyV>.

²⁷ Lolita C. Baldor & Jon Gambrell, *U.S. Military May Put Armed Troops on Commercial Ships in Strait of Hormuz to Stop Iran Seizures*, A.P. NEWS (Aug. 4, 2023, 9:52 AM), <https://bit.ly/4d8qqqC>.

²⁸ Alison Bath, *U.S. Marines Already Training to Escort Civilian Tankers in Bid to Blunt Iranian Interference*, STARS & STRIPES (Aug. 4, 2023), <https://bit.ly/46w14E0>.

²⁹ Fuentes, *supra* note 25.

³⁰ Representation of the Philadelphia Chamber of Commerce, 8th Cong. 2–6 (1804) (statement of Thomas Fitzsimmons, President) [hereinafter Fitzsimmons] (Mr. Fitzsimmons, writing to the U.S. House of Representatives, described the dangers faced by merchant vessels in 1804.).

³¹ Robert W. Tucker, *Law of War and Neutrality at Sea*, 50 INT’L L. STUD. 334 (1957).

³² Amal Sethi, *Vessel Protection Detachments and the Search for Immunity*, 8 L. REV. GOV’T L. COLL. 1, 2 (2014). Private security teams are also an available defensive measure. However, this paper will only address those armed guard teams comprised of members of the U.S. military. *See also Naval Armed Guard Service in World War II*, NAVAL HIST. & HERITAGE COMMAND (Jun. 1, 2022), <https://bit.ly/3AcNjwr>; Marco Odello, *The Enrica Lexie Incident and the Status of Anti-Piracy Security Personnel on Board*, 26 J. CONFLICT & SEC. L., 559 (2021).

³³ ROGER KNIGHT, *CONVOYS: THE BRITISH STRUGGLE AGAINST NAPOLEONIC EUROPE AND AMERICA* 6 (2022) (“Convoys were, and are, temporary gatherings of ships voyaging between friendly ports, keeping together to be protected by escorting warships.”).

³⁴ An Act to Provide an Additional Armament for the Further Protection of the Trade of the United States, and for other Purposes, 1 Stat. 553 (1798) [hereinafter 5th Congress] (“That the President of the United States shall be, and he is hereby authorized and empowered, to cause to be built, purchased, or hired, a number of vessels, not exceeding twelve, nor carrying more than twenty-two guns each, to be armed, fitted out and manned under his direction.”).

operated by civilian crews and not members of the military.³⁵ World War I brought armed guard teams aboard U.S.-flagged merchant vessels, and in World War II the practice expanded.³⁶ However, in the years following World War II, the United States tended to employ armed guards sparingly, relying primarily upon convoy for merchant defense.³⁷

In 2023, Iranian harassment of commercial merchant vessels in the SOH included boarding, attempts to board, and threats to seize cargo.³⁸ Moving beyond an escort and intelligence role, the United States proposed to again employ service member armed guard teams aboard merchant vessels.³⁹ Although the strategy is not novel, when used previously these armed teams raised two primary concerns: 1) the chain of command, and 2) the potential for increased risk of hostility.⁴⁰ The 2023 proposal adds a third concern: criminal liability.

This paper will walk through previous uses of armed guard teams by both the United States and the British, identifying ways in which the chain of command and hostility risk were addressed. It will then explore a 2020 International Tribunal for the Law of the Sea (ITLOS) case involving the Italian vessel ENRICA LEXIE, which centered around the question of criminal liability for service member armed guards.⁴¹ After applying lessons derived from both historical usage and the ENRICA LEXIE incident, it is clear that the 2023 plan to station U.S. service member armed guards aboard foreign-flagged civilian merchant vessels puts those service members at risk for prosecution in foreign criminal courts, and deprives them of the immunity to which they would otherwise be entitled while performing their official duties.

³⁵ Fitzsimmons, *supra* note 30.

³⁶ RODNEY CARLISLE, SOVEREIGNTY AT SEA: U.S. MERCHANT SHIPS AND AMERICAN ENTRY INTO WORLD WAR I (2009); HEADQUARTERS OF THE COMMANDER IN CHIEF, UNITED STATES FLEET, WARTIME INSTRUCTIONS FOR UNITED STATES MERCHANT VESSELS (1942) [hereinafter WARTIME INSTRUCTIONS].

³⁷ Reeve & Macfarlane, *supra* note 21.

³⁸ Bath, *supra* note 28.

³⁹ *Id.*

⁴⁰ *To Alexander Hamilton from James McHenry*, 12 May 1798, FOUNDERS ONLINE, NAT'L ARCHIVES n. 2, <https://bit.ly/3SCOH3> (after the passage of “[a]n Act to provide an additional Armament for the further protection of the trade of the United States; and for other purposes” the Secretary of War, James McHenry, asked Alexander Hamilton for help in crafting instructions regarding the vessels and their use of force, to avoid pulling the country into war unintentionally); *see also* CARLISLE, *supra* note 36, at 99–100 (President Woodrow Wilson disagreed with Naval officers regarding armed guard abilities to protect merchants at sea); *Arming Merchant Vessels: Hearings before the H. Comm. on Foreign Aff.*, 77th Cong. 47 (1941) (statement of John F. Finerty, Keep America Out of War Congress and the National Council for Prevention of War); *id.* (Representative Frances P. Bolton, in considering the proposal to arm merchant vessels ahead of World War II, asked “[i]f a ship is armed and has a civilian captain and a naval officer is in charge of the gun crew, who is the superior officer?”).

⁴¹ *See generally* “Enrica Lexie” Incident (It. v. India), Case No. 2015-28, Award, (Perm. Ct. Arb. 2020).

II. HISTORICAL BACKGROUND

To better understand these legal risks, we must first examine the ways in which the United States has protected merchant traffic during prior conflicts. From the American Revolution through 2019, each use has differed slightly, modified based upon legal concerns and changing technology.

A. *Revolutionary War*

Prior to the American Revolution, piracy was the primary threat to merchant vessels.⁴² So pervasive was the danger, that some colonial merchants refused to set sail “until a sufficient number was ready to justify the sending of the ships of war” for a convoy.⁴³ Although some were also armed with cannon for self-defense, they were operated by the ship’s crew and not by members of the military.⁴⁴

Following the Revolution, the pirate threat did not abate.⁴⁵ Logically, the new country used many of the same strategies as the British—arming merchant vessels with cannon and sending them via convoy.⁴⁶ On April 27, 1798, President John Adams signed “An Act to provide an additional Armament for the further protection of the trade of the United States; and for other purposes” which permitted the president to build vessels not “carrying more than twenty-two guns each” for the defense of American merchant traffic.⁴⁷ Underscoring the primacy of the pirate concern to the United States, at the time of the bill’s passage

⁴² PERCY SCOTT FLIPPIN, *ROYAL GOVERNMENT IN VIRGINIA, 1624–1775* at 324, 329 (1919) (“Pirates were very numerous from 1660 to about 1730 on the Atlantic Coast and in the West Indies, and the Carolina coast was one of their favorite hiding-places.”). While not in place at the time of the American Revolution, for the sake of context, UNCLOS defines piracy as:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

UNCLOS, *supra* note 15, art. 101.

⁴³ FLIPPIN, *supra* note 42, at 329.

⁴⁴ *Id.*

⁴⁵ *Letter from James McHenry to John Adams, May 18, 1798*, NAT. ARCHIVES: FOUNDERS ONLINE [hereinafter McHenry letter], <https://bit.ly/4ftmX9L>.

⁴⁶ 5th Congress, *supra* note 34.

⁴⁷ *Id.*

Secretary of War James McHenry required clarification on whether these new armed vessels could also be used for warfare, or whether they were intended solely to defend merchants.⁴⁸

These merchant vessels were at risk in American coastal waters and while transiting abroad.⁴⁹ In his 1804 letter to the U.S. House of Representatives, the President of the Philadelphia Chamber of Commerce describes the prevailing view—that it was “absolutely necessary either to give public protection to that part of our commerce, or to suffer our merchants so to equip their ships as to be able to repress those depredations.”⁵⁰ Their vessels needed protection, whether by convoy or cannon.⁵¹

Another common threat was from privateers.⁵² Unlike pirates, who operated outside of (or in opposition to) the law, privateers were “privately-owned merchant ships that the government, in wartime, permitted to attack the enemy’s trade vessels.”⁵³ Issued “letters of marque” by the government, these privateers had the legal right “to seize vessels belonging to belligerent nations and to claim those vessels and their cargoes, or prizes, as spoils of war.”⁵⁴ Some U.S. merchants functioned as both—sailing as merchants, but attacking enemy shipping “when the opportunity arose.”⁵⁵ However, their letters of marque did not convert them from civilian merchants to members of the armed forces.⁵⁶

B. Civil War

Privateering did not decline until the mid-19th century, highlighted by the signing of the 1856 Declaration Respecting Maritime Laws in Paris.⁵⁷ Signed

⁴⁸ *Id.*; McHenry letter, *supra* note 45.

⁴⁹ *Special Message to Congress on the Wreck of the U.S.S. Philadelphia in Tripoli*, AM. PRESIDENCY PROJECT, <https://bit.ly/4d9jvzC> (Captain Bainbridge of the Frigate PHILADELPHIA describes an attack on a merchant from “an armed ship from the Emperor of Morocco”); *Capture of the Frigate USS Philadelphia 31 October 1803: Selected Naval Documents*, NAVAL HIST. & HERITAGE COMMAND, <https://bit.ly/4dvLgln>. Captain Bainbridge took the Moroccan ship as a prize and made way for Gibraltar. Unfortunately, on October 31, 1803, he ran PHILADELPHIA aground. He surrendered to the Tripolitans, and his own ship was then taken as a prize. *Id.*

⁵⁰ Fitzsimmons, *supra* note 30.

⁵¹ *Id.*

⁵² Jennifer González, *Pirates, Privateers, and Civil War Maritime Laws*, LIBR. OF CONG.: IN CUSTODIA LEGIS: LAW LIBRARIANS OF CONGRESS (May 28, 2020), <https://bit.ly/4cVuxZ4>.

⁵³ *Id.*

⁵⁴ Eric Jay Dolin, *American Rebels at Sea*, AM. HERITAGE, <https://bit.ly/4c2RTe7>.

⁵⁵ *Id.*

⁵⁶ *Id.*; see also Thomas Jefferson to William Duane, 4 August 1812, NAT. ARCHIVES: FOUNDERS ONLINE, <https://bit.ly/4eD1CtF> (President Jefferson describing the importance of the U.S. privateer system during the War of 1812, stating that the British “will annihilate our public force on the water, but our privateers will eat out the vitals of their commerce”).

⁵⁷ Declaration Respecting Maritime Law, Apr. 16, 1856, *reprinted in* 1 AM. J. INT’L L. 89 (Supp. 1907).

by Britain, Russia, France, Austria, Prussia, Sardinia-Piedmont, and the Ottoman Empire, the Declaration stated that “[p]rivateering is, and remains, abolished”⁵⁸ The United States was not a party.⁵⁹ This failure to support the abolition of privateering created a legal hurdle for the United States during the Civil War.⁶⁰

The Confederate States of America (C.S.A.) issued letters of marque to privateers, but because the United States did not recognize the C.S.A. to be a state, it subsequently refused to lend legal authority to the C.S.A.’s letters of marque.⁶¹ All merchants possessing C.S.A. letters of marque were to instead be treated as pirates.⁶² Privateers continued to threaten U.S. merchant traffic for the remainder of the war.⁶³

C. *World War I*

World War I marked a clear change in U.S. merchant vessel defense strategy, as civilian merchant vessels were defensively armed with both guns and service member armed guard teams.⁶⁴ This change began with the British, who in 1912 caught wind that Germany was planning to arm German merchant vessels, presumably in preparation for war.⁶⁵ The British fleet needed to adapt accordingly.⁶⁶ The First Sea Lord believed that “the Germans were arming their merchant ships, nominally for the protection of their own trade, but more

⁵⁸ *Id.*

⁵⁹ Jan Martin Lemnitzer, ‘*That Moral League of Nations Against the United States*’: *The Origins of the 1856 Declaration of Paris*, 35 INT’L HIST. REV., no. 5, 1068, 1070 (2013) (privateering was the Americans’ “main strategic weapon in case of war with Britain,” and they were hesitant to cede it).

⁶⁰ *Id.* (in fact, the United States attempted to belatedly join the Declaration, but “the Declaration was closed and it was too late for further accessions.”)

⁶¹ González, *supra* note 52.

⁶² *Id.*; see also *Proclamation 81—Declaring a Blockade of Ports in Rebellious States*, AM. PRESIDENCY PROJECT, <https://bit.ly/3YyS5Q> (President Abraham Lincoln stating, “if any person, under the pretended authority of the said States or under any other pretense, shall molest a vessel of the United States or the persons or cargo on board of her, such person will be held amenable to the laws of the United States for the prevention and punishment of piracy.”).

⁶³ *Declaration Respecting Maritime Law. Paris, 16 April 1856*, INT’L HUMAN. L. DATABASES, INT’L COMM. RED CROSS, <https://bit.ly/4fpwlpC> (showing that the United States never joined the Declaration).

⁶⁴ CARLISLE, *supra* note 36, at 93 (describing President Woodrow Wilson’s realization that he needed to arm merchant vessels).

⁶⁵ MATTHEW S. SELIGMANN, THE ROYAL NAVY AND THE GERMAN THREAT, 1901–1914: ADMIRALTY PLANS TO PROTECT BRITISH TRADE IN A WAR AGAINST GERMANY 157 (2012).

⁶⁶ *Id.* (as stated by Captain Richard Webb in 1913, “of ‘the 38 vessels reported to carry their armament on board’ at least twenty-one would make it to sea as commerce raiders and would need hunting down. Suitable British forces would need to be deployed in sufficient numbers to frustrate them.”).

probably in order to attack ours.”⁶⁷ The British therefore responded by arming their own merchant vessels.⁶⁸ Although already protected by “a system of cruiser patrols” that would “hunt for enemy raiders” in the Atlantic, they considered individual arms to be necessary as these cruisers could not provide an effective defense across such a large ocean.⁶⁹ The proposal was not “to turn British merchant vessels into warships,” but instead to “enable them to defend themselves from German auxiliary cruisers.”⁷⁰

Known as “defensively armed merchant ships” (DAMS), these vessels were outfitted with two 4.7-inch naval guns at their stern.⁷¹ The guns were placed at the stern, to emphasize that they were for solely for defense.⁷² Because civilian mariners were not gunners, trained members of the Royal Navy Reserve supplemented each civilian crew.⁷³

Understandably, some British commercial owners questioned whether these defensive arms would impact their legal status as non-belligerents.⁷⁴ The Crown Legal Office concurred with the Admiralty’s assessment that they “must be treated under existing rules as merchant vessels whether armed for self-defence or not.”⁷⁵ However, this was not the only legal concern when employing DAMs.

⁶⁷ *Id.* at 135–38 (describing the British as under the impression that Germany had armed commercial vessels and stationed members of the armed forces aboard, so that when the war began they could be converted into warships).

⁶⁸ *Id.* at 132 (“While in the eighteenth century cannons on merchantmen had been anything but rare, during the early years of the nineteenth century this practice had gradually diminished and, instead, the demarcation between unarmed civilian vessels and armed warships had become firmly established, in common usage if not in law.”).

⁶⁹ *Id.* at 136 (quoting Churchill as saying “I question . . . the policy of dotting the British cruisers at regular intervals along the trade routes. It is a waste of force. The intervals of 800 miles and more are so numerous, and the withdrawals of cruisers for coaling will be so frequent, that practically no protection will be afforded the individual ship.”).

⁷⁰ *Id.* at 138.

⁷¹ *Id.* at 132, 138 (explaining the Admiralty used 4.7-inch guns because they had 152 of them in storage at the time).

⁷² *Id.* at 138 (“[A]ll guns fitted to these ships were to be placed aft, ‘in a position where it is difficult to employ them *offensively*.’ They could only be used when in flight to return fire to a pursuing enemy.”).

⁷³ *Id.* at 142 (describing the challenge of recruiting these additional gun crews, with the British adding financial incentives and making gunnery training more convenient to attend).

⁷⁴ *Id.* at 149–50.

⁷⁵ SELIGMANN, *supra* note 65, at 147, 150–51 (noting that it was not a quick review—the Crown Legal Office took five months to conduct their analysis, completing it “two days after Britain’s entry into the First World War.” In addition, despite Germany’s role in starting this armed merchant race, the German Admiralty Staff referred to armed merchant ships as “an absurdity and a regrettable backward step in the development of international law,” and some German scholars thought that merchants should be treated as pirates if they fired their weapons offensively).

The British were unsure whether these merchant vessels would be permitted to pull into foreign ports, as some countries may prohibit bringing ammunition into their harbors.⁷⁶ To buy more time to work through this legal and diplomatic issue, DAMS were outfitted with guns, but not yet supplied with ammunition (a fact of which Germany was unaware).⁷⁷ Without ammunition, the vessels could transit between ports unimpeded, even if local laws would normally prevent armed merchants from docking.⁷⁸ Ammunition was then sent to foreign bases via warship, in preparation for a declaration of war.⁷⁹

Although these arms were intended to be defensive, offensive use was not immediately off the table.⁸⁰ First Lord of the Admiralty Winston Churchill bristled at a proposal to add additional cruisers to the British Fleet for “trade protection purposes,” viewing the DAMS to be “commissioned for police duty on the trade route,” and, if necessary, able to “hoist the Blue Ensign”—become warships—and take offensive action.⁸¹ Churchill’s view was problematic for a number of reasons, including that these ships carried only stern-mounted defensive weapons.⁸² On August 19, 1914, the British Ambassador sent the U.S. Secretary of State a note, stating that “British merchant vessels will never be used for purposes of attack; that they are merely peaceful traders and armed only for defense; that they will never fire unless fired upon; and that they will never

⁷⁶ *Id.* at 152; *see also id.* at 140 (“Nevertheless, in response the Foreign Office stated that it knew of no international treaty or usage that prevented a merchant vessel from mounting a gun, but thought it likely that there might be any number of local, municipal, or domestic regulations that restricted the right to carry so dangerous an item as live ammunition into a commercial harbor.”).

⁷⁷ *Id.* at 152–53 (“As no public declaration was ever made on the matter, the German naval authorities were left completely in the dark as to whether or not DAMS routinely carried munitions of war. The intelligence they received was conflicting. They were told by HAPAG that shells were not stored on board, but received from the German naval attaché in London information that they were; they did not know which report to believe.”).

⁷⁸ *Id.* (“If they asked questions about ammunition, a truthful answer could and would be given and, if necessary, backed up officially by Britain’s overseas representatives, but otherwise the matter would never be referred to.”).

⁷⁹ *Id.* at 153 (“Those DAMS that did not ply their trade exclusively within the Empire would then have somewhere to go for ammunition should war break out before arrangements were made with foreign harbour authorities.”).

⁸⁰ *Id.*

⁸¹ *Id.* at 158, 162 (“In July 1914, after receiving yet another request from his naval advisers to build more cruisers to hunt down German commerce raiders, Winston Churchill penned a strident note of refusal. ‘I can in no circumstances which I can now foresee,’ he fulminated, ‘consent to the provision of cruisers in excess of those needed to cover German warships simply for the purpose of meeting the menace of German armed merchantmen.’” He went so far as to assert that the “owners will be indemnified by the Government for all loss or damage to ship or cargo arising from acts of the enemy,”—an expensive proposition).

⁸² *Id.* at 159.

under any circumstances attack any vessel.”⁸³ This appeared to be the end of Churchill’s “Blue Ensign” plan for his DAMS.⁸⁴

Several of these defensive plans actually increased the risk of harm to merchant vessels—especially when it came to interactions with submarines.⁸⁵ Germany used submarine warfare heavily, and German submariners considered it “impractical” to verify a merchant vessel’s status using surface techniques, as surfacing would make them practically defenseless.⁸⁶ Although traditionally merchant vessels were not lawful objects of attack during war, they “could be stopped, visited, and searched in order to examine her papers and determine whether she was carrying contraband.”⁸⁷ By adding guns to merchant vessels, the British created confusion about whether they were harmless merchants or had been integrated “into the naval forces of the enemy.”⁸⁸ Further, the British also employed “Q-Ships,” vessels that appeared to be harmless merchants, “but were actually heavily armed warships employed to lure submarines to the surface and destroy them.”⁸⁹ With distinction muddled, Germany considered all to be a target and announced in February 1916 that “any Allied armed merchant ship,

⁸³ *London Naval Treaty, Article 22, and Submarines*, 30 INT’L L. STUD. 1, 11 (1930).

⁸⁴ *Id.* at 12 (The British Ambassador also urged the United States to adopt this view in a September 9, 1914 note: “if the United States Government take the view that British merchant vessels which are bona fide engaged in commerce and carry guns at the stern only are not permitted purely defensive armament, unavoidable injury may ensue to British interest and indirectly also to United States trade which will be deplorable.”).

⁸⁵ Sally V. Mallison & W. Thomas Mallison, *Naval Targeting: Lawful Objects of Attack*, 64 INT’L L. STUD. 241, 245 (1991).

⁸⁶ *Id.* (“The arming of British merchant ships, even though it was stated to be for ‘defensive purposes’ only, made it impractical for submarines to use traditional visit and search techniques.”); see also CARLISLE, *supra* note 36, at 27 (“Submarine hulls were unarmored, and one or two holes from a deck gun could easily send a U-boat to the bottom.”).

⁸⁷ Howard S. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*, in *The Law of Naval Warfare*, 70 INT’L L. STUD. 293, 298 (1998).

⁸⁸ *Id.*; see also Mallison, *supra* note 85, at 245 (“During the First World War the traditional doctrine that enemy merchant ships may not be the objects of direct attack was eroded because of the integration of such merchant ships into the naval forces of the enemy.”).

⁸⁹ Mallison, *supra* note 85, at 245. Q-Ships were

merchant ships rigged with concealed guns that would slowly steam through known U-boat cruising zones. When ordered to stop, a false ‘panic party’ would scramble into lifeboats, apparently abandoning ship. As the submarine approached to dispatch the vessel with gunfire, panels on the deck of the supposedly innocent and apparently abandoned merchant ship would be thrown down, the British fighting ensign raised, and the guns aboard the Q-ship, manned by sailors of the Royal Navy, would open up on the submarine, sometimes with success.

CARLISLE, *supra* note 36, at 26.

whether a liner or cargo ship, would be treated as a ship of war, and would be sunk without warning.”⁹⁰

One year later, on February 1, 1917, Germany announced that it was beginning “unrestricted submarine warfare.”⁹¹ Over the United States and Britain’s objections, Germany declared large swaths of the ocean to be zones where they would attack all vessels (even neutrals) that entered.⁹² Only two days after the announcement, a German submarine sank the U.S. merchant vessel HOUSATONIC.⁹³ Nine days later, they sank another: the LYMAN M. LAW.⁹⁴ These attacks impacted merchant crews, who were understandably “reluctant to commit themselves to crossing the Atlantic in the face of German attacks.”⁹⁵ To shore up merchant support, President Woodrow Wilson proposed the Armed Ship Bill, which mirrored the British DAMS plan and would give him the authority to put “guns and gun crews on private merchant ships” for their protection during these dangerous transits.⁹⁶ The bill failed, so he used his commander-in-chief authority to issue the order.⁹⁷ Not only were the vessels to be armed, but groups of U.S. Navy sailors were to be embarked, and “placed under the command of each vessel’s civilian master.”⁹⁸

In March of 1917, Germany sank three U.S. merchants in three days, pushing the United States toward a declaration of war.⁹⁹ By the time Congress could vote on the resolution, German submarines hit three more.¹⁰⁰ One of those ships, the AZTEC, was the first merchant vessel armed by the United States, and it had a 13-man gun crew of U.S. Navy sailors aboard.¹⁰¹

⁹⁰ CARLISLE, *supra* note 36, at 27 (“German U-boats approached British merchant ships very warily to determine if they carried weapons; if they showed weapons, the submarines attacked the armed merchant ship without warning.”).

⁹¹ Mallison, *supra* note 85, at 245.

⁹² *Id.* at 246.

⁹³ CARLISLE, *supra* note 36, at 74–78 (Despite the fact that Germany created the “unrestricted submarine warfare” policy because it viewed visit and board procedures to be impractical for a submarine, U-53 actually hailed and reviewed the papers of HOUSATONIC prior to her sinking. The boat’s captain told the ship’s captain “[y]ou are carrying foodstuffs to an enemy of my country, and though I am sorry, it is my duty to sink you.”).

⁹⁴ *Id.* at 82.

⁹⁵ *Id.* at 88.

⁹⁶ *Id.* at 90.

⁹⁷ James W. Harlow, *Soldiers at Sea: The Legal and Policy Implications of Using Military Security Teams to Combat Piracy*, 21 S. CAL. INTERDISC. L. J. 561, 591 (2011).

⁹⁸ *Id.*

⁹⁹ CARLISLE, *supra* note 36, at 106 (The three ships were the VIGILANCIA, CITY OF MEMPHIS, and ILLINOIS).

¹⁰⁰ *Id.* at 140 (The ships were the AZTEC, MARGUERITE, and MISSOURIAN).

¹⁰¹ *Id.* at 141 (“The fact that AZTEC was armed and was nevertheless sunk was not lost on members of Congress. Both those who favored the President’s call for a declaration of war and those who opposed it saw that the loss of the AZTEC demonstrated the futility of attempting to protect merchant ships by arming them.”).

D. World War II

At the dawn of World War II, protection of merchant vessels was again a concern for the United States.¹⁰² The Neutrality Act, passed in 1939, contained a provision that prevented merchant vessels from “employing defensive arms when a state of war existed between nations.”¹⁰³ Although the United States was not yet in World War II, this provision was concerning as war was clearly on the horizon.¹⁰⁴ In October of 1941, the House Committee on Foreign Affairs held hearings on the proposal for repeal.¹⁰⁵ Following heated debate, Congress repealed the requested provisions on November 17, 1941 and permitted the vessels to again be armed.¹⁰⁶ However, despite having the legal authority, the Navy did not have the manning to meet this new demand.¹⁰⁷ Armed guard schools were created to train military members of all backgrounds to augment merchant crews.¹⁰⁸ Learning a lesson from World War I, the United States made a key change to the plan for arming during World War II: military armed guard teams were designed to primarily report to military officers, as opposed to the merchant vessel’s civilian master.¹⁰⁹

In 1942 the Navy published the “Wartime Instructions for United States Merchant Vessels.”¹¹⁰ Paragraph 1902(d) of these instructions stated that “[t]he decision as to the range for opening or ceasing fire shall reside exclusively with the commander of the Armed Guard,” but paragraph 1803 stated that “[p]articipation in armed resistance must be confined to persons acting under

¹⁰² *Arming American Merchant Vessels: Hearing Before the H. Comm. on Foreign Aff.*, 77th Cong. 2–3 (1941) (statement of Cordell Hull, Sec. of State) [hereinafter Hull Statement] (asserting that the Neutrality Act of 1939 “makes it impossible for American merchant vessels to defend themselves on the high seas against danger from lawless forces seeking world domination” and the relevant provisions “are a handicap” that “render our merchant vessels defenseless and make them easier prey for twentieth century pirates”).

¹⁰³ Harlow, *supra* note 97, at 591.

¹⁰⁴ Hull Statement, *supra* note 102 (“The Hitler government is engaged in a progressive and widening assault carried out through unrestricted attacks by submarines, surface raiders, and aircraft at widely separated points. The intent of these attacks is to intimidate this country into weakening or abandoning the legitimate defenses of the hemisphere by retreating from the seas.”).

¹⁰⁵ *Id.*

¹⁰⁶ Quincy Wright, *Repeal of the Neutrality Act*, 36 AM. J. INT’L. L. 8 (1942) (“The repealed provisions had required transfer of title of all goods before export to belligerents and had prohibited American ships from being armed, from trading with belligerent ports, and from passing through combat areas proclaimed by the present.”).

¹⁰⁷ NAVAL HIST. & HERITAGE COMMAND, *supra* note 32.

¹⁰⁸ *Id.* (explaining the Armed Guard Schools were located “at Little Creek (later moved to Shelton) Virginia; San Diego, California; and Gulfport, Mississippi”); see also Beverly L. Britton, *Navy Stepchildren: The Armed Guard*, U.S. NAVAL INST. (1947), <https://bit.ly/3WGGMCZ>.

¹⁰⁹ Harlow, *supra* note 97, at 592.

¹¹⁰ WARTIME INSTRUCTIONS, *supra* note 36.

order of the master or officer in command of the Armed Guard.”¹¹¹ Further, Paragraph 3105, in defining the right to resist capture, mentions the master’s “definite right to use his defensive armaments.”¹¹² This opaque chain of command created the potential for issues if the master and the commander of the armed guard were not aligned.¹¹³ Alignment was a primary concern for the Navy, which considered “the ideal Armed Guard officer” to be “a tactful person who could look after the interests of his men and at the same time keep relations smooth between the Navy complement and the Master, officers and crew of the merchant ship.”¹¹⁴

Responding to the conditions that failed to protect the AZTEC in World War I, during World War II the United States did not restrict its protection of merchant vessels solely to armed crews—it also heavily utilized the convoy system, with some containing upwards of sixty merchant vessels.¹¹⁵ One disadvantage to the use of the convoy system was that the attacking force need not determine the character of the merchant vessel—“the acceptance of the protection of belligerent warships renders neutral vessels liable either to attack or to seizure and condemnation.”¹¹⁶ However, with Germany’s increasing use of unrestricted warfare zones, this was less of a concern as all American merchant vessels entering those areas were considered targets, regardless of their means of defense.¹¹⁷

¹¹¹ *Id.* ¶¶ 1902(d), 1803.

¹¹² *Id.* ¶ 3105. This same section provides for a situation where the master may open fire “against an enemy acting in defiance of International law.” *Id.* ¶ 3107.

¹¹³ *Id.* ¶ 1804 (stating “there is nothing in international law that justifies a merchant vessel in opening fire on a suspicious but unidentified vessel. On the other hand, merchant vessels are specifically prohibited from taking offensive action against any vessel unless first attacked, or unless it may be reasonably presumed that the vessel is maneuvering to attack.”).

¹¹⁴ NAVAL HIST. & HERITAGE COMMAND, *supra* note 32.

¹¹⁵ Thomas J. Cutler, *The Key Role of Convoys*, NAVAL HIST. MAG. (Aug. 2020), <https://bit.ly/3Ynt3SP>. Cutler explains:

Warships escorting the convoy, under an escort commander, would set up a screen about three to four miles from the convoy’s perimeter, ideally positioned so that their radar and visual ranges overlapped. If there were enough escorts available, a second group would precede the convoy at about five to nine miles distance, using radar and sonar to sweep ahead. For a successful depth-charge attack, escorts relied on a tight running circle to enable them to quickly get their sterns over a detected target, and they used their superior speed to allow them to continue prosecuting an attack on a U-boat and then catch up to their advancing convoy.

Id.

¹¹⁶ Robert W. Tucker, *Law of War and Neutrality at Sea: Visit, Search, Seizure and Destruction of Neutral Vessels and Aircraft*, 50 INT’L L. STUD. 332, 334 (1955).

¹¹⁷ Mallison, *supra* note 85, at 248.

E. *Operation Earnest Will*

In September of 1980, the Iran-Iraq War, commonly known in the United States as “The Tanker War,” began after Iraq attacked Iran over a border dispute.¹¹⁸ Iraq attacked oil tankers it presumed were bound for Iran, to disrupt Iranian income that would fuel the war effort.¹¹⁹ While the United States was initially neutral, the resulting impacts to the freedom of navigation in the SOH brought the United States into the conflict.¹²⁰ Both Iran and Iraq declared “exclusion zones” where merchant vessels were subject to attack, and the Iraqi Air Force considered neutral-flagged tankers to be “participating directly or indirectly in the enemy war effort,” and therefore lawful objects of attack.¹²¹ Kuwait, concerned for the safety of its oil tankers transiting in the region, requested assistance from the Soviet Union and the United States.¹²² As part of “Operation Earnest Will,” the United States re-flagged Kuwaiti tankers and convoyed them using U.S. Navy vessels.¹²³ When Iranian small boats fired upon

¹¹⁸ EDWARD J. MAROLDA & ROBERT J. SCHNELLER JR., *SHIELD AND SWORD: THE UNITED STATES NAVY AND THE PERSIAN GULF WAR* 32 (2001) (“In September 1980, Iraqi dictator Saddam Hussain launched his armed forces on a massive offensive into western Iran. He used Iranian-sponsored subversion of his regime as an excuse to grab territory.”)

¹¹⁹ *Id.* at 32–33. Marolda and Schneller observe:

Since waging the war cost Iran and Iraq a total of more than \$1 billion a month, each side hoped to break the deadlock by targeting the other's economic base. Because oil was the lifeblood for both combatants, the contending armed forces struck at production and export facilities ashore, offshore platforms, and tankers underway in the Persian Gulf . . . By 1987, surface-to-surface attacks by Iranian armed speedboats, land-based Silkworm missiles, and mines on neutral tankers plying the Gulf alarmed Western leaders.

Id. See also GEORGE K. WALKER, *THE TANKER WAR, 1980-88: LAW AND POLICY* 380 (2000) (“Iran conducted visit and search operations aboard neutral flag merchantmen, looking for cargoes destined to benefit the Iraqi war effort; both belligerents attacked and damaged or destroyed some of these ships, sometimes by surface ship or aircraft attacks, but also by mining.”).

¹²⁰ Margaret G. Wachenfeld, *Reflagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf*, DUKE L.J. 174, 189 (1988) (“United States actions in the Persian Gulf address intrusions on a crucial international freedom—the freedom of navigation.”); ELLEN C. COLLIER ET AL., CONG. RSCH. SERV., IB87415, *THE PERSIAN GULF AND THE U.S. NAVAL PRESENCE: ISSUES FOR CONGRESS* 3 (1987) (“In 1984, as the tanker war began to intensify, the United States began to reemphasize that it was determined to keep open the Gulf’s shipping lanes and that it was considering supplying U.S. naval escorts for U.S.-flag ships.”).

¹²¹ Mallison, *supra* note 85, at 269–70.

¹²² *Id.* at 271.

¹²³ Fuentes, *supra* note 25; see also Mallison, *supra* note 85, at 271; MAROLDA & SCHNELLER JR., *supra* note 118, at 33 (“The Navy had been escorting U.S.-flagged ships in the gulf since the beginning of the war. Spurred to action by the prospect that the Soviet Union might agree to re-flagging and escort operations first, President Reagan authorized 11 Kuwaiti tankers to sail under U.S. registry.”).

naval vessels in the convoy, the Navy used force in self-defense.¹²⁴ More than 400 merchant vessels were targeted, 115 were sunk or scrapped, and 432 civilian mariners killed.¹²⁵

F. Operations Guardian Mariner and Vigilant Mariner, 2003-2006

For the first time since World War II, during Operation Iraqi Freedom (OIF) the United States embarked service member armed guards aboard civilian vessels.¹²⁶ Deemed Operations Guardian Mariner and Vigilant Mariner, these armed guards functioned as anti-terrorist security teams aboard Military Sealift Command (MSC) vessels that were moving supplies and supporting the war.¹²⁷ Similar to the chain of command utilized during World War II, the embarked military detachment commander was given authority “over the use of force,” with the civilian master “relieved of any responsibility in a use of force situation.”¹²⁸ The master remained responsible for navigation and shipboard operations.¹²⁹

G. “Accompanying” Mission of 2015

In the SOH in 2015, the United States used a lesser form of convoy that it deemed “accompanying.” On 28 April, 2015, the IRGC attacked a Marshall Islands-flagged cargo ship, the M/V MAERSK TIGRIS, in the SOH.¹³⁰ The IRGC “fired shots across the bow,” seized the vessel, and detained the crew.¹³¹ The USS FARRAGUT (DDG 99) received a distress signal from MAERSK

¹²⁴ In addition, Britain, France, Italy, the Netherlands, and Belgium sent combatants to escort their own flagged vessels. Mallison, *supra* note 85, at 272 ().

¹²⁵ Jan Stockbruegger, *US Strategy and the Rise of Private Maritime Security*, 30 SEC. STUD. 578, 590 (2021) (“Over 411 merchant vessels were attacked, including 239 oil tankers. In all, 115 vessels were sunk or had to be scrapped, and 432 civilian sailors lost their lives.”).

¹²⁶ Harlow, *supra* note 97, at 593–94.

¹²⁷ *Id.*; see also *Department of Defense Authorization for Appropriations for Fiscal Year 2005: Hearing Before the Sen. Comm. on Armed Serv.*, 108th Cong. 2 (2004) (statement of General John W. Handy, Commander, U.S. Transportation Command) (“Supported heavily by Army and Marine Corps forces and expertise, [Operation Guardian Mariner] ultimately mobilized 110 twelve-man teams plus a command and control element to secure vessels transiting chokepoints and ports within the CENTCOM AOR deemed at risk for terrorist activities.”).

¹²⁸ Harlow, *supra* note 97, at 594.

¹²⁹ *Id.*

¹³⁰ Barbara Starr, *U.S. Navy to Accompany British-Flagged Ships Near Iran*, CNN (May 4, 2015, 2:24 PM), <https://cnn.it/4bKhW3a>; see also Matthew Rosenberg & Danny Hakim, *U.S. Sends Ships to Strait of Hormuz to Shield Vessels After Iran Seizure*, N.Y. TIMES (Apr. 30, 2015), <https://bit.ly/3SCmYyz>.

¹³¹ Rosenberg & Hakim, *supra* note 130.

TIGRIS, proceeded to the scene, and dispatched surveillance aircraft to monitor the situation.¹³²

Two days later, the United States announced it would use warships to accompany U.S.-flagged cargo ships transiting the strait.¹³³ This plan was then expanded to accompany British-flagged ships as well.¹³⁴ The choice of language was intentional—the United States made it clear that it was not convoying or escorting, but a third option that was “basically a step down from escorting.”¹³⁵ As a U.S. Fifth Fleet spokesperson made clear, “U.S. naval forces will transit the strait along with and nearby such shipping, although it is not as though they’ll necessarily be in some sort of formation.”¹³⁶ The mission was short-lived, as the United States ceased its accompanying activities on May 6, 2015 and Iran released the MAERSK TIGRIS the next day.¹³⁷

III. CRIMINAL LIABILITY

With the 2023 plan to place Marine armed guards aboard commercial vessels in the SOH, the issues of chain of command clarity and increased likelihood of hostilities remain. However, by placing those armed guards aboard foreign-flagged merchant vessels, a third issue arises: criminal liability. The below case involving the ENRICA LEXIE, an Italian vessel armed with Italian marines, who shot and killed two Indian mariners outside of Indian territorial waters, illustrates all three concerns, with a focus on criminal liability.¹³⁸

A. ENRICA LEXIE

On February 15, 2012, Italy stationed six Italian marines aboard the Italian commercial oil tanker ENRICA LEXIE, to protect the vessel from potential pirate attack during its transit from Sri Lanka to Egypt.¹³⁹ This “Vessel Protection Detachment” (VPD) was provided with “rules of engagement issued

¹³² Cheryl Pellerin, *Navy to Accompany U.S.-Flagged Ships in Strait of Hormuz*, DEP’T DEF. (May 1, 2015), <https://bit.ly/4bOlW9m>; see also Missy Ryan & William Branigin, *U.S. Dispatches Destroyer After Iran Boards Commercial Ship*, WASH. POST. (Apr. 28, 2015), <https://bit.ly/4h2DlBN>.

¹³³ *Id.*

¹³⁴ Starr, *supra* note 130.

¹³⁵ Bradley Peniston, *What’s the Difference Between ‘Accompanying’ and ‘Escorting’ a Ship?* DEFENSE ONE (May 1, 2015), <https://bit.ly/4690OcF>.

¹³⁶ *Id.*

¹³⁷ Phil Stewart, *U.S. Navy Stops Accompanying Ships through Strait of Hormuz*, REUTERS (May 6, 2015, 2:20 AM), <https://bit.ly/4fdsQlB> (“Colonel Steve Warren, a Pentagon spokesman, said the decision was taken after several days of accompanying U.S. and British commercial ships without incident.”); see also Sam Lagrone, *Iran Releases Maersk Tigris*, USNI (May 7, 2015, 10:38 AM), <https://bit.ly/3ZNEzb3>.

¹³⁸ See “Enrica Lexie” Incident (It. v. India), Case No. 2015-28, Award, (Perm. Ct. Arb. 2020).

¹³⁹ *Id.* ¶¶ 81, 86.

by the Italian Ministry of Defense.”¹⁴⁰ However, the ship’s master was an Italian civilian mariner, and not a member of the Italian armed forces.¹⁴¹

On the second day of transit, while about twenty nautical miles off the coast of India, the bridge team observed a vessel that “seemed to be a fishing boat” about one nautical mile away and heading toward ENRICA LEXIE.¹⁴² Attempts to hail the boat and confirm its identity were unsuccessful.¹⁴³

Named ST. ANTONY, the boat was registered to an Indian national but appeared to be unflagged.¹⁴⁴ ST. ANTONY continued directly toward ENRICA LEXIE, and did not respond to visual signals (flashing lights, holding weapons over their heads).¹⁴⁵ At five hundred meters, two Italian marines from the VPD “each fired four rounds of a mix of tracer and ordinary bullets” at the boat.¹⁴⁶ These warning shots had no impact—the boat did not slow.¹⁴⁷ Although the crew of ST. ANTONY later claimed they were not carrying arms, one Italian marine described “long-barrel rifles slung over their shoulders, with a posture clearly aimed at boarding” ENRICA LEXIE.¹⁴⁸ ENRICA LEXIE’s crew did not see fishing nets or equipment, increasing suspicions of piracy.¹⁴⁹

At three hundred meters, the Marines fired four more rounds as the crew headed to the engine room to shelter.¹⁵⁰ The Captain increased the vessel’s speed to maximum, and at eighty to one hundred meters, they again fired four rounds each.¹⁵¹ At thirty meters, the boat finally changed course.¹⁵² Two ST. ANTONY crew members were killed.¹⁵³ According to ST. ANTONY’s captain, he was

¹⁴⁰ *Id.* ¶ 83; see also Marco Odello, *The Enrica Lexie Incident and the Status of Anti-Piracy Security Personnel on Board*, 26 J. CONF. SEC. L. 551, 561 (2021) (describing the Italian government’s reasons for preferring military armed guard teams over private: primarily compliance with IMO guidelines, and stronger control over the use of arms).

¹⁴¹ *It. v. India*, Case No. 2015-28, ¶ 85.

¹⁴² *Id.* ¶¶ 87, 91.

¹⁴³ *Id.* ¶ 92 (“[T]he ‘Enrica Lexie’ attempted to establish contact by way of a call on channel 16 of the VHF communication system, to no avail.”).

¹⁴⁴ *Id.* ¶ 105 (“registered in the State of Tamil Nadu . . . but apparently flew no visible Indian flag.”).

¹⁴⁵ *Id.* ¶ 94 (“[t]his caused no alteration in the craft’s course, which continued to clearly head toward our vessel, with a 30° approach angle to starboard, relative to our stern.”).

¹⁴⁶ *Id.* ¶ 95.

¹⁴⁷ *Id.* ¶ 96 (“The small craft maintained its course and speed . . .”).

¹⁴⁸ *Id.* ¶¶ 96, 111 (“At the Hearing, when the Arbitral Tribunal asked Captain Fredy: ‘what kind of visible equipment was the St. Antony carrying on 15th February,’ he replied ‘[a] small knife to cut the fish.’”).

¹⁴⁹ *Id.* ¶ 96 (“[S]ince I could not see any fishing net or fishing containers, I didn’t understand why such a small boat was 20 miles from the coast.”) (quotation omitted).

¹⁵⁰ *Id.* ¶ 97.

¹⁵¹ *It. v. India*, Case No. 2015-28, ¶¶ 99–100.

¹⁵² *Id.* ¶ 101.

¹⁵³ *Id.* ¶ 115–16.

asleep, and had left the boat under the charge of an unlicensed crew member.¹⁵⁴ When he awoke, he “took over the steering,” and “abruptly helmed the boat away,” ending the engagement.¹⁵⁵

ENRICA LEXIE’s crew reported a pirate attack, and ST. ANTONY’s crew reported a “firing by merchant vessel” to the Indian Coast Guard.¹⁵⁶ After being directed to anchor in the Indian port of Kochi, ENRICA LEXIE did so.¹⁵⁷ Upon arrival at Kochi, the Indian Coast Guard boarded ENRICA LEXIE, asserted that the incident was “under the jurisdiction of their territorial waters,” and told the two Italian marines they were “under investigation for the murder of the two fishermen.”¹⁵⁸ The marines refused to go ashore, and one submitted a statement to the authorities asserting that the vessel, the detachment, and the “weapons and the witness material” were “under exclusive Italian judicial authority.”¹⁵⁹

The Indian Coast Guard detained ENRICA LEXIE, and the police arrested the two marines for murder.¹⁶⁰ The marines believed they were immune from criminal prosecution “as ‘military personnel of a Sovereign country performing state functions of protecting the interest of vessels of Italy flying Italian flags as agents and representatives of State.’”¹⁶¹ They filed a petition, stating that “India did not have jurisdiction under its own domestic law; that Italy had exclusive jurisdiction under UNCLOS; and that in any event, under international law, the marines had immunity from Indian criminal jurisdiction.”¹⁶² The court dismissed their petition, asserting that “even though the incident occurred outside India’s territorial waters . . . the Indian Penal Code and the Indian Code of Criminal Procedure” applied in India’s exclusive

¹⁵⁴ *Id.* ¶ 109, 112.

¹⁵⁵ *Id.* ¶ 114.

¹⁵⁶ *Id.* ¶¶ 124, 127.

¹⁵⁷ *Id.* ¶¶ 145–46. ENRICA LEXIE received a message from the Maritime Rescue Coordination Center in Mumbai, stating “‘understand there has been a piracy incident/firing incident by your vessel on a suspicious skiffs at around 1600 hrs . . . You are requested to head for Kochi and establish communication with Indian Coast Guard . . . Request ETA Kochi. Regards, MRCC Mumbai.’ . . . Italy and India disagree as to whether the message from MRCC Mumbai was receive before or after ‘Enrica Lexie’ had changed course.” *Id.*

¹⁵⁸ *Id.* ¶¶ 149, 157–58.

¹⁵⁹ *Id.* ¶ 159.

¹⁶⁰ *Id.* ¶ 172. (“On 2 May 2012, the Supreme Court of India ordered that ‘the Government of Kerala and its authorities shall allow the [“Enrica Lexie”] to commence her voyage.’ The ‘Enrica Lexie’ ‘[sailed] out of Indian waters’ on 5 May 2012.”) (citations omitted); *id.* ¶ 168 (“At 1600 IST on the same day, the Kerala Police escorted the Marines from the ‘Enrica Lexie’ and arrested them at Wellington Island, Kochi Oil Terminal Berth, ‘on an allegation of murder.’”).

¹⁶¹ *It. v. India*, Case No. 2015-28, ¶ 173.

¹⁶² *Id.* ¶ 179; see UNCLOS, *supra* note 15, art. 100 (In its High Court filing, Italy cited Article 100 of UNCLOS: “[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”).

economic zone (EEZ).¹⁶³ The marines petitioned the Indian Supreme Court, which ignored the UNCLOS argument, ordered “a ‘Special Court’ be established to try the Marines,” and denied all other petitions.¹⁶⁴

While the case worked its way through the Indian courts, two prosecutions stemming from the incident were also underway in Italy.¹⁶⁵ On February 16th, the day after the shooting, an Italian civil prosecutor opened a criminal case against “persons unknown,” and initiated an investigation into “piracy and suspicion of piracy.”¹⁶⁶ On February 22nd, a separate military prosecutor charged both marines with “‘aggravated failure to obey orders, of violence resulting in murder of private individuals during military operations abroad, and of dispersion of military equipment (bullets)’ in connection with the ‘Enrica Lexie’ incident.”¹⁶⁷ The same day, the public prosecutor named the marines “suspects for the offence of murder and complicity in murder against unknown persons committed on the high seas in the Indian Ocean.”¹⁶⁸ Two Italian marines were now under investigation for murder in two separate countries for actions they took while performing their military duties aboard ENRICA LEXIE.¹⁶⁹ All criminal cases were eventually stayed, pending the decision of ITLOS.¹⁷⁰

ITLOS asserted jurisdiction after Italy alleged that India violated provisions of UNCLOS.¹⁷¹ Italy objected to three Indian actions: 1) India’s assertion of criminal jurisdiction in its contiguous zone, 2) India’s breach of Part VII (High Seas) of UNCLOS, and 3) India’s failure to provide immunity to the Italian marines.¹⁷² India believed it had jurisdiction over the incident, because the shots fired “killed two Indian nationals,” and therefore the “center of gravity of the incident thus rests with India.”¹⁷³ Further, India argued that its courts did not exercise jurisdiction over the marines until “after they entered Indian

¹⁶³ *It. v. India*, Case No. 2015-28, ¶ 180 (In the High Court of Kerala’s view, “[i]t can be treated only as a case of brutal murder and can in no way be masqueraded as a discharge of the sovereign function.”).

¹⁶⁴ *Id.* ¶¶ 182, 184–86. In addition, the Supreme Court stated that this “Special Court” could address the issue of jurisdiction raised by Italy. *Id.* ¶ 182.

¹⁶⁵ *Id.* ¶ 204.

¹⁶⁶ *Id.* ¶¶ 205–06.

¹⁶⁷ *Id.* ¶ 209.

¹⁶⁸ *Id.* ¶¶ 209–10 (The military prosecutor “relinquished jurisdiction over the incident in favour of the Rome Public Prosecutor, who thereafter continued the preliminary investigation.”).

¹⁶⁹ *Id.* ¶¶ 168, 209.

¹⁷⁰ *Id.* ¶¶ 191, 216.

¹⁷¹ *Id.* ¶ 218; *see also* Odello, *supra* note 32, at 555 (discussing the process by which the issue which spawned two simultaneous murder trials in two different countries ended up at ITLOS instead).

¹⁷² *It. v. India*, Case No. 2015-28, ¶ 259.

¹⁷³ *Id.* ¶ 228.

territory.”¹⁷⁴ Each Italian assertion, along with the Indian response and the subsequent Tribunal determination, is addressed below.

1. Criminal Jurisdiction Outside of Territorial Waters

Italy first argued that India’s assertion of criminal jurisdiction outside of Indian territorial waters via the 1976 Maritime Zones Act was a violation of UNCLOS.¹⁷⁵ The act addresses criminal jurisdiction in India’s maritime zones.¹⁷⁶ A subsequent 1981 Notification, which referenced this Maritime Zones Act, extended India’s criminal jurisdiction to offenses occurring in its EEZ.¹⁷⁷ To Italy, this provision violated UNCLOS.¹⁷⁸ Article 89 of UNCLOS states that “[n]o State may validly purport to subject any part of the high seas to its sovereignty.”¹⁷⁹ Italy viewed India’s 1981 Notification to the 1976 Maritime Zones Act to subject a part of the high seas to its sovereignty, and therefore violate Article 89.¹⁸⁰

India argued that this domestic law was not the same as the “claim of sovereignty” prohibited by Article 89, and was “in harmony with UNCLOS.”¹⁸¹ However, because India did not assert jurisdiction until ENRICA LEXIE arrived in Kochi (and therefore within Indian territorial waters), the issue was irrelevant.¹⁸² Thus, the tribunal refrained from ruling on the law’s legality.¹⁸³ However, it did assert that both states had the same rights over the incident,

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ¶ 260.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; see also *id.* ¶¶ 263–64 (The 1981 Notification “extends to the exclusive economic zone” offenses listed in the Indian Penal Code—stating that “[w]hen an offence is committed by any person in the exclusive economic zone . . . such person may be dealt with in respect of such offence as if it had been committed in a place in which he may be found or in such other place as the Central Government may direct under section 13 of the said Act.”).

¹⁷⁸ *Id.* ¶ 278.

¹⁷⁹ *Id.* ¶ 289; UNCLOS, *supra* note 15, art. 89.

¹⁸⁰ *It. v. India*, Case No. 2015-28, ¶¶ 289, 303 (according to Italy, “the fact that India ‘is extending the full body of its criminal laws to the EEZ *tout court*’ is a ‘deep and comprehensive assertion of typically sovereign authority [that] must be properly characterized as an attempt to subject the EEZ to Indian sovereignty.’” (emphasis in original)).

¹⁸¹ *Id.* ¶ 271; see also *id.* ¶ 274 (Because the parties therefore “did not hold ‘clearly opposite views’” regarding the domestic law, India objected to ITLOS jurisdiction over the issue.).

¹⁸² *Id.* ¶ 346.

¹⁸³ *Id.* The tribunal concurred, as “no enforcement actions were taken by the Indian authorities against the ‘Enrica Lexie’ or the Marines in the Indian exclusive economic or contiguous zones.” *Id.* ¶ 356. See also *id.* ¶ 370 (“[T]he Arbitral Tribunal is not called upon to rule on any question of Indian law or proceedings instituted before Indian courts. Accordingly, there is no need for the Arbitral Tribunal to address such question in the present proceedings.”).

because Article 92 of UNCLOS gives flag states “exclusive jurisdiction on the high seas,” and the incident “took place” aboard both vessels.¹⁸⁴

2. UNCLOS Part VII (High Seas)

Italy’s second objection regards the same domestic law, objecting not to its legality but to its application in the present case.¹⁸⁵ Although in this argument Italy considers India to have breached Part VII of UNCLOS in five different ways, only two are pertinent to this study: 1) Italy alleges that India violated UNCLOS Article 97(1) by taking penal or disciplinary action against the marines, and 2) Italy alleges that India violated UNCLOS Article 97(3) by detaining ENRICA LEXIE for investigation.¹⁸⁶ The Tribunal’s answer to both questions hinged on the definition of “incident of navigation.”¹⁸⁷

Italy considered India’s criminal proceedings against the Marines to be a violation of Article 97(1) of UNCLOS.¹⁸⁸ Article 97 (1) states that:

In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.¹⁸⁹

Because they considered the VPD marines to be “in service of the ship” during a “collision or other incident of navigation” on the high seas, the Italians claimed exclusive jurisdiction over the marines’ actions.¹⁹⁰ India objected, arguing that not only was the ENRICA LEXIE shooting not an “incident of navigation,” but the marines were not “persons in service of the ship.”¹⁹¹ Why did Italy consider a shooting to be an incident of navigation? Italy unsuccessfully argued that the

¹⁸⁴ UNCLOS, *supra* note 15, art. 92 (“1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”); *It. v. India*, Case No. 2015-28, ¶ 348.

¹⁸⁵ *It. v. India*, Case No. 2015-28, ¶ 371.

¹⁸⁶ *Id.* ¶ 576 (“Italy submits that India breached Article 97, paragraph 1, by instituting penal proceedings against the Marines who, according to Italy, were persons ‘in service of the ship’ during a ‘collision or other incident of navigation.’”); *id.* ¶ 623 (“Italy claims that India breached Italy’s exclusive flag-State jurisdiction under Article 97, paragraph 3, by ordering the detention of the ‘Enrica Lexie’”).

¹⁸⁷ *Id.* ¶¶ 642, 659.

¹⁸⁸ *Id.* ¶ 576.

¹⁸⁹ UNCLOS, *supra* note 15, art. 97(1).

¹⁹⁰ *It. v. India*, Case No. 2015-28, ¶ 576.

¹⁹¹ *Id.* ¶ 602.

vessels were “on a collision course” at the time of the incident, and the marines fired shots in order to alter ST. ANTONY’s course.¹⁹² The Tribunal found that India did not violate Article 97(1) when it took penal or disciplinary action against the marines, but failed to address whether they were “in service of the ship.”¹⁹³

Italy also considered India’s detention of ENRICA LEXIE for investigation to violate Paragraph 97(3) of UNCLOS.¹⁹⁴ Article 97(3) states that “[n]o arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.”¹⁹⁵ However because the Tribunal previously determined Article 97 to only apply “in matters of collision or any other incident of navigation,” and this matter was not an “incident of navigation,” Italy’s paragraph 3 argument also failed.¹⁹⁶

3. Immunity

Italy viewed the Italian marines to be immune from Indian criminal prosecution because they were “Italian State officials exercising official functions” at the time of the shooting.¹⁹⁷ The question for the Tribunal was whether India “has in principle the right to exercise jurisdiction over the Marines or whether such exercise of jurisdiction is precluded because the Marines enjoy immunity under international law?”¹⁹⁸ Conceding that UNCLOS does not address the issue of immunity, the tribunal applied customary international law, which provides for immunity “from foreign criminal jurisdiction” for “State officials in respect of their ‘official acts’ or ‘acts performed in an official capacity.’”¹⁹⁹

¹⁹² *Id.* ¶ 580–81 (The marines “fired shots in a[n] . . . attempt to dissuade the St Antony from continuing its approach” and “following these shots, the St Antony ultimately did change its course to move away from the Enrica Lexie.”); *id.* ¶ 590 (Italy asserted “that ‘incident of navigation’ has a broad meaning which includes events other than collisions, such as incidents at sea in response to a perceived pirate attack; otherwise, Italy argues, the words ‘[i]n the event of a collision or any other incident of navigation’ would have no meaning.”); *id.* ¶ 650 (The Tribunal interpreted the phrase to mean an event “that (i) occurs in relation to the movement and manoeuvring of a ship; and (ii) which allegedly causes some form of serious damage or harm, including to the ships involved, their cargo, or the individuals on board.”).

¹⁹³ *Id.* ¶¶ 655–56 (“While the acts for which the Marines are being prosecuted, and the harm caused by those acts, took place while two ships were sailing in the exclusive economic zone of India, they are not caused by the movement or manoeuvring of those ships and cannot be said to have been part of an ‘incident of navigation.’”).

¹⁹⁴ *Id.* ¶ 658.

¹⁹⁵ UNCLOS, *supra* note 15, art. 97(3).

¹⁹⁶ *It. v. India*, Case No. 2015-28, ¶ 659.

¹⁹⁷ *Id.* ¶ 732.

¹⁹⁸ *Id.* ¶ 841.

¹⁹⁹ *Id.* ¶¶ 842–43.

The marines were “subject to a military chain of command,” but under Italian law also had “additional status of officers and agents of the judicial police.”²⁰⁰ The tribunal concluded they were “State officials of the Italian Republic” for the purposes of the immunity analysis.²⁰¹ On the question of whether they acted “within the scope of their duties as officials of the State,” the tribunal found that they “were under apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a VPD.”²⁰² As they were state officials who were acting within the scope of their official duties at the time of the shooting, the Tribunal found the marines to be immune from India’s criminal prosecution.²⁰³

The ENRICA LEXIE dispute took more than eight years to reach its conclusion.²⁰⁴ The marines were arrested on February 19, 2012, and detained in an Indian prison until granted bail (albeit with heavy restrictions on their movement) on May 30, 2012.²⁰⁵ In 2021, the Indian Supreme Court accepted 1.1 million euro from the Italian government, and “it contextually declared the extinction of all criminal proceedings against the two Italian marines and disposed of all related pending matters before the court.”²⁰⁶ By the time the case reached ITLOS, Italy had already ceased its use of VPDs.²⁰⁷

In addition to highlighting the matter of criminal liability, the ENRICA LEXIE incident perfectly illustrates the problem with having two chains of command (civilian and military) aboard the same vessel.²⁰⁸ The ship’s civilian master was responsible for the safe navigation of the vessel, while at the same time the VPD was responsible for “anti-piracy activities.”²⁰⁹ Sensing a threat, the

²⁰⁰ *Id.* ¶¶ 851, 853 (explaining they had status “which authorized them, among other things, to arrest pirates and maintain them under their custody,” and to “conduct investigations” for the public prosecutor involving piracy).

²⁰¹ *Id.* ¶ 855.

²⁰² *Id.* ¶ 856, 862.

²⁰³ *Id.* ¶ 874 (“The Arbitral Tribunal accordingly finds that the Marines enjoy immunity in relation to the acts that occurred during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines.”).

²⁰⁴ The incident occurred in February 2012, and the tribunal issued its award on May 21, 2020. *See generally id.*

²⁰⁵ As conditions of their bail, they surrendered their passports, and were ordered to stay within 10 kilometers of the City Police Commissioner’s office, and muster daily with the Police Commissioner. *It. v. India*, Case No. 2015-28, ¶ 168, 177. This continued until February 2013, when both were permitted to “travel to Italy for a four-week period” so they could “vote in the European Union Elections”. *Id.* ¶ 187.

²⁰⁶ Odello, *supra* note 32, at 554.

²⁰⁷ *Id.* at 561; *see also It. v. India*, Case No. 2015-28, ¶ 84 (“In June 2015, Italy repealed provisions that allowed Italian ship owners to request protection from VPDs, following the decline in the number of piracy attacks.”).

²⁰⁸ *See generally It. v. India*, Case No. 2015-28.

²⁰⁹ Eugenio Cosumano & Stefano Ruzza, *Contractors as a Second Best Option: The Italian Hybrid Approach to Maritime Security*, 46 OCEAN DEV. & INT’L L. 111, 115 (2015).

marines opened fire without an order from the master.²¹⁰ Although later bringing the vessel to maximum speed, Italian investigators found that the master “did not seek to implement all possible passive measures of protection,” and the ship “did not change her course and speed to give way to the craft that had the right of way, or to move away and be in a safe position (given her higher speed) from a piracy/armed robbery threat.”²¹¹ The record does not indicate any coordination between the VPD and the master over whether ENRICA LEXIE would respond with force or attempt to navigate away from the threat.²¹² In fact, the master’s failure to navigate away from the “near collision course” with ST. ANTONY prompted the marines to fire in the first place.²¹³ Yet, the master alone made the decision to anchor in Kochi, which subjected the marines (not the master) to Indian criminal jurisdiction.²¹⁴ The Italian investigator found that both the VPD members and the master “did not do their best to enhance closer cooperation opportunities between the parties involved in the action.”²¹⁵ The division of authority hampered the effectiveness of their response.²¹⁶

B. Application to the 2023 Proposal

In ENRICA LEXIE, the tribunal addressed several issues that directly impact the United States’ plan to station service member armed guards aboard foreign-flagged vessels in the SOH, particularly the rights of the coastal state over criminal prosecution, the rights of flag states over incidents that occur on the high seas, and immunity from prosecution for state officials performing acts in their official capacity.²¹⁷ Of note, although the ENRICA LEXIE incident involved two countries that are parties to UNCLOS (India and Italy), neither Iran nor the United States have ratified the treaty.²¹⁸ However, because the United States considers most portions of UNCLOS to be customary international law, it will serve as the framework for analysis.²¹⁹

²¹⁰ Clive R. Symmons, *Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems Under Law of the Sea*, 51 MIL. L. & L. WAR REV. 21, 34 (2012).

²¹¹ *It. v. India*, Case No. 2015-28, ¶ 200 (quoting Piroli Report (Confidential Annex), p. 4-14, para. 3 (Annex IT-233)).

²¹² *Id.* ¶¶ 200–03.

²¹³ *Id.* ¶ 200.

²¹⁴ *Id.* ¶138; see also *id.* ¶ 390 (Captain Vitelli believed he had a “seaman’s duty, if not a legal duty” to bring the ship to port at Kochi) (citation omitted).

²¹⁵ *Id.* ¶ 200.

²¹⁶ Symmons, *supra* note 210, at 38.

²¹⁷ See generally *It. v. India*, Case No. 2015-28.

²¹⁸ *Status of Treaties: United Nations Convention on the Law of the Sea*, U.N. TREATY COLLECTION, <https://bit.ly/3BHBCyy>.

²¹⁹ Monica Medina, Ass’t Sec. of State, Remarks: The Constitution of the Sea (Dec. 8, 2022) (articulating that the Biden Administration’s view at the U.N. on the 40th anniversary of UNCLOS, stating “let me again reiterate the United States’ continued view that much of the convention

1. Coastal State Rights

The shooting incident between ENRICA LEXIE and ST. ANTONY occurred in India's EEZ.²²⁰ Although Indian courts attempted to assert jurisdiction on those grounds, by the time the matter was in front of the tribunal it instead argued that India never asserted jurisdiction until ENRICA LEXIE arrived in Kochi (Indian territorial waters).²²¹ The tribunal therefore declined to address coastal state jurisdiction over the incident.²²² However, had the incident taken place in India's territorial sea, the analysis may have been different. The pertinent section of Article 27 of UNCLOS allows for a coastal states to exercise criminal jurisdiction over a foreign ship passing through its territorial sea if "the consequences of the crime extend to the coastal state" or "the crime is of a kind to disturb the peace of the country or the good order of the territorial sea."²²³ If the shooting took place in India's territorial sea, India may have argued that the "consequences of the crime" took place aboard an Indian vessel (and therefore "extended to the coastal state") or that the shooting disturbed India's peace.²²⁴

This provision of UNCLOS could impact vessels operating under the 2023 proposal. As examined above, aside from Operations Guardian Mariner and Vigilant Mariner, the United States has only used service member armed guards aboard merchant vessels transiting the high seas—most frequently the Atlantic Ocean.²²⁵ The likelihood of an incident occurring in another country's territorial sea while crossing the Atlantic is slim. However, the 2023 proposal involved vessels transiting the SOH, which at its narrowest point is only 27 nautical miles wide.²²⁶ Iran considers large parts of the strait to be its territorial waters, and at the center of the strait the territorial seas of Oman and Iran overlap.²²⁷ Regardless of the validity of Iran's claims, when transiting the SOH

reflects customary international law, and our steadfast commitment to upholding the rights, freedoms, and obligations of all UN member states as reflected in the convention").

²²⁰ *It. v. India*, Case No. 2015-28, ¶ 180.

²²¹ *Id.* ¶¶ 180, 346.

²²² *Id.* ¶¶ 346.

²²³ UNCLOS, *supra* note 15, art. 27.

²²⁴ *Id.*

²²⁵ CARLISLE, *supra* note 36, at 88 (armed guards were used for Atlantic crossings during World War I); Cutler, *supra* note 115 (use of armed guards and convoys in the Atlantic during World War II).

²²⁶ Alexander Lott & Shin Kawagishi, *The Legal Regime of the Strait of Hormuz and Attacks Against Oil Tankers: Law of the Sea and the Law on the Use of Force Perspectives*, 53 OCEAN DEV. & INT'L L. 123, 125 (2022).

²²⁷ *Id.* ¶ 125 ("The territorial seas of the coastal states of the Strait of Hormuz overlap only at the center of the strait, located north of the Omani Musandam Peninsula and between the Omani island of Great Quoin and Iran's island of Larak, where the strait is approximately 21 NM wide."); Frederick V. Perry & Wendy Gelman, *Iran, The United States, and the Strait of Hormuz: Can International Law Prevent Catastrophe?*, 70 DRAKE L. REV. 333, 338 (2022).

a merchant vessel travels in close proximity to at least two coastal states: Iran and Oman.²²⁸ Should an incident occur that impacts one of those coastal states, they may assert a claim for criminal jurisdiction over the marines involved in that incident.²²⁹

2. Flag State Rights

In *ENRICA LEXIE*, both India and Italy claimed jurisdiction over the shooting incident.²³⁰ The tribunal, relying upon Article 92 of UNCLOS, found that because the incident occurred aboard both vessels, both states were flag states and therefore had jurisdiction.²³¹ Although still heavily contested, there was no third-party concern because the Italian vessel had an Italian crew, and the Indian vessel had an Indian crew.²³² This would not be the case under the U.S. proposal.

In the U.S. proposal, U.S. marines would be stationed aboard foreign-flagged merchant vessels.²³³ Should a similar incident occur, there may potentially be three states competing for jurisdiction: the United States, the flag state, and the coastal state.²³⁴ As discussed above, because the shooting was not deemed an “incident of navigation” for the purpose of Article 97(1), the tribunal rejected Italy’s claim that detention of the *ENRICA LEXIE* and her marines was improper.²³⁵ However, if Italy’s interpretation stood, or if the incident was a true “incident of navigation”—UNCLOS Article 97 assigns jurisdiction to, not only the flag state, but also the “State of which such person is a national.”²³⁶ For *ENRICA LEXIE*, both of these states were the same.²³⁷ Under the U.S. proposal, the vessel’s flag state and the United States might share jurisdiction over the offending service member.²³⁸

²²⁸ Lott, *supra* note 226, at 125.

²²⁹ UNCLOS, *supra* note 15, art. 27; U.S. Dep’t of Transp., *2023-011-Persian Gulf, Strait of Hormuz, Gulf of Oman, Arabian Sea, Gulf of Aden, Bab al Mandeb Strait, Red Sea, and Somali Basin-Threats to Commercial Vessels*, MSCIA ADVISORY, bit.ly/3y1JXvM (In an advisory released on September 6, 2023, the U.S. Department of Transportation Maritime Administration advised merchants transiting the Strait of Hormuz to “remain as distant as possible from Iran’s territorial sea,” and to instead “transit close to Oman’s territorial sea.”).

²³⁰ “Enrica Lexie” Incident (It. v. India), Case No. 2015-28, Award, ¶ 368 (Perm. Ct. Arb. 2020).

²³¹ *Id.*

²³² *Id.* ¶¶ 85, 106 (listing relevant members of the respective ships).

²³³ Fuentes, *supra* note 25.

²³⁴ UNCLOS, *supra* note 15, art. 92.

²³⁵ It. v. India, Case No. 2015-28, ¶ 656.

²³⁶ *Id.* ¶¶ 580–81; UNCLOS, *supra* note 15, art. 97.

²³⁷ It. v. India, Case No. 2015-28, ¶¶ 580–81.

²³⁸ UNCLOS, *supra* note 15, art. 97.

3. Immunity

Neither coastal state nor flag state jurisdiction would be a matter of concern for these marines if they are declared immune from foreign criminal jurisdiction as “State officials” performing acts in “an official capacity.”²³⁹ The ENRICA LEXIE tribunal found the Italian marines to be immune after applying customary international law, weighing heavily that they were “subject to a military chain of command,” and were “State officials of the Italian Republic” who were “authorized . . . to arrest pirates and maintain them under their custody.”²⁴⁰ At the time of the shooting, the Italian marines were “under an apprehension of a pirate threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy.”²⁴¹ Their actions were “fulfilling a State function,” and they were aboard “to ensure ‘the protection of ships flying the Italian flag in transit in international maritime spaces at risk of piracy.’”²⁴² Based upon these factors, the tribunal determined the marines to be immune from prosecution in Indian court.²⁴³ The analysis may be different when applied to U.S. marines aboard foreign-flagged merchant vessels.

The tribunal’s decision hinged on whether the marines were “fulfilling a State function” and acting “within the scope of their duties as officials of the State.”²⁴⁴ It is easy to argue that an Italian marine defending an Italian vessel from pirate attack is “fulfilling a State function,” as the marines were aboard the merchant vessel to act as a VPD pursuant to Italian law.²⁴⁵ As there is no similar U.S. law, it is harder to argue that a U.S. marine acting in defense of a foreign merchant vessel would be fulfilling a similar state function.

The statutory mission of the U.S. Marine Corps provides for the “seizure or defense of advanced naval bases,” “the conduct of such land operations as may be essential to the prosecution of a naval campaign,” and “protection of naval property at naval stations and bases.”²⁴⁶ Although the marines “shall perform such other duties as the President may direct,” which could include defense of foreign merchant vessels, the Marine Corps’ mission also states that those other duties “may not detract from or interfere with the operations for which the Marine Corps is primarily organized.”²⁴⁷ The protection of foreign commercial interests abroad is not an operation for which the Marine

²³⁹ *It. v. India*, Case No. 2015-28, ¶¶ 842–43.

²⁴⁰ *Id.* ¶¶ 851–55.

²⁴¹ *Id.* ¶ 862.

²⁴² *Id.* ¶ 859.

²⁴³ *Id.* ¶ 873.

²⁴⁴ *Id.* ¶¶ 856–59.

²⁴⁵ *Id.* ¶ 859.

²⁴⁶ 10 U.S.C. § 5063 (1986).

²⁴⁷ *Id.*

Corps is primarily organized. If placed in a situation similar to that faced by the Italian marines aboard ENRICA LEXIE, it would be difficult for U.S. marines to secure immunity from foreign criminal jurisdiction unless there was an attendant change to their statutory mission.

IV. CONCLUSION

When used in the past, U.S. service member armed guard teams raised questions regarding the proper chain of command and the potential for increased hostilities resulting from their presence.²⁴⁸ These questions had the potential to place them in harm's way, either by decreasing their effectiveness or making them more likely targets of attack. However, in exercising their duties there was never a threat of foreign criminal jurisdiction, as they were operating aboard U.S. flagged vessels in the high seas. The 2023 proposal to place U.S. service members service aboard foreign-flagged vessels raised an additional type of harm: that of criminal liability.

In transiting the SOH, merchant vessels operate in dense traffic and near coastal state waters. If involved in an incident with a vessel from that coastal state, the service members could find themselves subject to foreign criminal jurisdiction, similar to the Italian marines aboard ENRICA LEXIE.²⁴⁹ Under customary international law, those Italian marines were immune because they were state officials fulfilling state functions.²⁵⁰ A U.S. marine defending a foreign-flagged merchant may not have the same argument available, as defending foreign commercial vessels is not a U.S. marine's state function. The 2023 proposal would place U.S. service members at risk of foreign criminal prosecution, and would deprive them of immunity to which they may otherwise be entitled.

²⁴⁸ See *supra* note 40 and accompanying text.

²⁴⁹ See *supra* Part II.A.iii.

²⁵⁰ *It. v. India*, Case No. 2015-28, ¶¶ 841–62 (analyzing the tribunal's rationale that found immunity).

RATIONAL CHOICE REALISM: THE EQUILIBRIUM OF ARMED CONFLICT

Major Joel W. Hood, USMC*

I. INTRODUCTION

Public international law is a regulatory regime that establishes the rules regarding mutually accepted conduct among states. Just as domestic tort law has been regarded as a regulatory regime for the externalities of undesired behaviors in society,¹ public international law can be regarded as a regulatory regime for the undesired behaviors of states. This regulatory regime has been conceived of in terms of game theory, specifically a game in which states have incentives to collaborate and to cheat.² This suggests that there are Pareto-optimal and -suboptimal solutions for states' interactions—including for armed conflict.³

This Article advocates that the Pareto-optimal production of armed conflict among states is not zero because of the presence of non-collaborating states, that is, cheaters, but also because states are *sovereign*. Their interests will never completely align. International law attempts to set the Pareto-optimal point at an artificially low point. As a result, the game states play is complicated and emerges as a competition that can be described in the same terms as game theory in economic models, that is, a market.

This conception of public international law aligns with John Mearsheimer's offensive realism, which asserts that armed conflict is not a quirk,

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¹ Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 505 (1961); THE LOCKE INSTITUTE, *THE ORIGINS OF LAW AND ECONOMICS: ESSAY BY THE FOUNDING FATHERS* 18 (Francesco Parisi & Charles K. Rowley eds., 2005). An externality is a cost imposed on society that is not reflected in its price. *Id.* While externalities can be either positive or negative, I refer to them in the negative sense throughout this Article.

² Jack Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L. 271 (2007).

³ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 9 (2014) ("'Equilibrium' . . . means a stable point, that is, a point at which, unless the conditions of demand or supply change, there is no incentive for sellers to alter price or output.").

but “an intrinsic element of life in the international system.”⁴ History supports this assertion, and also that law alone is inadequate to deter states’ natural tendencies to maximize their relative power.⁵ States that would produce unacceptable kinds and quantities of armed conflict can only be deterred by the power of other states. “Strength ensures safety, and the greatest strength is the greatest insurance of safety.”⁶ This leads to the inevitable conclusion: law requires an enforcement mechanism. Without enforcement, modern versions of Pompey the Great may well say: “Do not quote laws at us who carry swords!”⁷

Hypothetically, the pairing of law and enforcement should create security for states—small and great—and prompt collaboration in a positive-sum game, or a market, for a single good: survival.⁸ This fits nicely within the international relations theory of defensive realism under which states prefer to maintain a status quo because they seek security, they seek survival.⁹ However, state security is relative to that of other states. To maximize security, states seek to maximize their share of the market.¹⁰ Therefore, it is only rational that “a state’s ultimate goal is to be the hegemon in the system.”¹¹

This is the basis of Mearsheimer’s theory of offensive realism in great power conflict. However, defensive and offensive realism are not mutually exclusive. Rather, they capture variation in states’ behavior as rational actors. Some—like many weaker states—preserve power, while others—like in great power conflict—accrue power. I attempt to reconcile defensive and offensive realism with the language of rational choice theory to show that public international law serves as the rules for a competitive market that demands armed conflict. I call my addition to realism, rational choice realism.

Part II of this Article explains the theory of rational choice realism in terms of game theory, often applied to economics. Part III is a brief historical explanation of how the Westphalian system gave rise to modern public

⁴ JOHN MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 22 (2001). Mearsheimer defines his theory of offensive realism as tendency of states to “maximize relative power, with hegemony as their ultimate goal.” *Id.*

⁵ See Edwin L. James, *GERMANY QUILTS LEAGUE; HITLER ASKS ‘PLEBISCITE’; Berlin Orders Delegates to Leave Arms Conference as Britain and France Veto Rearming of Reich*, N.Y. TIMES, (Oct. 15, 1933), <https://nyti.ms/47ZWgq2>.

⁶ MEARSHEIMER, *supra* note 4, at xi.

⁷ PLUTARCH, *LIFE OF POMPEY* (Bernadotte Perrin, ed. 1917) (“Cease quoting laws to us that have swords girt about us!”).

⁸ This is not a classical realism paper that focuses on power. The human obsession for power is rooted in the human obsession to survive. The collective will to survive in a democracy is presented as the will of the sovereign state.

⁹ MEARSHEIMER, *supra* note 4, at 19.

¹⁰ *Id.* at 410.

¹¹ *Id.* at 21.

international law, sovereignty, and the state as a rational actor. This is critical to understanding how the rules of the market formed and why one can assume states to be rational actors. Part IV demonstrates the failure of states to set the equilibrium of armed conflict at an artificially low point during the conflicts of the twentieth century and how hegemony can produce positive externalities. Part V warns that unregulated space in the market for survival created by new technologies may result in a catastrophic disequilibrium. In Part VI, I explore implications of viewing survival as a market, and in Part VII, I conclude.

II. RATIONAL CHOICE REALISM

The reader, along with well-meaning liberal international relations thinkers, may advocate that the Pareto optimality of armed conflict is zero output because there is no demand for it.¹² This argument necessarily indicates that one believes that the demand for armed conflict is 0 and that the price elasticity of demand for armed conflict is high ($E_d > 1$).¹³ These assumptions ignore ugly, fundamental truths behind state-on-state violence:

- (1) there is demand for it (e.g., Russia's war of aggression against Ukraine), and
- (2) an increase in the marginal cost of armed attack for aggressors does not result in substitution to diplomacy, economic relations, and interruption of means of communication.¹⁴

¹² In fact, the reader would not be alone in such an assertion. That was the conclusion of 62 countries in 1928 when they signed the Kellogg-Briand Pact, which condemned war and "declare[d] in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another . . . the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS: WITH SOLUTIONS AND NOTES 103-4 (1929).

¹³ POSNER, *supra* note 3, at 332. The price elasticity of demand is a metric that signals how much of a good a consumer is willing to purchase at a given price. It also signals how willing or able a consumer is to substitute the good. For example, a high elasticity of demand signals that there are close substitutes for the good and that if the price increases consumers will switch to a substitute. The more inelastic demand is the less willing the consumer will be to substitute for another good. Posner describes the price elasticity of demand as "the proportional effect on the quantity demanded of a proportional change to price. To illustrate, if a 1 percent price increase would cause the quantity demanded to fall by 2 percent, the elasticity of demand with respect to price is -2. If the elasticity of demand were -1, it would mean that a 1 percent increase in price would cause a percent reduction in quantity demanded, and thus that total revenue was unchanged." *Id.*

¹⁴ U.N. Charter art. 41 lists alternative measures short of armed conflict: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

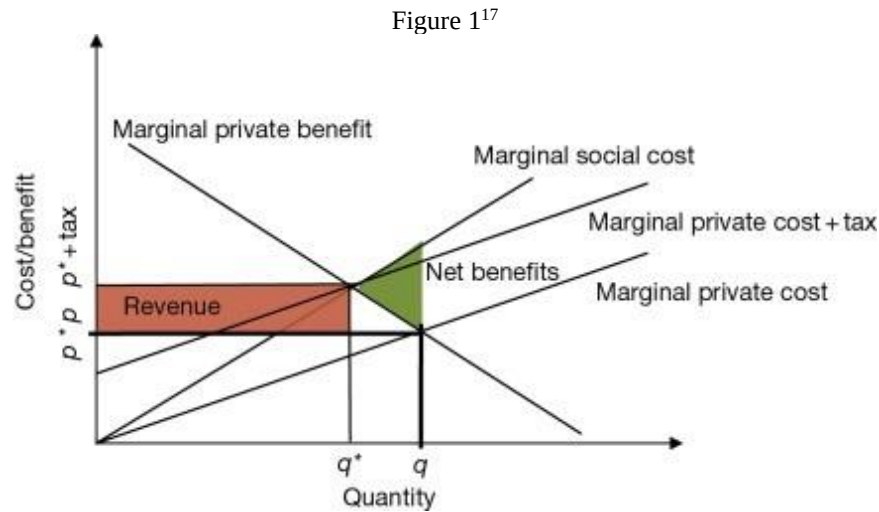
Therefore, it is not for scholars or statesmen to impose a normative standard, that is, that no armed conflict ought to be produced, but to pragmatically ask, how much? Where is the Pareto optimum? The answer does not come from scholars but rather from states who, through state practice and *opinio juris*, create customary international law. If states neglect to set clear parameters, the threshold, or the Pareto optimum, will continue to shift creating uncertainty and opportunity for great powers to maximize their power by testing the limits of the game. As a result, armed conflict will shift the market to a new equilibrium point. By this reasoning, however, states can bring the equilibrium point back to a lower point of demand for and production of armed conflict—but how?

A. *Law as a Tax*

States are rational actors maximizing their security, and though some collaborate and some cheat, they all do so rationally.¹⁵ In a domestic market, one way to internalize an externality—to force a good to reflect its true social cost—is to impose Pigouvian taxes on it.¹⁶ A Pigouvian tax increases the price of the good, which in turn, and dependent upon the elasticity of demand for the good, reduces the quantity demanded and subsequent production to a socially acceptable point, as shown in Figure 1.

¹⁵ The author concedes that this is a contested premise, that many actors may not be rational, and that there is substantial research to the contrary. See, e.g., Kruis, J. et al., *Deviations of Rational Choice: An Integrative Explanation of the Endowment and Several Context Effects*, 10 SCI. REP. 16226 (2020), <https://bit.ly/47YoVLR>; Beard, *supra* note 2.

¹⁶ “A Pigouvian tax, named after 1920 British economist Arthur C. Pigou, is a tax on a market transaction that creates a negative externality, or an additional cost, borne by individuals not directly involved in the transaction.” Tax Foundation, *Pigouvian Tax*, <https://taxfoundation.org/taxedu/glossary/pigouvian-tax/>.



Now, instead of a tax, imagine that a state's government passed new laws impacting the components of a good, its packaging, or the age at which individuals can purchase it. These laws would impose real costs on the producer of the good, who then passes those costs to the consumer. These hypothetical laws would increase the price and lower the quantity demanded much like a tax. Law imposes obligations on producers and consumers that forces them to internalize the cost of their choices in the market.

¹⁷ Steffen Kallbekken, *Public Acceptability of Incentive-Based Mechanisms*, 3 ENCYC. ENERGY, NAT. RESOURCE, & ENV'T ECON. 306 (2013), <https://bit.ly/4dD8XrY>. Kallbekken explains:

The figure shows that the marginal private benefit of consuming the good decreases with the quantity demanded, while the marginal private cost of supplying the good increases with the quantity supplied. In an efficient market, the market clears when marginal private benefits equal marginal private costs. In the figure, this occurs when quantity equals q and costs and benefits equal p . This is the market equilibrium. However, assume that the consumption of the good has a negative externality (e.g., consuming gasoline produces local air pollution). The line 'marginal social cost' shows the marginal external cost added to the marginal private cost of supplying the good. The externality can be internalized by imposing a tax on purchases of each unit of the good (see the line 'marginal private cost + tax'), with the tax rate set equal to the marginal external cost at the social optimum. Imposing such a tax would shift the market equilibrium to the point p^*q^* . This is socially optimal as the externality is fully internalized.

Id.

In much the same way, public international law is a tax on states' actions in their game for survival.¹⁸ The law imposes obligations on states in an effort to internalize the costs of starting conflict (*jus ad bellum*) and the costs of their conduct during conflict (*jus in bello*).¹⁹ These costs serve as significant barriers to entry into the market for armed conflict because not all states have the administrative, legal, and technical expertise to satisfy those high legal hurdles. Intuitively, that is what law has always done. It seeks to impose an equilibrium point—whether dealing with production of goods, civil rights, behavior, or, in the instant case, armed conflict.

B. *Hegemony as Enforcement*

The integrity of public international law is conditioned on voluntary submission. By definition, only states can make international law.²⁰ However, by itself, law can only raise costs as long as it is followed. Fortunately, the law is not, nor should it be, the only tool that regulates the market. There exists another tool that can raise the cost of impermissible aggression, intervention, and armed conflict. I refer to this in the context of monopoly. In international relations, this kind of monopoly is referred to as hegemony.

To understand this point we can examine how a monopolist behaves in a domestic market. Calabresi states:

For, generally, sellers in relatively monopolistic industries sell at higher price to cost ratios than sellers in relatively competitive industries. As a result, fewer goods are demanded from monopolistic industries than is in fact warranted by their true cost. It is this idea that economists and antitrust lawyers have in mind when they speak of the misallocation of resources caused by monopoly.²¹

In a domestic market this misallocation of resources bears a negative connotation. It hampers the production of goods. However, in the case of state production of armed conflict, a higher price to cost ratio and less armed conflict produced is a positive externality. Because the price is set higher, less armed conflict is demanded. The result is a misallocation of the market's resources. This

¹⁸ HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 183 (Richard Tuck ed., Jean Barbeyrac, trans., Liberty Fund 2005) (1625). The struggle for resources and survival has long been recognized as the purpose of war. "The end of war (being the preservation of life or limbs, and either the securing or getting things useful to life)." *Id.*

¹⁹ Joel Hood, *The Equilibrium of Violence: Accountability in the Age of Autonomous Weapons Systems*, 11 *BYU INT'L LAW & MGMT. R.* 12 (2015).

²⁰ See Statute of the International Court of Justice, art. 38, P 1, June 26, 1945, 832 U.S.T.S. 993.

²¹ Calabresi, *supra* note 1, at 504.

is a boon, a positive externality to monopoly, to hegemony. One might even be tempted to call it a “peace dividend.”

Originally, the United States was not the only hegemon envisioned for the post-World War II world. President Franklin Roosevelt envisioned “the Four Policemen,” comprised of the United States, the United Kingdom, the Soviet Union, and the Republic of China.²² They “would have the power to deal immediately with any threat to the peace and any sudden emergency which requires action.”²³ They would be geopolitical hegemonies—a cartel—exercising monopolistic control of the *jus ad bellum* and *jus in bello*. The fact that this four-way division of world policing never materialized does not negate the fact that their purpose was intuitive and crucial to the new legal regime embodied in the United Nations.

While monopoly—or hegemony—seems distasteful, it is the crucial complement to the metaphorical taxation the international legal regime imposes on states’ propensities toward armed conflict. In fact, the United Nations (U.N.) Charter attempts this very thing by enabling the U.N. Security Council to be the sole actor in the international market that can authorize offensive military action.²⁴ By contrast, a market for armed conflict in perfect competition where there are no barriers to entry will, by definition, produce the greatest quantity of violence at the lowest cost. This may explain the immense tragedy of great power competition in World War I.

While the U.N. Charter may authorize force, the U.N. has no standing force of its own.²⁵ Because of this, it is inherently a reactionary organization. It puts out fires; it cannot prevent them. A true monopoly on armed conflict requires the ability to establish and even increase barriers to entry in the market. The United Nations is clearly not that hegemon, and the market equilibrium of armed conflict continues well above zero, as demonstrated by Russia’s continued war of

²² *The Tehran Conference, 1943*, U.S. DEP’T. STATE: OFF. HISTORIAN [hereinafter *Tehran Conference*], <https://bit.ly/4eS6r1R>.

²³ *Id.*

²⁴ Article 42 of the U.N. Charter states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id. However, states retain their right for self and collective defense under Article 51. *Id.*

²⁵ *Id.* Article 43 has never been implemented.

aggression against Ukraine.²⁶ Currently, the hegemonic power of the United States provides some positive externalities. These wax and wane, as the degree to which the United States employs its hegemonic deterrence is subject to the rationale of political administrations that alternate between liberal and realist philosophies.

These philosophies are the product of hundreds of years of development, by which states gained international legal personality and became rational actors.

III. WESTPHALIAN SOVEREIGNTY

Concluded in 1648, “the Congress of Westphalia, brought the Thirty Years’ War to an end and was one of the most memorable events in European history, marking the real beginning of international law.”²⁷ The Holy Roman Emperor Charles V and Martin Luther ushered in this era following their historic confrontation at the Diet of Worms.²⁸

The Emperor was not only the greatest monarch of his day, but the autocratic ruler of territorial domains hardly equalled in extent by any sovereign of ancient or modern times—Emperor of Germany, King of Spain in the era of her greatest power, of the Netherlands, the greater part of Italy, various other principalities of Europe, and of the far-off dependencies of Mexico, Peru, and the other vast regions beyond the seas—the most magnificent empire on earth. Added to these unrivalled possessions, the Emperor cherished an ambition to be the arbiter, if not the actual ruler, of the entire civilized world But an unexpected obstacle arose in the person of the obscure Augustinian monk, whose preaching against the practices of the Roman Church had brought down upon him the fearful excommunication of the Pope. Yet, notwithstanding this

²⁶ Erik Larson, *How War Crimes and the Crime of Aggression Are Being Pursued Against Russia*, BLOOMBERG (Dec. 6, 2022, 12:23 AM), <https://bloom.bg/4gSlKcS>. Article 8 of the Rome Statute defines “crime of aggression” as:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State . . . the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90.

²⁷ John W. Foster, *The Evolution of International Law*, 18 YALE L.J. 149, 153 (1909).

²⁸ *Id.*

malediction, the common people heard him gladly, and presently nobles and princes rallied to his crusade against the Mother Church. In time the mighty monarch, inspired by the Holy Father and disturbed by threatened political revolt against his authority, summoned the audacious monk to appear before him to recant his heresies, and cease to disturb the peace of Europe. In that great convocation in the Cathedral at Worms, as he stood before the Emperor, surrounded by the princes, nobles and hierarchy of his empire, Luther little foresaw the effect of his attitude. It was an appeal to reason and the conscience. His was intended as a religious reformation, but his preaching proved a most powerful political propaganda.

The closing declaration of his defense before the Emperor: “Here I stand, I cannot otherwise; God help me!” rang throughout Europe. It kindled the fires of the *autos de fe* in Spain. It brought to France the St. Bartholomew massacre and the struggle of the Huguenots. It divided Germany into two warring camps. It changed the faith and politics of all Scandinavia. It inspired the heroic revolt of the Netherlands. It made England, under Elizabeth, the bulwark of Protestantism. It drenched Europe in blood for many years, but out of the long and bitter struggle was to come the triumph of reason and conscience upon the ruins of the mighty and dominating empire over which Charles V once reigned supreme.²⁹

The ensuing religious reform, political upheaval, and violence throughout Europe lasted for much of the next one hundred years, culminating in the Thirty Years’ War.³⁰ In 1555, the Peace of Augsburg ended the original war between German Lutherans and Catholics, stipulating that the 224 German states could rule their realms according to their conscience.³¹ This established the first instance of *cuius regio, eius religio*.³² However, the treaty did not prohibit the intervention of sovereigns in the internal affairs of individual realms. In the years to come, rulers instigated wars and invasions upon defense of their fellow-sectarians, though political motives were very often at the root.³³ The Thirty Years’ War was one of the bloodiest of the European wars to date, lasting from

²⁹ *Id.* at 150–51.

³⁰ PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 109–10 (2002).

³¹ *Id.* at 105.

³² *Id.* Literally: “Whose realm, his religion.”

³³ *Id.* at 106–7.

1618 to 1648 and claiming the lives of between four and twelve million people.³⁴ Germany suffered enormously:

The close of the struggle found Germany exhausted and ruined. Three-fourths of the population had perished. Three-fourths of the houses were destroyed, together with five-sixths of the cattle. Commerce had well-nigh disappeared. Some arts had perished entirely. Manufacturing skill had been forgotten amid the ravages of warfare. Science and literature had almost departed from the land.³⁵

During the early years of that savage war, Hugo Grotius published the first serious attempt at codifying international law based on the Bible and the law of nature: *De Jure Belli ac Pacis—On the Law of War and Peace*.³⁶ The work appealed to reason and conscience, argued for a more humane method of conducting war, and advocated the sovereignty of independent states.³⁷

Enlightened rulers like Gustavus Adolphus, at once accepted its principles and sought to put them into practice. Although the war went on to the limit of exhaustion of the combatants, when at last their representatives came together to consider terms of peace, they instinctively turned to Grotius' great work to guide them to a just conclusion. It has been well said that it is one of the few books that have changed the history of the world.³⁸

It was in these circumstances that the Congress of Westphalia met in 1648 and ended the Thirty Years' War.³⁹ It stipulated that all parties would recognize the Peace of Augsburg, granted limited religious freedom, and, perhaps most importantly, recognized the exclusive power of the sovereign over his lands and people.⁴⁰ It established the modern parameters of sovereignty.

By establishing the modern parameters of sovereignty, the Peace of Westphalia established a new model within which states would act—the rules of the game had changed. The right of exclusivity over one's territory was the beginning of what we now refer to as international legal personality. Each state

³⁴ Pascal Daudin, *The Thirty Years' War: The first modern war?*, HUMANITARIAN LAW AND POLICY (May. 23, 2017), <https://blogs.icrc.org/law-and-policy/2017/05/23/thirty-years-war-first-modern-war/>

³⁵ BOBBITT, *supra* note 30, at 105.

³⁶ Foster, *supra* note 27.

³⁷ *Id.*

³⁸ *Id.*

³⁹ BOBBITT, *supra* note 30, at 109–10.

⁴⁰ *Id.* at 20.

became an actor participating on the world stage, leveraging its interests and building its resources to remain independent and sovereign in the face of the great empires.

The Westphalian system became a legal regime in which states exercised the monopoly of violence within their political borders.⁴¹ Any violence emanating from the state was now assumed to be an act of that state.⁴² Max Weber defined the modern state as a “human community that successfully claims the monopoly of the legitimate use of physical force within a given territory.”⁴³ Without this

⁴¹ In the United States, that monopoly and sovereignty rests with the people, and the people invest officials with those powers through regular elections. In this way, the state’s competition for survival is an aggregate of the enfranchised populace’s desire for survival, as expressed by the equation: $\sum_{i=1}^{population} x_i = y$, where y is the aggregate desire for survival. This may explain why democracies rarely, if ever, go to war against each other. However, in a dictatorship, the equation changes to $\sum_{i=1}^1 x_i = y$. It expresses the desire of just one person. Oligarchy represents the aggregate of but a few, for example, $\sum_{i=1}^5 x_i = y$. This models the difference between defensive realism and offensive realism, and why defensive realism describes states that seek the status quo while offensive realism describes gambling with the disenfranchised whose aggregate desire for survival is not factored into the equation.

⁴² G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002); Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001). The Responsibility of the State for Internationally Wrongful Acts is a direct outgrowth of the Westphalian model. In relevant part, those articles state that international law governs wrongful acts, that the conduct of official state organs is considered an act of the state, as are the actions of persons or entities that are empowered by a state to act (e.g., *Tadic*), actions under the instruction of or direct control of a state, and by lack of action, i.e., omission (*Corfu Channel*). It bears mentioning that not every action is directly attributable to the state. As stated in Chapter II, note 2 of the above-referenced articles:

In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.

Id. no. 2.

⁴³ See Generally, MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 156 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., The Free Press 1965); MAX WEBER’S COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS 156 (John Dreijmanis ed., Gordon C. Wells trans., Algora Publishing 2008). I will not attempt to give an exhaustive definition of the state here, but I find Weber’s sociological perspective compelling:

What, though, from the sociological point of view, is a political association? What is a “state?” This cannot be defined sociologically on the basis of what it

fundamental characteristic of international legal personality—legitimate monopoly on violence within a territory—public international law could not exist because only states make international law. The monopoly on force allows the state’s government to speak as the sole organ of foreign affairs.⁴⁴

Thus, the monopolist of internal state violence has the *de facto* legitimacy to bind the state to action or inaction.⁴⁵ And yet, not every state has an equal market share of survival, that is, each state’s resources and military force are not equal. Thus, every state’s sovereignty, their monopoly on domestic physical force, is in some sense a function of one or more other states’ willingness to allow it to exist. Herein lies the distinction between *de facto* sovereignty and *de jure* sovereignty.⁴⁶ *De facto* sovereignty, carried to its logical conclusion, means that only a state that is beholden to no other states for its existence is truly sovereign, truly secure. This is why Mearsheimer posits that a state’s ultimate goal is to the hegemon of the system.⁴⁷

does. There is almost no task that has not at some time been taken on by a political association. At the same time, there is also no task of which it could be said that it is always and exclusively to be performed by those associations that are termed political, or by states, in today’s language, or by the historical precursors of the modern state. Rather, one can ultimately only define the modern state sociologically by reference to a specific means that is proper to it, as it is to every political association, namely, physical force. “Every state is founded on force,” as [Leon D.] Trotsky once said in Brest-Litovsk. That is indeed true. If there had existed social structures for which force as a means was unknown, then the concept of the “state” would have lapsed; then something that would be called “anarchy,” in this particular sense of the word, would have emerged.

Force is not the normal or sole means available to the state. There can be no question of that. It is, however, specific to it. Today, the relationship of the state to force is a particularly intimate one. In the past, many different associations, from the clan onward, have regarded force as a quite normal means. Today, by contrast, we must say: The state is the human community that, within a defined territory—and the key word here is “territory”—(successfully) claims the monopoly of legitimate force for itself. The specific characteristic of the present is that the right to use physical force is only granted to any other associations or individuals to the extent that the state itself permits this. The state is seen as the sole source of the “right” to use force. For us, therefore, “politics” means the attempt to gain a share of power or to influence the distribution of power, whether it be among states or among groups of people living within a state.

Id.

⁴⁴ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁴⁵ See, e.g., George Washington, President, United States, *The Proclamation of Neutrality* (1793), <https://bit.ly/3NeZ4WI>.

⁴⁶ See U.N. Charter art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”).

⁴⁷ MEARSHEIMER, *supra* note 4.

States require resources—human, technological, natural—to survive among other states and to extend their production possibilities frontiers.⁴⁸ Their continued existence is predicated upon securing their relative sovereignty in relation to other states. This is the key to understanding states as rational actors. Sovereignty is fundamentally an existential question. This is no doubt what Brazil had in mind when it responded to the Dumbarton Oaks Proposals with an amendment to what is now U.N. Charter 2(4), which would have included a prohibition on the use of economic measures in any way inconsistent with the purposes of the United Nations.⁴⁹

A. *Jus ad Bellum*

The law regarding a state's legal recourse to armed conflict has changed since Westphalia. However, some canons of public international law are still employed.⁵⁰ Until recently, one might have assumed that the U.N. Charter had laid to rest the Machiavellian myth that “for a King or sovereign city nothing profitable is unjust.”⁵¹

⁴⁸ Andrew Bloomenthal writes:

This technique can be used by economists to determine the set of points at which a country's economy is most efficiently allocating its resources to produce as many goods as possible. If the production level is on the curve, the country can only produce more of one good if it produces less of some other good. If the economy is producing less than the quantities indicated by the curve, this signifies that resources are not being used to their full potential. In this case, it is possible to increase the production of some goods without cutting production in other areas. The production possibility frontier demonstrates that there are limits on production, given that the assumptions hold. Therefore, each economy must decide what combination of goods and services should be produced to attain maximum resource efficiency.

Andrew Bloomenthal, *Production Possibility Frontier (PPF): Purpose and Use in Economics*, INVESTOPEDIA (April 19, 2024), <https://www.investopedia.com/terms/p/productionpossibilityfrontier.asp>.

⁴⁹ U.N. Conference on International Organization, Dumbarton Oaks Proposals Comments and Proposed Amendments, in 3 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 243 (1945).

⁵⁰ Defense of nationals has been used by Nazi Germany, Russia in Georgia, and Russia in Ukraine. See *Chamberlain and Hitler 1938*, THE NATIONAL ARCHIVES, <https://www.nationalarchives.gov.uk/education/resources/chamberlain-and-hitler/source-2b/>; Robert P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L. L. 1 (2011); Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>.

⁵¹ GROTIUS, *supra* note 18, at 76. Grotius writes:

B. *Jus in Bello*

Following Westphalia and Grotius's plea for a more humane conduct of warfare, states slowly transformed the *jus in bello*. Belligerents began to exchange prisoners, "the lawlessness of the soldiery was restrained; the sack of cities and the indiscriminate destruction of private property diminished; and through the eighteenth and nineteenth centuries steady progress was made in the amelioration of war."⁵²

For example, during its Civil War in 1863 the United States adopted the Lieber Code.⁵³ It became the basis for further rules of armed conflict in that century and the modern law of armed conflict (LOAC) today.

In 1864, the International Committee for Relief to the Wounded—now known as the International Committee of the Red Cross—came into being and organized the first Geneva Conference. The first Geneva Convention "for the Amelioration of the Condition of the Wounded in Armies in the Field" stipulated that military hospitals and personnel were neutral and non-targetable, that wounded had to be cared for and repatriated, and that civilians were guaranteed protection if they too helped or sheltered the wounded.⁵⁴

The St. Petersburg Declaration of 1868, which followed soon thereafter, developed the principle of limiting unnecessary suffering. It prohibited "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."⁵⁵ The Russian tsar also convened the 1899 Hague Convention whose participants prohibited launching projectiles from "balloons or

Cicero rightly commended the excellence of this science, in the business of alliances, treaties, conventions between states, princes, and foreign nations, and in short, in all affairs that regard the rights of war and peace. And Euripides prefers this science before the knowledge of all other things, whether divine or human, when he makes Helen to say thus to Theonoe: "Twould be a base reproach/To you, who know th' affairs present and future/of men and gods, not to know what justice is." And indeed this work is the more necessary, since we find some, both in this and in former ages, so far despising this sort of right, as if it were nothing but an empty name. The saying of Euphemus in Thucydides is almost in every ones mouth, to a King or sovereign city, nothing is unjust that is profitable. Not unlike to which is this, that amongst the great the stronger side is the juster side; and, that no state can be governed without injustice.

Id.

⁵² Foster, *supra* note 27.

⁵³ Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 65 (1994).

⁵⁴ Convention for the Amelioration of the Condition of Wounded In Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361, <https://bit.ly/3YaNzWy>.

⁵⁵ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297, <https://bit.ly/3ZSV99B>.

other similar new methods” for five years,⁵⁶ “the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases,”⁵⁷ and dum-dum bullets.⁵⁸ Each of these had as its principle aim to regulate excessive violence and further established the rules of the game.⁵⁹

That first Hague Conference anticipated a second, which was held in 1907. Like its predecessor, the Second Hague Conference of 1907 attempted to regulate emerging technologies.⁶⁰ It saw a renewal of the moratorium on aerial bombardment.⁶¹ However, the prohibition was only “until the next Peace Conference” instead of a set number years.⁶² Germany, Russia, and France did not sign the declaration.⁶³ Furthermore, the outbreak of World War I interrupted the next scheduled Hague Conference and made the prohibition unenforceable as to the remainder of nations. Thus, there were fewer restrictions to aerial bombardment when World War I began. The rules of land warfare applied to

⁵⁶ THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 & 1907 at 220 (James B. Scott ed., 1918).

⁵⁷ *Id.* at 224. Interestingly, the declaration states:

The contracting Powers agree to abstain from the use of projectiles the sole purpose of which is the diffusion of asphyxiating or deleterious gases . . . it shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents shall be joined by a non-contracting Power.

Id. In 1907 Great Britain ratified the declaration, but the United States never did. *Id.* Thus, gas warfare between the belligerents before the entrance of the United States was illegal, but legal once the United States had entered the conflict. This is not to suggest that the United States could act with impunity, but rather that as early as 1899, and certainly earlier in the St. Petersburg Conference, reciprocity was the main enforcement mechanism of LOAC.

⁵⁸ Final Act of the International Peace Conference, The Hague, 29 July 1899, INT’L HUMANITARIAN LAW DATABASES, <https://bit.ly/3BJACtN>.

⁵⁹ See GROTIUS, *supra* note 18, at 163. Grotius prophetically dictated how the principle of unnecessary suffering and other provisions of customary international law must come about, that is, state practice and *opinion juris*:

But the more extensive right, is the Right of Nations, which derives its authority from the will of all, or at least of many, nations. I say many, because there is scarce any right found, except that of Nature, which is also called the Right of Nations, common to all Nations. Nay, that which is reputed the Right or Law of Nations in one part of the world, is not so in another, as we shall shew hereafter, when we come to treat of Prisoners of War, and Postliminy or the Right of Returning. Now the proofs on which the Law of Nations is founded, are the same with those of the unwritten Civil Law, viz. continual use, and the testimony of men skilled in the laws. For this law is, as Dio Chysostom well observes, the Work of Time and Custom.

Id.

⁶⁰ 1 PROCEEDINGS OF THE HAGUE PEACE CONFERENCE OF 1907 at 678 (1James B. Scott ed., 1920).

⁶¹ *Id.*

⁶² *Id.*

⁶³ THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 & 1907, *supra* note 56, at 237.

aerial bombardment at least in one sense: undefended cities and towns were still non-targetable.⁶⁴ However, cities like London were technically defended and, therefore, the zeppelin raids of World War I violated no laws.⁶⁵

Submarines were discussed at length in the 1907 Conference, but emerged practically untouched.⁶⁶ The 1899 Hague Conference had addressed the topic of submarines and torpedo boats, but the delegates were only presented with a vote on the issue of the “prohibition of submarine or diving torpedo-boats.”⁶⁷ They did not address submarine operations, assuming that law customary to the conduct of naval operations would apply.⁶⁸ Many of the delegates expressed the sentiment that if the proposed ban on submarines were unanimous, they would acquiesce.⁶⁹ Needless to say, the delegates did not establish a prohibition, and the law of war regarding submarines was not taken up seriously again until the Washington Conference in 1921.

Such was the state of the market at the beginning of the twentieth century—the *jus in bello* and *jus ad bellum* providing the regulatory regime for the market of armed conflict. As the next section will demonstrate, this feeble regulatory regime was not sufficient to curtail the externalities of armed conflict in a market in perfect competition.

IV. THE MARKET FROM WORLD WAR I TO PRESENT

A. *World War I – A Market in Perfect Competition*

Leading up to World War I, the rules imposed low costs on states that wished to participate in the market for armed conflict. As discussed, the *jus in bello* and *jus ad bellum* were comparatively underdeveloped by modern standards. Additionally, the market of armed conflict was operating at high, if not optimal, efficiency. The European colonial powers had a high demand for resources, their economic production possibilities frontiers were expanding, and their war-making

⁶⁴ TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 13 (1992).

⁶⁵ *Id.* It was technically considered “defended” because it had a wall around it.

⁶⁶ *See also id.* at 18.

⁶⁷ PROCEEDINGS OF THE HAGUE PEACE CONFERENCE OF 1899 at 299 (James B. Scott ed., 1920) [hereinafter HAGUE PEACE CONFERENCE OF 1899].

⁶⁸ TAYLOR, *supra* note 64, at 17.

⁶⁹ HAGUE PEACE CONFERENCE OF 1899, *supra* note 67, at 367. German delegate, Captain Siegel, stated “that if all the other Governments agreed not to adopt vessels of this kind, Germany would join in this understanding.” *Id.* This of course was mooted by the delegate from France’s assertion “that the submarine torpedo has an eminently defensive purpose, and that the right to use it should therefore not be taken from a country.” *Id.* Contrast this serious political jostling with the pompous statement from the delegate from the Netherlands: “the submarine torpedo is the weapon of the weak.” *Id.*

capability was expanding due to new technologies and booming populations.⁷⁰ Thus, low barriers to entry, coupled with the high demand for expansion, enabled a greater quantity of armed conflict demanded at a catastrophically low price.

The *jus in bello* was similarly permissive, as discussed in Part III. The market was in equilibrium among the great powers. Yet, by the end of the war there was great public demand and renewed interest “in the use of multinational treaties not only to limit armaments, but also to govern their use.”⁷¹

This outcome is not surprising. The equilibrium of any market is only achieved after failure, often repeated failures. In fact, equilibrium may well be thought of as the sum of all failures. This is due to the fundamental information problem at the center of supply and demand—the optimal allocation of resources.⁷²

In the context of armed conflict, this means that the market had created the ideal situation for the maximum quantity of armed conflict to occur. This momentum made the war almost inevitable. Poor diplomatic relations were the final blow because diplomacy is collaboration, the alternate paradigm to attaining security. In fact, one might well say that armed conflict is simply the basest form of communication—the belligerents expressing their will via force of arms in a Clausewitzian wrestle. The relatively low elasticity of demand for security via armed conflict was increased incrementally over the course of the Great War, finally imposing sufficient cost that diplomacy prevailed in the eleventh hour on the eleventh day of the eleventh month in 1918.

During the Great War, the weak legal regimes began to collapse. The 1899 Hague Convention’s prohibition on the use of asphyxiating gases was breached with horrendous results. On 22 April 1915, a thick yellow smoke was seen billowing from the German trenches between Langemarck and Bixschoute near Ypres, Belgium.⁷³ This was the first use of modern chemical warfare. “Soon a gas wall of chlorine two miles long and a hundred feet high began to drift toward the French positions at Langemarck.”⁷⁴ Five thousand soldiers died in that first attack.⁷⁵

⁷⁰ HAGUE PEACE CONFERENCE OF 1899, *supra* note 67 (submarines, machine guns, aircraft, asphyxiating gas). Europe’s population doubled from 200 million to 400 million in the nineteenth century. Krishan Kumar, *Modernization*, ENCYC. BRITANNICA, <https://bit.ly/4exykwD>.

⁷¹ TAYLOR, *supra* note 64, at 19.

⁷² The marginal cost per one unit increase of armed conflict versus the marginal utility gained.

⁷³ Major Joseph Burns Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 3 (1960).

⁷⁴ *Id.*

⁷⁵ *Id.* at 6.

During the course of the year, the Germans, followed by the French and the British, continued to use gas clouds in an effort to break the lines of the entrenched enemy.⁷⁶ In 1917, artillery shells containing gas began to compliment the yellow clouds of chlorine and the smell of old hay that accompanied phosgene.⁷⁷ By the end of the war, phosgene would account for eighty percent of all military personnel gas deaths.⁷⁸

The German forces first used mustard gas on 12 July 1917.⁷⁹ It was much more effective than other gases, producing eight times as many casualties.⁸⁰ Its main advantage was its persistence and potency.⁸¹ Contact with the skin produced blisters and it could remain on the ground for days after the attack.⁸² It became the chemical weapon of choice throughout that year and into the next.⁸³ The last gas was an American invention—lewisite.⁸⁴ Whereas chlorine gas caused many casualties but few deaths, lewisite was potent enough to “penetrate the pores and poison the body.”⁸⁵ While each of the gases were grisly in their effects and placed enormous numbers of soldiers *hors de combat*,

it must be noted that its victims were confined to troops in the field. It was not directed against nor did it affect the civilian population. This fortunate result was aided by the fact that the airplane was not used as a means of disseminating gases. Despite the escape of the civilian population in World War I it was fear for their safety from gas that preoccupied the states in the inter-war period.⁸⁶

The vague customary international law governing submarines proved to be insufficient to restrict their more abusive uses. In 1917, Germany declared the area surrounding the British Isles a war zone into which merchant vessels entered at their own peril. In reality, the German navy had been practicing unrestricted submarine warfare since 1915 with the sinking of the *RMS Lusitania*, which later contributed to the United States’ entrance into World War I.⁸⁷

⁷⁶ *Id.* at 8, 9.

⁷⁷ *Id.* at 9; *Smells Like Musty Hay-Phosgene*, U.S. ARMY WWII POSTER, <https://bit.ly/4eSS1i5>.

⁷⁸ Kelly, *supra* note 73, at 11.

⁷⁹ *Id.* at 10.

⁸⁰ *Id.* at 10–11.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Kelly, *supra* note 73, at 11.

⁸⁶ *Id.* at 12.

⁸⁷ *Sinking of the Lusitania: Topics in Chronicling America*, LIBR. CONG., <https://bit.ly/4gVmBJD> (last visited Oct. 18, 2024).

This economic warfare at sea attempted to both deny the enemy material and to starve the enemy into submission.⁸⁸ In fact, “[n]either side denied using starvation as a method of warfare.”⁸⁹ Consequently, there was widespread humanitarian and governmental outcry against submarine warfare.⁹⁰ Perhaps one of the most egregious violations of the law of war by use of unrestricted submarine warfare was the sinking of a British hospital ship and the destruction of both lifeboats and survivors.⁹¹

Aircraft too had evolved. Gone were the days Captain Crozier described during the 1899 Hague Conference: “[I]t can carry but little; it is capable of hurling, only on points exactly determined and over which it may pass by chance, indecisive quantities of explosives, which would fall, like useless hailstones, on both combatants and non-combatants alike.”⁹² The dirigible changed the quantities of explosives that an airborne vessel could carry. By 1915, one would be hard-pressed to find someone in London arguing that the bombs descending from German dirigibles were “like useless hailstones.”⁹³ Rather, “by the end of the year over 200 civilians had been killed and many were terrorized.”⁹⁴ The deliberate targeting of steel and munitions factories by both sides of the conflict demoralized the enemy “consistent with the theory of collateral casualties.”⁹⁵

These few examples of the failure of the *jus in bello* to stanch violations of distinction highlight the status of the market for armed conflict at that time. It was laissez-faire—a time of recklessness. The information problem prevailed. How could the belligerents know that each unit of security produced by armed conflict was overwhelmed by the marginal cost per unit?

B. Accountability and Finding Equilibrium

Not only did the victors of the Great War demand accountability for violations of the laws and customs of war, but the populations of the former belligerent states demanded a more efficient legal regime.

[T]he enormous carnage of World War I stimulated public demand for measures to prevent a recurrence of such slaughter

⁸⁸ Lieutenant David A. Melson, *Targeting War-Sustaining Capability at Sea: Compatibility with Additional Protocol I*, ARMY LAW., Jul. 2009, at 44, 47.

⁸⁹ *Id.* at 47.

⁹⁰ TAYLOR, *supra* note 64, at 18.

⁹¹ *Id.* at 17. Lieutenant Patzig and his subordinate officers, Lieutenants Dithmar and Boldt, were charged in the Leipzig Trials, but Patzig fled the country and, although convicted, Dithmar and Boldt escaped from prison after only a few months. *Id.*

⁹² HAGUE PEACE CONFERENCE OF 1899, *supra* note 67, at 354.

⁹³ *Id.*

⁹⁴ TAYLOR, *supra* note 64, at 12.

⁹⁵ W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 22 (1990).

and destruction. Military and diplomatic interest was rekindled in the use of multinational treaties not only to limit armaments, but also to govern their use. The airplane, the submarine, and poison gas had profoundly affected the conduct of the war, and it was to these relatively new weapons, largely untouched by the Hague Conventions, that attention now turned.⁹⁶

The Treaty of Versailles established the League of Nations, whose Preamble read as follows:

THE HIGH CONTRACTING PARTIES, In order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war by the prescription of open, just and honourable relations between nations by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another Agree to this Covenant of the League of Nations.⁹⁷

The Treaty of Versailles nominally held the offending parties accountable. Article 227 stated that William II of Hohenzollern, formerly German Emperor, would be publicly arraigned, “with a view to vindicating the solemn obligations of international undertakings and the validity of international morality.”⁹⁸ Articles 228 through 230 gave the Allied and Associated Powers the right to “bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.”⁹⁹ They formed the basis of the Leipzig Trials.¹⁰⁰ In fact, the officers of the submarine that sank a British hospital ship—Lieutenant Patzig and his subordinate officers, Lieutenants Dithmar and Boldt—were each charged during the Leipzig trials.¹⁰¹

Article 8 of the Treaty anticipated the reduction of national armaments as a move toward peace. Articles 10 through 17 regulated disputes between states

⁹⁶ TAYLOR, *supra* note 64, at 19.

⁹⁷ Treaty of Peace between the United States and Germany, pmbl., June 28, 1919, 42 Stat.1939 [hereinafter Versailles Treaty], <https://bit.ly/3ZQdK5V>. The United States never joined the League of Nations, even though it was first proposed by President Woodrow Wilson “as part of his Fourteen Points plan for an equitable peace in Europe.” *The League of Nations, 1920*, U.S. DEP’T. STATE: OFF. HISTORIAN, <https://bit.ly/3Nd051c>.

⁹⁸ Versailles Treaty, *supra* note 97, art. 227.

⁹⁹ *Id.* arts. 228–300.

¹⁰⁰ TAYLOR, *supra* note 64, at 17.

¹⁰¹ *Id.* The inefficacy of the Leipzig Trials is indisputable. However, the fact remains that there were clear notions of who should be held accountable and why.

and required that disputes likely to lead to war be submitted to the members of the League of Nations for arbitration. An act of aggressive war would “*ipso facto* be deemed to have committed an act of war against all other Members of the League.”¹⁰²

Additional treaties followed. In the interwar period, there were five conferences that attempted to regulate naval warfare: the Washington Naval Conference from 1921 to 1922, the Geneva Naval Conference in 1927, the Second Geneva Naval Conference in 1932, the London Naval Conference in 1930, and the Second London Naval Conference in 1935. The State Parties created law, as only states can do, to raise the cost of armed conflict and thereby reduce the externalities of its use.

The Washington Conference involved nine nations, seven treaties, and thirteen resolutions.¹⁰³ The general purpose of each treaty was to “prevent the possibility of another war” and engage naval competitors in negotiations.¹⁰⁴ During the course of the conference, British delegate Lord Balfour called for a prohibition on the use of submarines, reasoning:

Is there any man who doubts that if they are once let loose to deal with merchantmen their powers will not in the stress of war be abused in the future as they have been so grossly abused in the past? I do not think, as I have already indicated, that it is the fighting use of the submarine which is really before us now. The question before us now is whether you are going to encourage an instrument of war which, if it be encouraged, if indeed it be permitted at all, will undoubtedly be used in the illegitimate destruction of commerce.¹⁰⁵

Balfour drew upon the recent memory of German U-boat attacks during the war. His reasoning reflected Great Britain’s strategic vulnerability to blockade. France’s delegates stringently opposed the proposal, and this led to an impasse.¹⁰⁶ The British delegation had this statement formally placed on the record of the conference: “[T]he use of submarines, whilst of small value for defensive

¹⁰²Versailles Treaty, *supra* note 97.

¹⁰³ NAVAL WAR COLLEGE, CONFERENCE ON THE LIMITATION OF ARMAMENT OF 1921 vii (1923).

¹⁰⁴ *The Washington Naval Conference, 1921–1922*, U.S. DEP’T. STATE: OFF. HISTORIAN [hereinafter *Washington Naval Conference*], <https://bit.ly/4eVnRLh>. The invitation to the conference read: “It may also be found advisable to formulate proposals by which in the interest of humanity the use of new agencies of warfare may be suitably controlled.” *Id.*

¹⁰⁵ *Id.* at 73–74.

¹⁰⁶ *Id.* at 54 (“France believes that the submarine is the only weapon which at present permits a nation scantily supplied with capital ships to defend itself at sea. For France, therefore, the submarine is an essential means of preserving her independence which she can not give up.”).

purposes, leads inevitably to acts which are inconsistent with the laws of war and the dictates of humanity, and the delegation desires that united action should be taken by all nations to forbid their maintenance, construction, or employment.”¹⁰⁷

Notwithstanding the failure of the conference to come to a consensus on submarines, the Five-Power Treaty was signed by the United States, Great Britain, Japan, France, and Italy.¹⁰⁸ It required the countries to set a lower ratio of warship tonnage and reduce the size of their navies by scrapping older ships, and outlawed expansion of bases in the Pacific.¹⁰⁹ These treaties expired in 1936.¹¹⁰

The Washington Conference also addressed aircraft, concluding “that it is not at all practicable to impose any effective limitations upon the numbers or characteristics of aircraft, either commercial or military.”¹¹¹ Furthermore, the committee stated:

[T]he use of aircraft in war should be covered by the rules of warfare as adapted to aircraft, by a further conference which should be held at a later date. . . the late war had revealed the imperative necessity for the adoption of new rules of warfare, and that these new rules of warfare should be framed so as to take into account the development of the science of aeronautics and its application to war.¹¹²

A committee met as per Resolution I of the Conference, but the *Hague Rules of Aerial Warfare*, although drafted, were never presented to the international community for official acceptance or discussion.¹¹³ Thus, aerial

¹⁰⁷ *Id.* at 93. Captain Mahan made a similar argument—though unconvincingly—in the 1899 Hague Conference. The Conference reports: “[H]e thinks . . . it is no more cruel to asphyxiate one’s enemies by means of deleterious gases than with water, that is to say, by drowning them, as happens when a vessel is sunk by the torpedo . . . he does not deem it logical to permit the use of submarine and submergible boats and to prohibit the use of shells filled with asphyxiating gases.” HAGUE PEACE CONFERENCE OF 1899, *supra* note 67, at 283, 328.

¹⁰⁸ *Washington Naval Conference*, *supra* note 104.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Perhaps the treaties limited tenure is why Taylor refers to them as a failure, TAYLOR, *supra* note 64, at 18.

¹¹¹ *Washington Naval Conference*, *supra* note 104, at 229.

¹¹² CONFERENCE ON THE LIMITATION OF ARMAMENT, *supra* note 103, at 229.

¹¹³ HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 374 (1993); Taylor writes:

For air warfare there were no further treaty developments, and in retrospect it is easy to see why the 1923 draft failed to win adherents. In 1921, the Italian air general Giulio Douhet had published a widely read book, *Command of Air*, preaching the doctrine that in future years air power would be decisive . . . Public opinion, during the years between the two world wars, settled into a

warfare continued to operate largely under only customary international law through both World Wars.¹¹⁴

U.S. President Calvin Coolidge convened the Geneva Naval Conference in 1927 to address classes of vessels not covered by the Five-Power Treaty in 1921.¹¹⁵ These classes of vessels included cruisers, destroyers, and submarines.¹¹⁶ The parties failed to form a treaty due to U.S. and British disagreement over cruiser limitations.¹¹⁷

The London Naval Conference in 1930 was a new attempt to revise and extend the terms of the Five-Power Treaty of 1921 and avoid a naval arms race.¹¹⁸ Specifically, a Joint Statement of the President of the United States and the British Prime Minister on October 10, 1929 expressed hope for the conference “not only to review the conversations on a naval agreement . . . but also to discuss some of the more important means by which the moral force of our countries can be exerted for peace.”¹¹⁹ The tone of the conference was one of establishing peace in light of the then-recent Kellogg-Briand Pact,¹²⁰ but the terms of the treaties were much more pragmatic.¹²¹

It limited the tonnage of auxiliary ships, granted the Japanese a higher ratio of tonnage for non-offense ship categories, and ended the impasse on cruiser vessels that halted the first Geneva Naval Conference.¹²² All of the provisions of the treaty, except article 22, were set to expire 31 December 1936.¹²³ Article 22

fatalistic acceptance that future wars between great powers would surely involve urban infernos produced by bombers, and that nothing could be done about it.

TAYLOR, *supra* note 64, at 19.

¹¹⁴ *Id.* at 10, 20.

¹¹⁵ *The Geneva Naval Conference, 1927*, U.S. DEP’T. STATE: OFF. HISTORIAN [hereinafter *Geneva Naval Conference*], <https://bit.ly/4dDvjt8>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *International Treaty for Limitation and Reduction of Naval Armament, opened for signature Apr. 22, 1930*, 46 Stat. 2858 [hereinafter *London Conference*].

¹¹⁹ *Id.*

¹²⁰ NAVAL WAR COLLEGE, *INTERNATIONAL LAW SITUATIONS: WITH SOLUTIONS AND NOTES* 103-4 (1929). The *Kellogg-Briand Pact* condemned war “as an instrument of national policy.” It further stipulated that the “contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be which may arise among them shall never be sought except by pacific means.” *Id.*

¹²¹ *Id.* at 210–11.

¹²² *Geneva Naval Conference, supra* note 115.

¹²³ *The London Naval Conference, 1930*, U.S. DEP’T. STATE: OFF. HISTORIAN [hereinafter *London Naval Conference*], <https://bit.ly/3YaSrLf>. In 1935, the United States, Great Britain, Japan, and France met to renegotiate the Washington and London Treaties before they expired the following

required submarines to follow the same standards of international law as applied to surface vessels. Specifically,

- (1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.
- (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.¹²⁴

This article of the 1930 London Treaty became known as the London Submarine Protocol of 1936, and over 35 nations eventually subscribed to it.¹²⁵ Subsection two directly addressed the issue of unrestricted submarine warfare.¹²⁶ Notwithstanding these protections, “German submarines frequently sunk British and other merchant ships without warning” during World War II.¹²⁷ Balfour had been prophetic in 1921.¹²⁸ No measures of law or accountability had reined in the new technology.

The Second Geneva Naval Conference formed a part of the League of Nations World Disarmament Conference, which failed when Adolf Hitler withdrew Germany from the Conference and the League of Nations in October 1933.¹²⁹ Japan withdrew that same year,¹³⁰ and Italy in 1937.¹³¹

year. Japan withdrew from the conference and the remaining powers agreed to a six-year moratorium on building large light cruisers. *Id.*

¹²⁴ London Conference, *supra* note 118, art. 22.

¹²⁵ Kelly, *supra* note 73, at 107; TAYLOR, *supra* note 64, at 87, 400. During the Nuremberg Trials, Admiral Karl Doenitz was prosecuted for unrestricted submarine warfare (among other things) in violation of this precedent. *Id.*

¹²⁶ *Id.* Though this was not a sufficient deterrent to Nazi Germany or the United States in the Pacific theater.

¹²⁷ *Id.* at 399.

¹²⁸ CONFERENCE ON THE LIMITATION OF ARMAMENT, *supra* note 103, at 73–74.

¹²⁹ James, *supra* note 5.

¹³⁰ *Japanese Decide to Quit the League*, N.Y. TIMES (Feb. 20, 1933), <https://nyti.ms/4evAbC9>.

BOBBITT, *supra* note 30, at 40.

¹³¹ Arnaldo Cortes, *Italy is Prepared to Leave League; Fascist Grand Council Called for Tomorrow*, N.Y. TIMES (Dec. 10, 1937), <https://nyti.ms/4eyLtFu>.

The League of Nations had failed to prevent or resolve armed conflict on numerous occasions, such as: the invasion of Albania by Serbia and Greece,¹³² the Japanese invasion of China (the Manchurian incident),¹³³ the Chaco War between Bolivia and Paraguay,¹³⁴ terrorism on the Hungarian-Yugoslav frontier,¹³⁵ and Italy's invasion of Ethiopia.¹³⁶ Moreover, it permitted the rearmament of Germany.¹³⁷ The League of Nations was weak because it was divided. The Manchurian incident was illustrative of this division:

[T]he real cause of the war lay in the subsequent failure of diplomacy to prevent the tragic consequences of that act in the breakdown of the structure of peace. In 1914 it was the state system of Europe, based on the balance of power, which in the face of determined aggression had been so definitely provoked. It was to prevent such confusion among the nations anxious for the preservation of peace that the League of Nations was established, with its provision for collective security. But in 1931, almost the same kind of confusion prevailed at Geneva as had been the case in the tragic days of August, 1914. This, however, was not merely to the inadequacy of the machinery of the League of Nations, but also to the fact that the United States was not a member of it. With the best will in the world toward the League, Secretary Stimson found himself in the critical opening hours of the crisis more or less in the position of a rival to the League Council.¹³⁸

The League of Nation's many failures were a signal to aggressor states that the cost for engaging in armed conflict was low and decreasing in comparison to the cost of diplomacy, which had been difficult and costly during the interwar period. It was predictable that if the marginal cost for engaging in armed conflict was low, rational state actors would engage in armed conflict.

The Treaty of Versailles, the Kellogg-Briand Pact, and numerous other treaties had attempted to set an artificial market equilibrium at an internationally approved point by declaring war illegal. It was an attempt to tax armed conflict out of existence. However, the general misunderstanding of that market—the low

¹³² JAMES T. SHOTWELL & MARINA SALVIN, LESSONS ON SECURITY AND DISARMAMENT FROM THE HISTORY OF THE LEAGUE OF NATIONS 50 (1949).

¹³³ *Id.* at 81.

¹³⁴ *Id.* at 68.

¹³⁵ *Id.* at 72.

¹³⁶ *Id.* at 73.

¹³⁷ *Id.* at 75.

¹³⁸ SHOTWELL & SALVIN, *supra* note 132, at 82.

cost of entry caused by the ineffective League of Nations—led to the next great externality: World War II.

C. *World War II—The League of Nations Fails*

The Treaty of Versailles did more than raise the costs on going to war; it forced Germany to pay reparations, severely restricted its military, and established the League of Nations. Reparations, coupled with the “guilt clause,”¹³⁹ served to lay the blame for the Great War solely upon Germany’s shoulders. The Allied powers almost certainly viewed this form of taxation as a punishment—a disincentive to future aggression. However, they did not understand the nature of the state as the aggregation of all individuals’ existential need for security. This is the fundamental need that politicians capitalize on.

The term “security” aggregates many of the statistical and historical factors that led to the rise of Hitler and the Third Reich. Inflation, poverty, a sense of being treated unfairly by other nations—all diminished Germany’s *de facto* sovereignty.¹⁴⁰ It is all too obvious that the German people’s collective need for security was easily manipulated.

The greatly weakened League of Nations lacked the power and cohesion to stop the rising Germany. By 1935, France concerned herself with her security in the face of a re-arming Germany.¹⁴¹ Cracks traced through the structure of the League of Nations. The Soviet Union invoked defense of nationals to invade Poland,¹⁴² and invaded Finland soon thereafter.¹⁴³ On December 14, 1939, the League of Nations expelled the Soviet Union.¹⁴⁴

The purpose of this section is not to give a history of World War II or of violations of the laws of war, but rather to explain the development of the market for armed conflict. Even before the end of the war, Roosevelt and Winston

¹³⁹ Versailles Treaty, *supra* note 97, art. 231.

¹⁴⁰ It is helpful for the reader at this point to review the author’s concept of sovereignty. A state’s existence and ability to exercise personality is contingent upon other states allowing it to exist. While *de jure* still sovereign, Germany was financially weak, diplomatically had no leverage, and was *de facto* less sovereign. A state accrues resources and military force until the marginal cost per unit of sovereignty equals the marginal utility gained.

¹⁴¹ SHOTWELL & SALVIN, *supra* note 132, at 93.

¹⁴² G.E.R. Gedye, *German Officers Arrive in Moscow*, N.Y. TIMES (Sept. 21, 1939), <https://nyti.ms/4eQrKRB>. The Soviet government reported that it had followed the German advance closely and had only invaded because “the Polish state had ceased to exist.” *Id.*

¹⁴³ G.E.R. Gedye, *In Finland the Soviets Reveal Their Real Aims*, N.Y. TIMES (Dec. 3, 1939), <https://nyti.ms/4eRkFjH>.

¹⁴⁴ G.E.R. Gedye, *Moscow Ridicules League Expulsion*, N.Y. TIMES (Dec. 17, 1939), <https://nyti.ms/3BuGMxQ>.

Churchill were shaping it.¹⁴⁵ At a meeting with “Chiang Kai-shek, Roosevelt and Churchill agreed to a pre-eminent role for China in postwar Asia.”¹⁴⁶ At the Tehran Conference in 1943, Roosevelt and Joseph Stalin began to secretly discuss the composition of the United Nations.¹⁴⁷ Roosevelt envisioned that the “United Nations would be dominated by ‘four policemen’ (the United States, Britain, China, and Soviet Union) who ‘would have the power to deal immediately with any threat to the peace and any sudden emergency which requires action.’”¹⁴⁸

In August 1944, delegates from the United States, Great Britain, and China met at Dumbarton Oaks, in Washington, D.C., to draft the proposed collective security charter.¹⁴⁹ The Dumbarton Oaks proposals envisioned a General Assembly of all member states and a Security Council “consisting of the Big Four plus six members chosen by the Assembly.”¹⁵⁰ At the Yalta Conference in 1945, France was included as one of the “policemen” on the Security Council.¹⁵¹ The United Nations formally came into existence on October 24, 1945.¹⁵² As a result, the League of Nations dissolved itself soon thereafter on April 18, 1946.¹⁵³

Unlike the League of Nations before it, the United Nations was premised on its ability to substantially raise the barriers for entry into the market for armed conflict. The U.N. Charter strengthened the *jus ad bellum* by prohibiting the use or threat of force as an offensive measure and limiting the legitimate use of force to U.N. Security Council Resolutions under article 42 and self-defense under article 51. However, relations between the United States and the Soviet Union had been deteriorating since the Potsdam Conference.¹⁵⁴ China was embroiled in a brutal civil war, which Chiang Kai-shek and the nationalist lost in 1949.¹⁵⁵ The People’s Republic of China would not be recognized by the U.S. government for decades to come.¹⁵⁶ These issues prevented Roosevelt’s four/five policeman vision from going into effect.

¹⁴⁵ *Wartime Conferences, 1941-1945*, U.S. DEP’T. STATE: OFF. HISTORIAN [hereinafter *Wartime Conferences*], <https://bit.ly/3ZSsRf6>.

¹⁴⁶ *Id.*

¹⁴⁷ *Tehran Conference*, *supra* note 22.

¹⁴⁸ *Id.*

¹⁴⁹ *The Formation of the United Nations, 1945*, U.S. DEP’T. STATE: OFF. HISTORIAN [hereinafter *Formation of the United Nations*], <https://bit.ly/3zAKqC>.

¹⁵⁰ *Id.*

¹⁵¹ *The Yalta Conference, 1945*, U.S. DEP’T. STATE: OFF. HISTORIAN, <https://bit.ly/3ZSh40o>.

¹⁵² *Formation of the United Nations*, *supra* note 149.

¹⁵³ Resolution for the Dissolution of the League of Nations (1946), Covenant of the League of Nations art. 3(3); 1 Int’l Org. 246 (adopted by the Assembly on Apr. 18, 1946) (1947).

¹⁵⁴ *Wartime Conferences*, *supra* note 145.

¹⁵⁵ *The Chinese Revolution of 1949*, U.S. DEP’T. STATE: OFF. HISTORIAN, <https://bit.ly/3zR8TqQ>.

¹⁵⁶ *Id.*

D. United Nations—Legal Monopoly on Armed Conflict

Regardless the divisions within the Security Council, the United Nations Charter provided very clear guidelines on the use of state-actor armed force in the post-war era. The most pertinent articles are 2, 42, and 51.

Article 2(4) reads: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁵⁷ However, this charter went much further than the Covenant of the League of Nations. In article 2(5) member states are required to give assistance in any action taken in pursuance of the charter, in article 2(6) non-member states are bound—ostensibly as a matter of customary international law—to the principles of the Charter, and article 2(7) preserves the Westphalian right of states to control their domestic affairs.¹⁵⁸

Article 2(5) anticipates several actions the Security Council can take pursuant to the charter, but of particular importance is its authority in chapter VII regarding “threats to peace, breaches of the peace, and acts of aggression.”¹⁵⁹ The League of Nations required states to bring complaints to the assembly for arbitration;¹⁶⁰ the United Nations is not so limited. The Security Council: (1) determines whether threats to the peace, breaches of the peace, or acts of aggression exist; (2) may disrupt economic relations, communications, or sever diplomatic relations; and (3) may use military force by “air, sea, or land forces as may be necessary to maintain or restore international peace and security . . . includ[ing] demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”¹⁶¹

The Security Council is limited only by article 51, which preserves the pre-U.N. right to self-defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense.”¹⁶² Even still, member

¹⁵⁷ U.N. Charter art. 2(4). Contrast this language with that of the Covenant of the League of Nations: “Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.” League of Nations Covenant art 11, para. 1.

¹⁵⁸ U.N. Charter art. 2.

¹⁵⁹ *Id.*

¹⁶⁰ League of Nations Covenant art 12, para. 1.

¹⁶¹ U.N. Charter ch. VII.

¹⁶² U.N. Charter art. 51. In recent years the definition of self-defense has been expanded to include anticipatory, interceptive, and preemptive defense. See Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1 (2008); Captain Sean M. Condrón, *Justification for Unilateral Action in Response to the Iraqi*

states must report self-defense measures to the Security Council and abide by any action it deems necessary.¹⁶³

From the forgoing it is clear that the United Nations Charter establishes the Security Council as the *de jure* the legal monopolist of armed conflict. The competition among the great powers on the Security Council prevents it from exercising that prerogative. The result is an incentive for member states to collaborate or cheat, as they see fit to provide for their own security. This may, in some measure, explain the Cold War.

E. The Cold War—Hegemons of Peace?

At this point it is useful to reexamine a few key points. States are rational actors competing in a market for armed conflict/survival. State survival is based on its relative, or *de facto*, sovereignty in relation to other states. States have often engaged in armed conflict to secure their sovereignty. They do so based on the rational calculation that the marginal cost per act of armed conflict is less than the marginal utility gained. However, this calculation is flawed with an almost insurmountable information problem—the state can never be sure what the marginal cost will be.

The great powers in World War I, competed in a Pareto optimal market of armed conflict. This was because the *jus ad bellum* allowed easy access to the market, and the *jus in bello* was anemic and underdeveloped. The collective sense from states throughout the industrialized world was that the cost of war was too high. Yet, a weak and divided regulatory regime like the League of Nations did not have sufficient power to artificially set the “market” equilibrium at a different point. The U.N. Charter includes the provisions necessary for enforcing its determinations but cannot do so due to lack of cooperation. For example, article 43, which provides for member states to supply forces and resources directly to the United Nations, has never been implemented. And yet, for nearly seventy years there has not been another “world war.” It has been an era of relative peace in world affairs. This seems counterintuitive. What could be the cause?

As in Part II, the great market power—hegemonic power—of the United States and the Soviet Union lowered the cost for actors in the marketplace for survival. We owe the continuity and legitimacy of the current legal regime to the hegemons that championed and cheated within that market.

Threat: A Critical Analysis of Operation Desert Fox, 161 MIL. L. REV. 115, 129 (1999); Major John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 64 (2010).

¹⁶³ U.N. Charter art. 51.

Hegemonic power is like monopolistic power. The hegemonic sovereign can set the cost of violence arbitrarily high because it has the force of arms to confront an entrant to the market on many fronts and in a variety of ways. In other words, the marginal cost to non-hegemon sovereigns increases to the unattainable point where they cannot overpower the hegemon. They must have the hegemon's acquiescence or blessing. To a certain degree, the U.N. Charter's prohibition on wars of aggression was maintained by hegemonic forces.

This may also explain the Cold War theory of deterrence and mutual assured destruction. The marginal cost of conventional armed conflict and nuclear weapons between the United States and the Soviet Union could not bring any additional sovereignty—no additional assurance of survival—only catastrophic loss. At this point, the participants in the market no longer suffered from an information problem. They knew exactly that they were at equilibrium—where cost equaled benefit. At this point of equilibrium, the only way to increase the state's relative sovereignty was to increase its resources, its economy, by shifting out its production possibilities frontier. In the capitalist United States, this was not only possible, it became a reality. The communist economy of the Soviet Union allowed no such expansion.

F. Post-Cold War and Market Vacuum

The breakup of the Soviet Union and the Warsaw Pact created a market vacuum. That vacuum could have resulted in new entrants into the market, as Mearsheimer states, seeking to become a new hegemon of the system.¹⁶⁴ Fortunately, most looked to the West for stability and respected the rule of law established by nearly fifty years of precedent for the reason noted earlier—that the new states became democracies.¹⁶⁵

The United States was then the only hegemonic sovereign. The U.N. legal regime was robust, and force could be brought to bear against states in violation of the U.N. Charter who overproduced armed conflict, for example, Serbia. Since that time, however, these strong barriers to conventional military conflict have been challenged by new technologies within various operational domains, for example, information, cyber, and artificial intelligence. These new technologies largely operate unregulated by treaties or customary international law. It is an unregulated market—often referred to as operations below the threshold of armed conflict, or grey-zone conflict.

¹⁶⁴ Mearsheimer, *supra* note 4, at 21.

¹⁶⁵ See note 41.

V. THE GREY ZONE: UNREGULATED SPACE

The unregulated space created by the emergence of new technologies is reminiscent of the turn of the twentieth century. This is why this Article's exploration of that time period is so critical. The failure of the 1899 and 1907 Hague Peace Conferences to regulate emerging submarine, air, and chemical technologies was catastrophic. The interwar period was similarly marred by the idealistic Kellogg-Briand Pact and a host of similarly impotent efforts to eliminate armed conflict.

Despite the efforts of well-intentioned academics to suggest customary international law for operations within cyberspace, states have made no movement toward accepting those regulations.¹⁶⁶ Artificial intelligence and information operations now partner with cyber operations in increasingly sophisticated operations in grey zone conflict.¹⁶⁷ Space operations are regulated to a greater extent by five international treaties and five declarations and legal principles.¹⁶⁸ However, these treaties do not fully address the use of space-based assets in the conduct of cyber operations.

These, and other technologies yet to be developed, shift the equilibrium from the artificially low point currently set by international law and set the international system on the road to armed conflict. The unwillingness of states to convene and address these technologies as the great powers did during the Hague Conventions indicates an unwillingness to regulate the market. Time will tell what the consequences will be.

VI. IMPLICATIONS

There are voices within and without the United States that clamor for its departure from the world stage as a hegemon. This violates the theory of rational choice realism. The previous sections of this Article have shown that perhaps never before has the United States' hegemonic presence on the world stage been more necessary. Nature—and international relations, as it appears—abhors a vacuum.

¹⁶⁶ See *The Tallinn Manual*, NATO COOP. CYBER DEFENSE CTR. EXCELLENCE, <https://bit.ly/3BLkiJ4> (“The nature of the Tallinn Manual will remain unchanged; it will continue to be a non-legally-binding scholarly work by distinguished international law academics and practitioners intended to provide an objective restatement of international law as applied in the cyber context.”).

¹⁶⁷ See, e.g., Blessing Guembe et al., *The Emerging Threat of AI-driven Cyber Attacks: A Review*, 36 APPLIED A.I., 36:1 (2022), <https://bit.ly/3BJzarq> (“[A] malicious actor can obtain structural, operational, and topological data about the user's devices, network flows, and network infrastructure to identify a critical relationship with the intended targets.”).

¹⁶⁸ *Space Law Treaties and Principles*, UNITED NATIONS OFF. FOR OUTER SPACE AFFAIRS, <https://bit.ly/48dI2Sr>.

The presence of the hegemon is a significant barrier for aggressor states to enter the marketplace for survival via armed conflict. Furthermore, the legal regime depends on it. Military force is the only check on states reshaping the rules-based order into rule by caprice and force—just as Germany, Japan, Italy, and the Soviet Union did with the League of Nations—and just as Russia and the People’s Republic of China are doing now.

This is not to say that the United States must be the only hegemon in the world. Yet, it is the only state that has invested so heavily in the international legal regime.¹⁶⁹ President Ronald Reagan spoke the truth:

History teaches that wars begin when governments believe the price of aggression is cheap. To keep the peace, we and our allies must be strong enough to convince any potential aggressor that war could bring no benefit, only disaster. So, when we neglected our defenses, the risks of serious confrontation grew.¹⁷⁰

Rational choice realism posits that states view their interactions with other states as a positive-sum game in which diplomacy is the primary mechanism, or a zero-sum game in which armed conflict is inevitable. They do so based on their own self-interest. But there is evidence to suggest that states do not always act in their own self-interest. Some states stubbornly believe that the international system is always a positive-sum game, despite evidence to the contrary. For example, President Zelensky of Ukraine was adamant that Russia would not invade.¹⁷¹ States that stubbornly persist in a positive-sum game while other states have a zero-sum mentality actually hasten the onset of armed conflict through their self-inflicted myopia.

VII. CONCLUSION

Armed conflict is not a quirk, but “an intrinsic element of life in the international system.”¹⁷² As a result, efforts to eliminate armed conflict altogether are not only misguided, they misunderstand the nature of the international system.

¹⁶⁹ See *U.S. Participation in United Nations Reports*, U.S. DEP’T STATE, <https://bit.ly/4eLQr1L>. The United States provided more than \$18 billion in 2022, which amounted to one-third of its entire budget. *Funding the United Nations: How Much Does the U.S. Pay?*, COUNCIL ON FOREIGN RELATIONS (Feb. 29, 2024), <https://www.cfr.org/article/funding-united-nations-what-impact-do-us-contributions-have-un-agencies-and-programs>

¹⁷⁰ Ronald Reagan, President, United States, Address to the Nation and Other Countries on United States-Soviet Relations (Jan. 16, 1984), <https://bit.ly/40f5Svf>.

¹⁷¹ *Ukraine Crisis: Don’t Create Panic, Zelensky Tells West*, BBC NEWS (Jan. 29, 2022), <https://bbc.in/3BPmZJO>.

¹⁷² MEARSHEIMER, *supra* note 4, at 22.

That system is like a market in which states compete for survival as rational actors. Some are defensive, maintaining the status quo, others offensive and seeking greater power to ensure their sovereignty and survival. This is rational choice realism.

However, armed conflict can be regulated. Public international law regulates the overproduction and negative externalities of these inevitable armed conflicts. It attempts, with varying degrees of success, to hold states accountable and set an equilibrium for armed conflict. Sadly, but realistically, this equilibrium point is above zero. However, an artificially low equilibrium can only be enforced with the backing of a hegemonic, monopolistic power. Rarely has history shown a hegemon to benevolent. Yet, this is another positive externality of the United States' defense of the current rules-based order. This too is rational choice realism, for it is only rational that "a state's ultimate goal is to be the hegemon in the system."¹⁷³

¹⁷³ *Id.* at 21.

CONGRESSIONAL AUTHORITY OVER ARMED CONFLICT AND ITS UNTAPPED POWER UNDER ARTICLE IV

Lieutenant Commander Jesse Jacob McMurdo, JAGC, USN*

Modern conflicts have significantly challenged the conventional understanding of the constitutional separation of powers regarding the regulation of armed conflict. For decades, the executive branch has been accumulating more authority to conduct military operations, relatively independent of direct congressional approval.¹ This transformation has been, in part, due to Congress's acquiescence to the actions of the executive branch.² Although Congress still maintains the "Power of the Purse," giving it the ultimate authority to functionally approve or disapprove armed conflicts, several political factors have resulted in considerable executive latitude to engage in armed conflict. These political factors include political discord, lump-sum appropriations, and clever use of reprogramming authorities.³ Consequently, while its appropriation power remains a potent tool, the appropriation power's utility in the routine authorization and regulation of armed conflicts has diminished.⁴ However, there is another underutilized constitutional power Congress may also wield to regulate executive action. The Constitution, through Article IV, Section 3, grants Congress the authority to regulate the disposal of Government property—known as the "Property Clause."

Under this clause, Congress has the constitutional authority to define and oversee the disposition of all Government assets, to include munitions, food, fuel, and any other military property. Through its appropriations authority, Congress controls the allocation of funds for procuring new government property but may also establish stipulations for its use from the outset. Simultaneously, Congress wields the capacity to impose specific conditions for the disposal of existing government property at a later stage. The Property Clause constitutes the second

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¹ See, e.g., McKaye Neumeister, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L. J. 2512, 2515 (2018).

² *Id.* at 2578–79.

³ See *infra* notes 6–14 and accompanying text.

⁴ See Neumeister, *supra* note 1, at 2517–23.

component of Congress's constitutional prerogative to establish usage conditions for already-purchased property, regardless of whether any conditions were initially set during the appropriation process. It appears that the full potential of the Property Clause remains largely untapped.

This Article presents a novel approach for Congress to enhance its role in regulating armed conflicts through its Constitutional authority. By leveraging the Property Clause, Congress can effectively limit the executive's authority to dispose of military equipment in the execution of an unauthorized armed conflict. To illustrate how the Property Clause may be effectively used to achieve this, this Article examines how the Property Clause could be incorporated into the War Powers Resolution ("WPR") such that it is triggered when the Armed Forces directly or indirectly disposes of, or is likely to dispose of, Government property during hostilities against foreign nations. Utilizing the Property Clause could represent one-half of a constitutional pincer movement, where constraints are initially imposed through conditions attached to appropriations (that is, the first half of the pincer) and further limitations are imposed on the disposal of existing Government property (the second half). From cradle to grave, Congress has the authority to set conditions on the use of property. Yet Congress has thus far only used its authority to set conditions at the cradle.

This Article begins by providing a concise overview of the practical challenges associated with Congress's appropriations powers. Part II delves into the limitations of the current state of the WPR and its overall lack of effectiveness. Part III explores the significance of the Property Clause and the constitutional authority it bestows upon Congress. Part IV presents an analysis along with illustrative language demonstrating potential modifications that incorporate the Property Clause.

I. THE POWER OF THE PURSE AND EXECUTIVE FLEXIBILITY

Congress's appropriations power serves as its primary means to simultaneously empower and restrain the executive branch by allocating funds to achieve specific ends and attaching conditions on when and how to spend the funds.⁵ Yet, despite this great authority, it is functionally limited by both Congress's need for political unity and the complexities inherent in the modern executive branch. In comparison to the Congresses of the eighteenth and nineteenth centuries, which could allocate specific appropriations to a much smaller and simpler executive branch, today's Congress faces disadvantages. Presently, Congress generally lacks the institutional capacity to provide anything

⁵ See generally Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

other than lump-sum funding to the executive, granting substantial discretion in its use.⁶

That is not to say that Congress does not or will not flex its appropriations muscle, as there are numerous examples of this in every annual budget. However, in the post-9/11 world, Congress has struggled to employ the appropriations power to effectively regulate unauthorized armed conflict.⁷ Nevertheless, Congress does wield its appropriations authority to enforce its will on both significant and minor matters.⁸ Extensive literature has been dedicated to this power and it is evident that Congress may tailor funding conditions according to its discretion, ranging from relatively trivial line items (for example, prohibiting funds for the retirement of the U.S. Air Force E-3 Sentry aircraft),⁹ to expressions of national policy (for example, Leahy vetting),¹⁰ to outright denial of funds for armed conflicts (for example, denying funds for the Vietnam War¹¹ or denying funds for the “continuous presence in Somalia of United States military personnel . . . after September 30, 1994”).¹² During armed conflicts between 1970 and 2007, Congress exercised its appropriations power on five occasions to explicitly restrict or terminate the executive’s deployment of the U.S. military overseas.¹³

Generally, the appropriations power has inherent weaknesses in two key areas: (1) executive flexibility in the funding space (for example, creative interpretations or use of existing funding streams and reprogramming authorities); and (2) political considerations that impact the decision-making process within Congress.

In practice, Congress faces political challenges when attempting to confront a unitary executive.¹⁴ The structural design of Congress presents the first

⁶ See, e.g., Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 90–91 (1995).

⁷ See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 476–78 (2011).

⁸ U.S. CONST. art. I, § 9, cl. 7.

⁹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395, 149.

¹⁰ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 1204.

¹¹ H.R.J. Res. 636, 93d Cong. (1973) (enacted as Pub. L. No. 93-52, § 108, 87 Stat. 130, 134).

¹² Pub. L. No. 103-139, § 8151, 107 Stat. 1418 (1995).

¹³ AMY BELASCO, LYNN CUNNINGHAM, HANNAH FISCHER, & LARRY NIKSCH, CONG. RSCH. SERV., RL33803, CONGRESSIONAL RESTRICTIONS ON U.S. MILITARY OPERATIONS IN VIETNAM, CAMBODIA, LAOS, SOMALIA, AND KOSOVO: FUNDING AND NON-FUNDING APPROACHES tbl. 1 (2007); see also RICHARD F. GRIMMETT, CONG. RSCH. SERV., RS20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 5 (2007).

¹⁴ Alan L. Feld, *The Shrunk Power of the Purse*, 89 B.U. L. REV. 487, 494 (“In sum, congressional control over federal expenditures has been weakened in several ways. Permanent appropriations constrain Congress’s ability to review and change priorities through the appropriation process.”).

challenge, as it tends to default to inaction when a majority agreement cannot be reached. The second political challenge arises from potential public perception of withdrawing funding from ongoing armed conflicts, as Congress aims to avoid appearing as though it is abandoning the troops. These, and other obstacles, significantly hinder Congress's ability to effectively regulate the executive in armed conflicts.

The structure of Congress is, by design, a fragmented institution that requires majority agreement, and occasionally a supermajority, to act. Political parties, individual Congress members' perspectives, and competing geographic interests consistently divide Congress.¹⁵ In today's political climate, Congress often tends toward inaction (such as in the case of government shutdowns) or passing compromised bills that may be so diluted as to miss the mark.¹⁶ In theory, congressional gridlock can benefit Congress: "[t]he burden of [C]ongressional inaction shifts in Congress's favor . . . when a desired outcome requires enactment of new legislation."¹⁷ However, in the context of armed conflict, inaction unequivocally favors the executive by creating a gray area, which allows the executive to invoke his Article II authorities.

Engaging in armed conflict does not require new enabling legislation, and funding can be secured from existing funding streams. Once the armed conflict is underway, the executive has put Congress in a political pickle by typically forcing one of three outcomes: withhold funding for troops engaged in active hostilities—generally a politically unappetizing move; acquiesce by maintaining the status quo vis-à-vis funding; or fully fund and authorize the executive's actions.¹⁸

The executive branch may also secure funds to initiate or maintain armed conflicts within its own existing coffers. The executive possesses the ability to finance the initial stages of an armed conflict through regular Department of Defense (DoD) operations and maintenance funds, as well as reprogramming authority, without explicit congressional approval if it is deemed to be in the national interest.¹⁹ This applies not only to minor military interventions, such as the 2011 military intervention in Libya, but also to large-scale combat operations

Explicit grants of discretion to alter or suspend congressional directives for the use of funds transfer the ability to make choices to executive agencies.").

¹⁵ See *id.* at 488.

¹⁶ Drew Desilver, *The Polarization in Today's Congress has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://pewrsr.ch/3YfKsfl>.

¹⁷ Feld, *supra* note 14, at 488.

¹⁸ See Ackerman & Hathaway, *supra* note 7, at 477.

¹⁹ *Id.*

like Operation Desert Storm.²⁰ Operation Desert Storm's initial deployment was financed using existing DoD funds, and specific appropriations for Desert Storm were not requested until six weeks into operations.²¹ Indeed this has been a regular executive practice throughout history: in emergent circumstances, creatively spend or commit funds and seek congressional approval later.²² Should Congress begin appropriating funds toward the emergent situation via the regular committee process, the executive can request "emergency" supplemental appropriations that bypass those congressional authorizing committees.²³ During the Iraq War, Presidents Bush and Obama both frequently utilized emergency funding requests not only to expedite appropriations through Congress, but also to put Congress at a political disadvantage, knowing that if Congress did not approve the request, it would be seen as denying troops in the field the materiel they needed to fight and win.²⁴

When Congress and the executive are at odds, the restrictions and conditions imposed on executive action through appropriations begins a game of funding cat and mouse. Recent instances unrelated to armed conflict highlight the executive's flexibility in utilizing funds, underscoring the functional freedom of movement the executive enjoys in the funding environment. Former president Donald Trump's use of DoD funds to build a southern border wall is one example of creative, though perhaps disingenuous, legal reasoning to reprogram funds. In short, then president Trump requested funding from Congress to fulfill his campaign promise of building a southern border wall.²⁵ Congress partially funded the wall, granting \$1.3 billion for construction instead of the \$5.7 billion sought.²⁶ Having been denied the full funding for the border wall, President Trump declared a national emergency at the southern border.²⁷ The national emergency declaration triggered 10 U.S.C. § 2808, granting the DoD authority to utilize unobligated military construction funds for other government projects.²⁸ Additionally,

²⁰ See Raven-Hansen & Banks, *supra* note 6, at 87; JEREMIAH GERTLER, CONG. RSCH. SERV., R41725, OPERATION ODYSSEY DAY (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS 22 (2011) ("At the rate of expenditures, DOD estimates that the total incremental cost—i.e. expenses over and above the normal costs of day-to-day activities—of Libya-related operations could reach about \$800 million during FY2011. The Defense Department expects to cover the added operational costs temporarily, at least, through 'cash flowing,' which involves reallocating funds originally intended for other purposes within the defense budget.").

²¹ *Id.*

²² Neumeister, *supra* note 1, at 2519.

²³ Ackerman & Hathaway, *supra* note 7, at 493.

²⁴ *Id.* at 506–07.

²⁵ Jessica Taylor & Brian Naylor, *As Trump Declares National Emergency to Fund Border Wall, Democrats Promise a Fight*, NPR (Feb. 15, 2019, 5:00 AM), <https://n.pr/3ZZbrOg>.

²⁶ *Id.*

²⁷ Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

²⁸ Consolidated Appropriations Act, 2019, Pub L. No. 116-6, § 229, 133 Stat. 13 (2019); Jacqueline Lewis, *The Executive's Power of the Purse in National Emergency: The President's Plan to Poach Defense Funds to Build the Wall*, 34 GEORGETOWN IMMIGR. L.J. 825, 827 (2020).

President Trump intended to use 10 U.S.C. § 284 authority and § 8005 authority to reprogram \$2.5 billion and “up-to” \$4 billion, respectively, to the wall from the DoD’s drug interdiction fund through a series of secretary of defense determinations.²⁹

President Trump’s actions to reallocate funds faced legal challenges, as they were deemed to violate statutory authority. However, the case was ultimately dismissed due to President Joe Biden’s election and the subsequent cancellation of the border wall construction.³⁰ Nonetheless, nearly \$10 billion of DoD funds had already been redirected to the wall, diverting resources from crucial areas such as military construction, F-35 fighter jets, and National Guard equipment, before either litigation or political pressure could intervene.³¹ The executive, as a single individual, can act more swiftly than Congress or the courts, resulting in difficult-to-undo actions.

Another instance highlighting creativity in funding allocation is the recent use of Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) funds by the DoD. These funds were used to reimburse DoD installations for expenses associated with the evacuation and housing of Afghan refugees. OHDACA funding is intended for “humanitarian assistance . . . humanitarian relief and for other humanitarian purposes *worldwide*.”³² As the name suggests, the intent is to use this funding *overseas* and it is almost exclusively used to support foreign partners.³³ Despite OHDACA’s emphasis on overseas humanitarian assistance, the DoD used this funding stream to reimburse U.S.-based installations for \$238 million.³⁴ The DoD’s rationale for using overseas humanitarian funds for domestic installations was presumably based on the direct causal link between the expenses and the humanitarian disaster that arose from Afghanistan’s rapid collapse.³⁵ While some may not consider the use of OHDACA funds for such purposes as a significant breach of the constitutional balance of power, it does underscore the executive’s ability to creatively and flexibly find funding when necessary.

²⁹ See, e.g., *id.*; *The White House Fact Sheet: The Funds Available to Address the National Emergency at Our Border*, WHITE HOUSE (Feb. 26, 2019), <https://bit.ly/47Y115E>.

³⁰ See *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom.* *Biden v. Sierra Club*, 142 S. Ct. 46 (2021).

³¹ John M. Donnelly, *Most of Pentagon Billions Moved to Border Wall Not Recoverable*, ROLL CALL (May 7, 2021, 7:36 PM), <https://bit.ly/4eNtWcy>.

³² 10 U.S.C. § 2561(a)(1) (2022) (emphasis added).

³³ See DEP’T OF ARMY, NO. 12-21, COMMANDER’S GUIDE TO SUPPORTING REFUGEES AND INTERNALLY DISPLACED PERSONS 27 (2012) (describing the purpose of OHDACA as a permanent fund for “[p]rojects to assist the civilian populations of developing nations.”) (emphasis added).

³⁴ DEP’T OF DEF. OFF. OF INSPECTOR GENERAL, DODIG-2023-040, MANAGEMENT ADVISORY: DoD RESTORATION COSTS TO REPAIR FACILITIES AFTER SUPPORTING OPERATION ALLIES REFUGE AND OPERATIONS ALLIES WELCOME HOME 5 (2022).

³⁵ See *id.*

When discussing Congress's constitutional authority in matters of war making, the focus often centers on its appropriations powers, as formal declarations of war have become seemingly obsolete and its other national defense authorities mainly deal.³⁶ As a practical matter, Congress's appropriations power has limited effectiveness on significant issues of national security, particularly in the current political environment. While Congress has the ability to tailor funding conditions and has exercised its power to restrict or terminate military deployments in the past, it does not frequently impose its will due to political obstacles and its own fragmented nature. The executive branch, on the other hand, has greater flexibility in utilizing existing funding streams and reprogramming authorities, allowing it to initiate and sustain armed conflicts without explicit congressional approval. The executive's ability to creatively allocate funds highlights its functional freedom of movement in the funding environment. These examples demonstrate that the executive can act swiftly, often with difficult-to-undo consequences, while Congress struggles to effectively regulate executive actions.

II. ISSUES FACING THE WAR POWERS RESOLUTION

The 1973 WPR signifies Congress's concerted effort to reclaim some of its diminished control over the executive's ability to initiate military action without congressional consent.³⁷ Passed in the wake of the Vietnam War, the WPR aimed to reassert the role of Congress in armed conflict, as envisioned by the Constitution's framers (according to Congress).³⁸ However, the effectiveness of the WPR is subject to much debate and discourse. Major criticisms can be categorized into two interconnected groups: (1) the WPR does not bind the executive's Article II authority to act in the national interest;³⁹ and (2) the WPR

³⁶ See, e.g., John C. Dehn, *War is More Than a Political Question*, 51 LOY. U. CHI. L.J. 485, 491–96, 509 n.138 (2019) (discussing Congress's power to declare war, grant "letters of Marque and Reprisal," establish rules governing the military as well as captures on land and sea, the authority to raise and support Armies, provide for a Navy, calling forth and arming the various militia, among others).

³⁷ War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548, § 1543(a) (2022)).

³⁸ 50 U.S.C. § 1541(a) (2024) ("It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.").

³⁹ See, e.g., Overview of the War Powers Resolution, 8 Op. O.L.C. 271 (1984). *Contra Fall Symposium On The 2001 And 2002 Authorization for Use of Military Force Resolutions and Their Relevance to the Current Military Operations Against The Islamic State in Iraq And Syria.*, 5 AM. U. NAT'L SEC. L. BRIEF 69, 103 (2015) ("And I have a bit of a hard time understanding that because if anybody takes a look at Article II, you see clearly that the President is not endowed with any specific war powers whatsoever. And I think, if anything, the War Powers Resolution grants the President

has no organic enforcement mechanism and is, therefore, essentially a symbolic action by Congress.⁴⁰ Additionally, much of the discussion surrounding the WPR centers around two key provisions: one that imposes consultation and reporting requirements on the executive, and another that limits the executive's authority to engage in hostilities beyond a period of 60 days.

The WPR Consultation Clause sets forth two conditions that, if met, mandates the executive to consult with Congress. It states:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.⁴¹

The requirement for prior consultation serves as the initial obligation under the WPR. However, if consultation is not feasible prior to introducing armed forces into hostilities, Section 4 of the WPR mandates that a report be submitted within 48 hours after such introduction.⁴²

It is worth noting that the WPR deliberately uses the term “hostilities” vice “armed conflict” to encompass situations where a “state of confrontation” exists even without actual combat.⁴³ After a report has been made pursuant to Section 4, Section 5(b) requires the executive to withdraw the armed forces from hostilities after 60 days (extendable up to 90 days if the executive determines it to be necessary) unless Congress specifically authorizes the hostilities.⁴⁴

war powers. It's not specifically telling him how to run his Army and Navy as Commander-in-Chief, but it certainly tells him when he can and cannot use it.”).

⁴⁰ See, e.g., MATTHEW C. WEED, CONGR. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 65–67 (2019).

⁴¹ 50 U.S.C. § 1542 (1973).

⁴² *Id.* § 1543.

⁴³ H.R. Rep. No. 93-287 at 7 (1973); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, Op. Att'ys Gen. 193–94 (1980).

⁴⁴ 50 U.S.C. § 1544(b) (1973). The requirement reads as follows:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon

However, executives since President Nixon have balked at the WPR's requirements, selectively complying, while objecting to these requirements.⁴⁵ The U.S. Department of Justice's Office of Legal Counsel's (OLC) opinion on the 2011 Libya military intervention succinctly argues that the WPR does not restrict the executive's control over the armed forces based on his Article II authority:

[T]he President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.⁴⁶

Under this reading the WPR does not bind the executive but rather empowers him to act, as it acknowledges and, in a way, encourages unilateral decisions to engage in hostilities within the 60-day window.

In terms of executive limitations, the OLC opinion primarily focuses on restrictions rooted in the Constitution rather than those derived from statutes.⁴⁷ The opinion notes that the only true constitutional restraint is whether the "military engagement . . . constitutes a 'war' within the meaning of the Declaration of War Clause"⁴⁸ OLC provides a broad definition of war, describing it as "prolonged and substantial military engagements" that expose servicemembers to "significant risk over a substantial period."⁴⁹ Rather than view the WPR as unconstitutionally limiting the executive's Article II authority, the OLC opinion views the WPR as a recognition of the executive's inherent authority

the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Id.

⁴⁵ E.L. Gaston, *War Powers Far from a Hot Battlefield: Checks and Balances on Presidential War-making through Individual and Unit Self-Defense*, 10 HARV. NAT'L SEC. J. 195, 228–29 (2019) (noting executives have under-reported hostilities, submitted reports late, or not submitted reports at all).

⁴⁶ Authority to Use Military Force in Libya, 35 Op. O.L.C. 20, 33 (2011).

⁴⁷ See *id.* at 31.

⁴⁸ *Id.*

⁴⁹ *Id.*

to employ the armed forces in situations short of war.⁵⁰ Thus, it takes constitutional authority to limit constitutional authority.

In the WPR Congress cited Article I, Section 8 of the Constitution (the Necessary and Proper Clause) for its constitutional authority to regulate the executive.⁵¹ The Necessary and Proper Clause gives Congress “the power to make all laws necessary and proper for carrying into execution, not only its own powers, but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.”⁵² While this may be the case, there is no organic enforcement mechanism for any WPR provisions.⁵³ Congress, for its part, has generally been unassertive in enforcing the WPR’s consultation and reporting requirements through any means, including the appropriations power.⁵⁴

Based on OLC’s strong implication that only constitutional authority can limit the executive’s use of the armed forces, the appropriations power is Congress’s counteracting power. However, as discussed earlier, the political will to exercise this power is often fraught with practical and political limitations. Nevertheless, there is one particularly intriguing proposal to enhance the “constitutional” effectiveness of the WPR by leveraging the House of Representatives’ parliamentary procedure to trigger a functional funding cutoff.⁵⁵ This proposal involves modifying the House of Representatives’ internal parliamentary procedures to include the “rule of germaneness,” which necessitates a relationship between an amendment and the matter being amended.⁵⁶ For example, if Congress (or the House alone) passes a resolution determining that military action is not congressionally authorized (and consequently subject to the WPR’s withdrawal requirements), the germaneness rule would enable any House representative to effectively veto military funding via a simple point of order objection.⁵⁷ If the House desired to fund the military action despite concerns with the WPR, then a simple majority would overrule the point of order objection.⁵⁸ Advantageously, a simple majority within the House

⁵⁰ *See id.*

⁵¹ 50 U.S.C. § 1541(b) (1973).

⁵² *Id.*

⁵³ *But see id.* § 1544(c) (Section 5(c) provides that the executive shall remove armed forces from hostilities if the Congress passes a concurrent resolution to do so. However, this provision is very likely an unconstitutional legislative veto under *INS v. Chadha*, 462 U.S. 919 (1983)).

⁵⁴ *See Gaston, supra* note 45, at 229–29; Laurence D. Pierce, *The Consultation Clause of the 1973 War Powers Resolution*, 1 ANTIOCH L. J. 125, 139 (1981).

⁵⁵ Michael J. Glennon & Charles Tiefer, *How to End Forever Wars*, LAWFARE (Sep. 9, 2019, 8:00 AM), <https://bit.ly/3NfmI5o>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (noting that this parliamentary procedure rule would be veto-proof, insulated from Senate meddling, avoid litigation, and not an unconstitutional legislative veto under *Chadha*).

alone would determine whether to fund the action. Since it is an internal matter of the House protected under Article I, Section 5 of the Constitution, it would not require presentment to take effect. Therefore, it would be subject to neither presidential veto nor Senate objection.⁵⁹ The authors of this proposal have named this parliamentary mechanism the “war powers lockbox,” describing the reliance on the House’s inherent constitutional authority to achieve its objective.⁶⁰ Implementing the war powers lockbox or a similar device, derived from the Constitution, would satisfy the OLC opinion’s notion of “constitutionally based” limitations.

Various other amendments and courses of action have been proposed to strengthen the WPR. These range from seeking injunctive relief from the judiciary to enforce a statute—political question concerns aside—to modifying the time limitations and adding a priority joint resolution procedure to aid Congress in sustaining or overriding executive action.⁶¹ Amendments that link the WPR’s provisions to an automatic funding cutoff unless Congress proactively authorizes additional funding, such as the war powers lockbox, appear to hold the most promise.⁶²

The WPR remains largely unenforced and symbolic. Executives selectively comply with its requirements and creatively interpret its terms. Congress, for its part, has only sporadically used its appropriations powers to pressure the executive regarding the introduction of forces into hostilities since the passage of the WPR.

III. THE PROPERTY CLAUSE

Article IV, Section 3 of the Constitution is generally concerned with territories aspiring to statehood and outlines the process for admitting new states into the Union.⁶³ Naturally, it grants Congress the requisite authority to directly govern these territories.⁶⁴ This grant of authority is known as the Property Clause:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *See Weed, supra* note 40, at 65–97 (discussing various amendments to the WPR and their relative pros and cons).

⁶² *Id.*

⁶³ U.S. CONST. art. IV, § 3.

⁶⁴ *Id.*

Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.⁶⁵

While the first part of Section 3, Clause 2 specifically deals with territory, the phrase “other Property” encompasses all property, both real and personal, owned by the U.S. government. The judiciary has had limited opportunities to interpret this aspect of the Constitution and, to the extent it has been litigated, the focus has primarily been on the authority of Congress to regulate land within states vice the power of and limitations on disposing of “other Property.”⁶⁶

The Property Clause grants Congress authority over all government-owned property. In *Ashwander v. Tennessee Valley Authority*,⁶⁷ the Supreme Court analyzed the contours of “the power of disposal” over federal property.⁶⁸ The Supreme Court heard a challenge to the constitutionality of a congressional program to develop a dam in partnership with the Tennessee Valley Authority.⁶⁹ As part of the contract with the Tennessee Valley Authority, the United States owned the dam-generated hydroelectricity, which the government then sold. A suit was brought alleging, inter alia, that Congress lacked the authority to sell the electricity generated from the dam.⁷⁰ The Court ruled that Article IV, Section 3 of the Constitution authorized Congress to “dispose” of legally acquired electricity through sale to third parties.⁷¹

During the analysis of the Property Clause, the Court considered the extent of “other Property” and whether the Constitution prescribed “inherent limitations which render invalid the disposition of property.”⁷² It concluded that “other Property” encompassed not only real property but also leases, royalties, mineral rights, and all personal property belonging to the federal government. The Court relied on historical understanding of the clause, citing Justice Joseph Story’s history of the Constitution, which states in relevant part:

⁶⁵ *Id.* cl. 2.

⁶⁶ *E.g.*, *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1541 (2022); *Kleppe v. New Mexico*, 426 U.S. 529, 540–41 (1976) (citing *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 673–74 (1945); *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922); *Dorr v. United States*, 195 U.S. 138, 149 (1904); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840); *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336–37 (1810)); Jeffrey M. Schmitt, *Limiting the Property Clause*, 20 NEV. L. J. 145, 147 n.7 (“Most recent scholarship on the Property Clause has focused on the power of the United States to own land within states.”).

⁶⁷ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 331–32 (1936).

⁶⁸ *Id.*

⁶⁹ *Id.* at 315–18.

⁷⁰ *Id.* at 331.

⁷¹ *Id.* at 340–41.

⁷² *Id.* at 330.

[The power of disposal] is not confined to the territory of the United States; but extends to “other property belonging to the United States;” so that it may be applied to the due regulation of all other *personal* and real property rightfully belonging to the United States. And so it has been constantly understood, and acted upon.⁷³

Concluding that Congress is constitutionally vested with the power to dispose of personal property, it then turned to any inherent limitations of that power.⁷⁴ It found no inherent limitations on how property should be disposed of, leaving the means of disposal to Congress’s discretion.⁷⁵ As the clause does not specify the method of disposal, Congress is only required to act appropriately based on the “nature of the property.”⁷⁶

Other jurisprudence analyzing Section 3 mainly focuses on the real property (that is, “territories”) aspect of the section.⁷⁷ In *United States v. San Francisco*,⁷⁸ the Supreme Court reaffirmed that Congress’s power under the Property Clause is “without limitations.”⁷⁹ Congress was constitutionally empowered to determine both means of disposal and any limits on that disposal.⁸⁰ In *Kleppe v. New Mexico*,⁸¹ the Supreme Court turned to the language of the Constitution itself to determine the limitations of Congress’s Property Clause authority, focusing on what regulations are “needful” and “respecting” of public lands.⁸² It again confirmed that Congress has the exclusive responsibility for determining rules that are necessary and respectful of public property.⁸³ Regarding federally-owned real property, the Court found that “the ‘complete power’ that Congress has over public lands necessarily includes the power to regulate.”⁸⁴

While these cases dealt with Congress’s constitutional authority over real property per the Property Clause, there is no linguistic or logical reason why Congress would not have the same authority over the “other Property” of the U.S. government. The authority, and any inherent restrictions, that is derived from the Property Clause necessarily applies to both “territory” and “other Property” given

⁷³ 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1319 (1831) (emphasis added).

⁷⁴ *Ashwander*, 297 U.S. at 331.

⁷⁵ *Id.* (citing *Gratiot*, 39 U.S. at 533, 538).

⁷⁶ *Id.* at 338.

⁷⁷ See generally, Schmitt, *supra* note 66.

⁷⁸ *United States v. San Francisco*, 310 U.S. 16, 29 (1940) (citing *Gratiot*, 39 U.S. at 533, 538).

⁷⁹ *Id.*

⁸⁰ *Id.* at 29–30.

⁸¹ *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

⁸² *Id.*

⁸³ See *id.*; see also Schmitt, *supra* note 66, at 79.

⁸⁴ *Kleppe*, 426 U.S. at 540.

its plain language meaning and reading. In fact, while litigation rarely acknowledges Congress’s broad power over U.S. government personal property, Congress’s authority under the Property Clause forms the constitutional basis for its delegation of authority to the General Services Administration (GSA).⁸⁵ The GSA’s mission is to procure, utilize, and dispose of federal property, both real and personal.⁸⁶ The GSA’s authority to set regulations on the disposal of federal property is uncontroversial.

Inherent within the “complete power” that Congress has over Federal property is its ability to impose conditions on its use, analogous to conditions imposed through the Appropriations Clause.⁸⁷ The Supreme Court has equated these two: “[a]lso beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges.”⁸⁸ The significance of Congress’s power over other property of the U.S. government is that Congress may, under this authority, impose conditions on the property’s disposal once it has been acquired.

This raises the question of what “dispose” means. At the time of the drafting of the Constitution, “dispose” had multiple verb usages, including:

1. To employ to various purposes; to diffuse
2. To give; to place; to bestow

⁸⁵ *Serra v. United States Gen. Serv. Admin.*, 847 F.2d 1045, 1049 (2d Cir. 1988) (“[GSA’s authority] to maintain, operate, and alter federal buildings, including their ‘grounds, approaches, and appurtenances . . . [is derived] from Congress’s power under the Constitution ‘to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States.’”).

⁸⁶ *See* Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 101.

⁸⁷ Schmitt, *supra* note 66, at 91–92. Schmitt writes:

For regulation of activities that take place directly on federal land or involve the use or disposal of federal property to further congressional policy on nonfederal lands, a court might analogize such enactments to actions taken pursuant to the spending power. For regulation of extraterritorial activities that affect federal lands, a court might analogize such enactments to actions taken pursuant to the Commerce Clause.

Congressional actions under the Property Clause to manage or to control the direct disposition of federal property should receive the same deferential review given to exercises of the spending power. In both instances, a reviewing court would find itself in the awkward position of telling a coequal branch how best to manage its resources - money, in the case of the spending power, and real or personal property, in the case of the Property Clause power.

Id.

⁸⁸ *Ivanhoe v. McCracken*, 357 U.S. 275, 295 (1958).

3. To turn to any particular end or consequence

4. To adapt; to form for any purpose.⁸⁹

Samuel Johnson's Dictionary of the English Language, a frequently referenced source for older definitions, provides six additional definitions of "dispose" that similarly convey the ability to determine the outcome of an object's status.⁹⁰ The modern definitions of "dispose," as in "dispose of," are:

1.a(1): to get rid of

1.a(2): to deal with conclusively

1.b: to transfer to the control of another

2: to place, distribute, or arrange especially in an orderly way.⁹¹

Both the historical and the modern meanings of "dispose" essentially grant the power to regulate an object, although the historical definition may be slightly broader than the modern usage. Again, this understanding of Congress's power, though not often relied on, has been affirmed by the judiciary and in practice is the source of the GSA's authority.

The Property Clause, although overshadowed by the Appropriations Clause in terms of Congress's power, is a potent tool. Under the Property Clause, Congress can regulate the use of federal real and personal property, including imposing conditions on its usage. If the conditions imposed through the Appropriations Clause represent ex-ante control over property usage, the "Other Property" Clause grants Congress ex-post authority to regulate the disposal of property.⁹² Congress can impose limitations on the disposal of munitions, food, fuel, and other resources. This authority serves as a constitutionally-based restriction on the executive, as envisioned in the OLC Libya opinion, and may also be politically advantageous for Congress compared to relying solely on the Appropriations Clause.

⁸⁹ *Disposal*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1773 4th folio ed.).

⁹⁰ *Id.*

⁹¹ *Dispose*, MERRIAM-WEBSTER DICTIONARY, <https://bit.ly/4eZ0joS>.

⁹² See *Edwards v. Carter*, 580 F.2d 1055, 1076 (US. App. D.C. 1978) ("The power to dispose of property is a power with specific constitutional limitations, substantially identical to the appropriation power, and by the Constitution, like the appropriation power and the power to levy taxes, it rests exclusively with the Congress.").

IV. WPR & THE PROPERTY CLAUSE

Simply put, Congress could amend the WPR to prohibit the disposal of DoD property in combat operations in a way that is analogous to cutting off funding via the Appropriations Clause. Utilizing the Property Clause offers several advantages for Congress. First, it is a constitutional authority that, according to the Supreme Court, is equivalent to the Appropriations Clause and may be used to limit executive action.⁹³ Second, by limiting the disposal of munitions, food, fuel, etc., it diminishes the value of the executive's flexibility to make use of alternative funding mechanisms to obtain desired goods, as discussed in Part I, because the authority to utilize the good itself is prohibited, however obtained. Lastly, this approach may be more acceptable for Congress as it shields them from political concerns about abandoning troops involved in active hostilities—the troops would be armed and prepared for action, only awaiting authorization to dispose of government property.

Modifying the WPR to limit executive action via the Property Clause would not require a massive overhaul of the WPR; though as a practical political matter it may be unachievable. This Article proposes a few suggested changes to the WPR to illustrate how the Property Clause could be integrated to bolster Congress's ability to regulate armed conflict; however, this Article will not provide suggestions for every single instance where the Property Clause would be incorporated. Proposed language provided in italics.

§ 1541(c) “Presidential executive power as Commander-in-Chief; limitation”

The *delegated* power of the President as Commander-in-Chief to dispose of any Government property, to include combat equipment, by the United States Armed Forces while engaged in hostilities, in direct or indirect support of hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, *may be* exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

§ 1542 “Consultation; initial and regular consultations”

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, *and those circumstances indicate that Government property, to include*

⁹³ *Id.*

combat equipment, may be disposed of without congressional authorization. After every such introduction, the President, shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

§ 1543 “Reporting requirement”

(a) “Written report; time of submission; circumstances necessitating submission; information reported”

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced *and the disposal of Government property against foreign nationals, not previously authorized, is clearly indicated by the circumstances-*

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

§ 1544(b) “Congressional action; Termination of use of United States Armed Forces; exceptions; extension period”

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall *cause the United States Armed Forces to cease disposing of Government property* with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such *disposal of Government property by the United States Armed Forces*, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use *Government property* in the course of bringing about a prompt *cessation of disposing of Government property*.

Shifting the authority of the WPR to the disposal of property could be used in conjunction with the Appropriations Clause to limit executive action to engage in hostilities. The Appropriations Clause could be used to set conditions on any new equipment, while the Property Clause could be used to set conditions for the use or disposal of existing equipment. This congressional pincer movement could provide comprehensive boundaries on the executive's ability to engage in hostilities by restricting the materiel necessary to accomplish the mission. Congress could also pass a stand-alone bill that conditions the use of DoD property at large to the adherence to the WPR. However, it is important to note that any modifications to the WPR or bills tying DoD property to WPR conditions would be subject to the presentment clause, which raises legitimate concerns about political feasibility.

It is essential to recognize that this approach would not be a cure-all solution resulting in flawless constitutional harmony. The executive could still interpret or define the concept of “hostilities” creatively when determining the start of the 60-day clock. For instance, then President Barack Obama argued that military operations in Libya were consistent with the WPR and did not require congressional authorization since U.S. ground troops were not engaged in sustained fighting or facing significant risks of casualties.⁹⁴ This reinterpretation of “hostilities” allowed the Obama Administration to employ “light-footprint” warfare tactics involving drones, special operations, air, and cyber-attacks that were either not “sustained” or posed minimal risk of U.S. casualties, thereby bypassing the requirements of the WPR.⁹⁵ Such creative interpretations would continue to pose challenges for the WPR, regardless of any amendments related to the Property Clause.

However, on a broader scale, Congress could still leverage the Property Clause in such situations, if it so chooses, to effectively regulate armed conflicts since “light-footprint” warfare still necessitates the use and disposal of government munitions, food, and fuel. Therefore, Congress can exercise its “complete power” in this realm to prohibit the utilization of existing combat materiel while employing the Appropriations Clause to restrict future usage.

⁹⁴ DEP’T OF STATE. & DEP’T OF DEF., REPORT ON UNITED STATES ACTIVITIES IN LIBYA 25 (2011); see also Jack Goldsmith, *Problems with the Obama Administration’s War Powers Resolution Theory*, LAWFARE (June 16, 2011, 08:38 AM), <https://bit.ly/3NjM2Hi>.

⁹⁵ Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7, 13–14 (2016).

V. CONCLUSION.

The dynamics of modern conflicts have raised profound challenges to the traditional constitutional framework that governs the authorization of armed conflict. The shifting balance of power between the executive and Congress poses a significant dilemma. While Congress's traditional appropriations power remains vital for regulating armed conflicts, its practical utility has been compromised by various factors, including political discord and creative use of existing funds and reprogramming authority.

However, the introduction of the Property Clause offers a potential avenue for Congress to enhance its regulatory role. By leveraging this constitutional authority, Congress can complement its appropriations power and restrain unauthorized armed conflicts by prohibiting the disposal of current Government property. This innovative approach suggests that amending the WPR to include the disposal of government property during hostilities can be a pivotal step in achieving greater control over military actions, allowing Congress to play a more assertive role in shaping the future of armed conflict in the 21st century.

“ANY SEXUAL MISCONDUCT”: THE APPLICATION OF MRE 412 TO ART. 117A

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I. INTRODUCTION

Congress has amended the Uniform Code of Military Justice (UCMJ) several times over the past decade, responding to public outcry against Service member misconduct.¹ One recent change came in the wake of the 2017 “Marines United” scandal, which involved an online group of active duty and former Marines, as well as current and former Service members from other branches, sharing intimate photos of Service members without their consent.² This scandal caused a national uproar and a demand for legislative action.³ Congress responded promptly by enacting Article 117a to the UCMJ in the 2018 National Defense Authorization Act.⁴ In so doing, Congress followed the path taken by many other states in criminalizing “revenge porn” type-conduct.⁵ This article’s enactment

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¹ See, e.g., National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (2013) (codified at 10 U.S.C. § 806b) (codifying certain rights for crime victims); National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1692 (2021) (codified at 10 U.S.C. § 824a) (creating military service offices of Special Trial Counsel).

² Thomas J. Brennan, *Hundreds of Marines Investigated for Sharing Photos of Naked Colleagues*, REVEAL NEWS (Mar. 4, 2017), <https://bit.ly/3X8JGiV>.

³ See Alex Ward, *The Military May Soon Consider Revenge Porn a Criminal Act*, VOX (Sep. 20, 2017), <https://bit.ly/3T6vAh6>.

⁴ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 533, 131 Stat. 1283, 1389 (2017) (codified at 10 U.S.C. § 917a).

⁵ See, e.g., *Nonconsensual Distribution of Intimate Images*, CYBER C.R. INITIATIVE, <https://bit.ly/3Z5HVph>. Forty-eight states, the District of Columbia, and two U.S. territories have passed laws criminalizing the nonconsensual distribution of intimate images.

was but the latest step forward in protecting victims of crimes involving sexual misconduct.

Nearly fifty years before the enactment of Article 117a in 2017, state legislatures and Congress adopted rape-shield laws to prohibit the in-court use of evidence of a victim's sexual behavior or a victim's sexual predisposition, except in very limited circumstances.⁶ In 1980, then-President Jimmy Carter adopted Military Rule of Evidence (MRE) 412, which parallels the state and federal rules, into the *Manual for Courts-Martial (MCM)*, along with the rest of the newly drafted Military Rules of Evidence.⁷ Though the military's rule was modeled on the federal rule, it was initially more expansive than the federal rule because it applied to "nonconsensual sexual offense[s]"⁸ and not just "rape or assault with intent to commit rape."⁹ The current version of the rule is even more broad than the first, applying to any case involving "an alleged sexual offense."¹⁰ Nationwide, the rule's enactment and subsequent implementation marked a new restrictive approach to determining evidence admissibility.¹¹ This type of evidence went from being permitted unless an exception applied to being prohibited unless an exception applied.

MRE 412 prohibits two broad categories of evidence: (1) evidence that the alleged victim engaged in "other sexual behavior" and (2) evidence to prove an alleged victim's "sexual predisposition."¹² Even though the rule restricts these broad categories of evidence, it only applies when sexual offenses are charged. As a result, one might assume that MRE 412 does not apply to Article 117a, despite the sexual content of the material it prohibits from being shared.¹³ Article 117a criminalizes the wrongful distribution of intimate visual images (WDII), not

⁶ *Rule 412: Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Disposition*, 12 TOURO L. REV. 457, 458–59 (1996). See, e.g., FED. R. EVID. 412 (1978); MICH. COMP. LAWS ANN. § 750.520j (West 1975); CAL. EVID. CODE § 782 (West 1975); MINN. STAT. ANN. § 609.347 (West 1975).

⁷ Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 11 (1990) (citing Exec. Order No. 12, 198, 45 Fed. Reg. 16932 (Mar. 14, 1980)).

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 412(a) (1984) [hereinafter 1984 MCM].

⁹ See FED R. EVID. 412 advisory committee's note to 1994 amendment.

¹⁰ MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 412(d) (2024) [hereinafter MCM] ("[T]he term 'sexual offense' includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. 'Sexual behavior' includes any sexual behavior not encompassed by the alleged offense. The term 'sexual predisposition' refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder. For the purpose of this rule, the term 'victim' includes an alleged victim.").

¹¹ Rosanna Cavallaro, *Rape-Shield Evidence and the Hierarchy of Impeachment*, 25 AM. CRIM. L. REV. 295, 295 (2019) ("Rule 412 reverses the ordinary approach of such rules and prohibits the use of any and all rape-shield evidence unless it is explicitly permitted by the Rule.").

¹² MCM, *supra* note 10, M.R.E. 412.

¹³ See UCMJ art. 117a (2017).

a sexual act.¹⁴ However, neither Congress nor the President has directly addressed the question of whether MRE 412 applies. Likewise, no military appellate court has addressed this issue.

This paper will argue for applying MRE 412 to Article 117a, absent clear guidance from Congress or the President. In short, practitioners and military judges should apply MRE 412 when Article 117a is charged because MRE 412 applies to sexual offenses; a “sexual offense” includes “any sexual misconduct” punishable by law, and Article 117a punishes a specific type of sexual misconduct. Part II of this paper will review the text and context of MRE 412 and Article 117a. Part III will present arguments for and against the application of MRE 412. Part IV will explain why MRE 412’s framework is the proper evidentiary sieve in Article 117a cases.

II. BACKGROUND: THE PROTECTION OF VICTIMS

A. History of Rape-Shield Protections and MRE 412

Originally passed as the Privacy Protections for Rape Victims Act of 1978¹⁵ and subsequently implemented as Federal Rule of Evidence (FRE) 412, the rule represented a paradigmatic shift in how and whether courts considered evidence of a victim’s sexual behavior.¹⁶ This new approach made evidence of “past sexual behavior” inadmissible except in limited circumstances.¹⁷ Past sexual behavior was broadly defined “to include all sexual conduct other than the rape or assault at issue. Hence, the rule embrace[d] all sexual conduct of the victim.”¹⁸ With the enactment of such laws, victims were no longer required to answer questions about their sexual history, manner of dress, way of talking, or anything about their lifestyle with a sexual connotation.¹⁹ This entire line of questioning was now prohibited. Before rape-shield laws were enacted, defense attorneys in rape cases routinely put the victim’s character on trial by offering character and opinion testimony of a victim’s unchaste character.²⁰ Lawmakers enacted these

¹⁴ Major Joshua B. Fix, *The Revenge of Preemption: How to Correct Unintended Consequences of the Military’s “Revenge Porn” Statute*, 3 ARMY LAW. 52, 53 (2021).

¹⁵ Privacy Protections for Rape Victims Act of 1978, Pub. L. No. 95–540, 92 Stat. 2046–47 (1978) [hereinafter Privacy Protections Act].

¹⁶ See Cavallaro, *supra* note 11.

¹⁷ Privacy Protection Act, *supra* note 15.

¹⁸ *United States v. Torres*, 937 F.2d 1469, 1472 (9th Cir. 1991) (quoting CHARLES A. WRIGHT ET AL., 23 FED. PRAC. & PROC. EVID. § 5384, at 541 (1980)).

¹⁹ Cavallaro, *supra* note 11, at 298 (2019) (citing Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764 (1986); *United States v. Dorsey*, 16 M.J. 1, 7 (C.M.A. 1983)).

²⁰ See 5 JACK B. WEINSTEIN, WEINSTEIN’S FEDERAL EVIDENCE § 412 App.01 (2d ed. 1997) (quoting 124 Cong. Rec., H11944 11945 (daily ed. Oct. 10, 1978) (statement of Rep. James R. Mann) (“Mr. Speaker, for many years in this country, evidentiary rules have permitted the introduction of

provisions to protect victims in sexual offense cases from being shamed with any evidence of unchaste character, which would discourage the reporting of this type of crime.²¹

With the implementation of FRE 412, relevant evidence about the victim's sexual reputation and character were barred entirely from admission, even though previously, such evidence was admissible under FRE 405.²² It also created a presumption that specific instances of previous sexual conduct by the victim were inadmissible.²³ This presumption could only be overcome in three particular instances. The first was that evidence could be admitted if it was constitutionally required.²⁴ The second exception permitted an accused to introduce "past sexual behavior" if it was used to demonstrate that someone other than the accused was the source of the semen or injury.²⁵ The third exception permitted evidence of "past sexual behavior" between the accused and the victim if it was offered to prove consent to the charged crime.²⁶ Notably, these three exceptions applied only to "sexual behavior," not "sexual predisposition."²⁷

The military rule has closely reflected the federal rule with a few exceptions.²⁸ In *United States v. Banker*, the Court of Appeals of the Armed Forces (CAAF) departed from the traditional MRE 412 balancing test for constitutionally required evidence in favor of one that elevated the victim's

evidence about a rape victim's prior sexual conduct. Defense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life.")).

²¹ Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 (1986) ("Rape-shield laws, as they are popularly known, reversed the long-standing common-law doctrine that permitted a defendant accused of rape to inquire into the complainant's 'character for unchastity,' that is, her propensity to engage in consensual sexual relations outside of marriage.").

²² See FED. R. EVID. 405 (1978) ("Rule 405. Methods of Proving Character (a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. (b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."); see, e.g., *Gish v. Wisner*, 288 F. 562, 562 (5th Cir. 1923) ("Hence, in a prosecution or suit for an assault with intent to commit rape, the rule is established by the great weight of authority that the general reputation for chastity of the complaining witness, who claims to be the victim, is material as bearing upon the vital question of her consent or nonconsent.").

²³ FED. R. EVID. 405 (1978).

²⁴ FED. R. EVID. 412(b)(1) (1978).

²⁵ FED. R. EVID. 412(b)(2)(A) (1978).

²⁶ FED. R. EVID. 412(b)(2)(B) (1978).

²⁷ FED. R. EVID. 412(b) (1978). Both "sexual behavior" and "sexual predisposition" are defined in the rule. Still, one way to summarize their differences is that "behavior" refers to things explicitly sexual, whereas "predisposition" refers to things implicitly sexual.

²⁸ *United States v. Banker*, 60 M.J. 216, 217 (C.A.A.F. 2004).

privacy interest.²⁹ To be admissible, the probative value of the evidence had to outweigh the prejudice to the victim’s privacy interest.³⁰ The court reversed course in *United States v. Gaddis*, returning to the traditional MRE 412 balancing test for determining the admissibility of constitutionally required evidence.³¹ However, military judges have given the rule the widest applicability in keeping with the rule’s shift from offense-focused to victim-focused. For example, the CAAF extended MRE 412 protections to victims of all allegations of sexual misconduct, consensual and nonconsensual, in the case of *United States v. Banker*.³² It did this despite the text of the rule, specifically, the heading of the rule itself and the definition of “nonconsensual sexual offense” provided in the rule.³³

B. History of Article 117a

Reporter Thomas J. Brennan broke the news story detailing the Facebook group, Marines United, on March 4, 2017.³⁴ His reporting detailed the existence of a private Facebook group with over 30,000 members composed of former and actively serving members of the armed forces, some of whom were sharing videos and images of nude women, including active and former Service members and civilians.³⁵ This news ignited a firestorm of coverage from national news outlets and attention from Congress and the Pentagon.³⁶

Within days of these reports, members of Congress called for new legislation to criminalize sharing sexually explicit photos without permission.³⁷ A new law was needed because, in most cases, the UCMJ did not plainly prohibit sharing intimate photos and videos voluntarily taken or recorded with the other

²⁹ *Id.* at 223 (“[W]hen balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but also prejudice to the victim’s legitimate privacy interests.”).

³⁰ *Id.*

³¹ *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011).

³² 60 M.J. at 220.

³³ MCM, *supra* note 10, M.R.E. 412 (“A ‘nonconsensual sexual offense’ is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.”).

³⁴ Brennan, *supra* note 2.

³⁵ *Id.*

³⁶ See Anna Hiatt, *Strong Responses Follow News of Nude Photo Sharing by Marines*, THE WAR HORSE, (Apr. 13, 2017), <https://bit.ly/3MpMnbd>; Bill Chappell, *Sharing of Nude Photos of Female Marines Online Prompts Pentagon Investigation*, NATIONAL PUBLIC RADIO, TWO-WAY (Mar. 6, 2017, 8:10 AM), <https://n.pr/3z3hqX3>; *Marine Corps Social Media Nude Photos Investigation*, C-SPAN (Mar. 14, 2017), <https://bit.ly/3X6GbcX> (displaying the testimony of the Commandant of the Marine Corps before the Senate Armed Services Committee about the Marines United scandal).

³⁷ *Illicit Photo Scandal Touches Other Military Branches Besides Marines: Report*, ABC NEWS (Mar. 10, 2017, 10:25 AM), <https://bit.ly/4g6YpDO>.

person's consent.³⁸ Senator Elizabeth Warren raised this issue to the Commandant of the Marine Corps, General Robert Neller, when the Senate Armed Services Committee questioned him. She asked whether the military services needed a "revenge porn" statute to criminalize this behavior.³⁹ General Neller responded that such a statute "would be helpful in the accountability process."⁴⁰

Congress rushed to fill this gap, and by the end of that year, it created a new punitive provision, Article 117a. Introduced initially as the "Protecting the Rights of Individuals Against Technological Exploitation Act or the PRIVATE Act," the provision was ultimately enacted as part of the 2018 National Defense Authorization Act.⁴¹ The law criminalized the "wrongful broadcast or distribution of intimate visual images."⁴² Its numbering as Article 117a located it in the section of the code dealing with military-specific offenses, those that have an impact on military readiness and efficiency, such as absence without leave⁴³ and disrespect,⁴⁴ and not with traditionally recognized common law offenses, such as murder⁴⁵ and rape.⁴⁶ It was placed just after Article 117, which prohibits provoking speeches or gestures between service members.⁴⁷ Its focus on military readiness and efficiency can be seen in the elements of the offense, which does not criminalize all sharing of intimate images, but only those that have a "reasonably direct and palpable connection to a military mission or military environment."⁴⁸ Senator Clare McCaskill, one of the provision's supporters in the Senate, spoke publicly about military readiness as a justification for the law: "Whether it's in the barracks or on the internet, degradation and intimidation of

³⁸ Military officers involved could have been charged with an Article 133 violation, criminalizing any conduct unbecoming an officer. See UCMJ art. 133 (2016). For enlisted personnel, it was possible to charge under Article 134, which criminalizes, *inter alia*, "all disorders and neglects to the prejudice of the good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces[.]" *Id.* art. 134.

³⁹ Jeff Schogal, *Marine Corps Social Media Policy: Cyberbullying is Illegal*, MARINE CORPS TIMES (Mar. 15, 2017), <https://bit.ly/4e18IHE>.

⁴⁰ *Id.*

⁴¹ Protecting the Rights of Individuals Against Technological Exploitation Act or the PRIVATE Act, H.R. 2052, 115th Cong. (2017) [hereinafter PRIVATE Act].

⁴² See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 533, 131 Stat. 1283, 1389 (2017) (codified at 10 U.S.C. § 917a).

⁴³ UCMJ art. 86.

⁴⁴ *Id.* art. 89.

⁴⁵ *Id.* art. 118.

⁴⁶ UCMJ art. 120. See generally DAVID A. SCHLUETER ET AL., *MILITARY CRIMES AND DEFENSES* (4th ed. 2024), which divides the code into Inchoate Offenses (Articles 77 to 82), Military Specific Offenses (Articles 83 to 117a), Common Law Offenses (Articles 118 to 132), and the General Articles (Articles 133 to 134).

⁴⁷ See UCMJ art. 117; see also SCHLUETER ET AL., *supra* note 46, § 5.50 ("This Article dates to the time of crusades and the Ordinance of Richard I, A. D. 1190, which was issued to prevent disputes between soldiers and sailors on their way to the Holy Land.").

⁴⁸ UCMJ art. 117a.

our service members is a serious crime that threatens good order and discipline, and we’ve got to give our military the tools it needs to treat it that way.”⁴⁹

In the years since this article was enacted, there have been relatively few appellate court decisions interpreting its text.⁵⁰ No court has heard a challenge to the application of MRE 412 to the offense.

III. DOES MRE 412 APPLY TO ARTICLE 117A?

A. Arguments for the Application of MRE 412 to Article 117a

1. Article 117a is a “Sexual Offense”

The first argument in favor of the applicability of MRE 412 to Article 117a is based on the text of the rule. That is, the language of MRE 412 is broad enough to include the offense. The argument can be stated as follows: (1) MRE 412 applies to “sexual offenses,” and (2) sexual offenses include those that contain “sexual misconduct,” and (3) Article 117a prohibits sexual misconduct, (4) it follows that MRE 412 applies to cases where Article 117a is alleged.

Definitionally, MRE 412 applies in any case involving an “alleged sexual offense.”⁵¹ Step one then is determining what constitutes a sexual offense. The rule defines “sexual offense” as “any sexual misconduct punishable under the [UCMJ], federal law or state law.”⁵² This definition of “sexual offense” differs from the definition of “sexual offense” contained in MRE 413.⁵³ The definition in MRE 413 is more restrictive and specific than that of MRE 412. Missing in MRE 413 are the words “any sexual misconduct.” Instead, MRE 413 applies to “a sexual offense.” The words “sexual offense” are defined as “an offense punishable under the [UCMJ], or a crime under federal law or state law,” which is the same

⁴⁹ Leo Shane III, *Congress Poised to Outlaw Revenge Porn in the Military*, ARMY TIMES (Sep. 20, 2017), <https://bit.ly/3XrBNqr>.

⁵⁰ Some of the reported cases include: *United States v. Grijalva*, No. 23-0215, 2024 CAAF LEXIS 385, at *11–15 (C.A.A.F. June 26, 2024) (finding that Article 134 was preempted by Article 117a); *United States v. Jennings*, No. ACM 40282, 2023 CCA LEXIS 525, at *15–25 (A.F. Ct. Crim. App. Dec. 13, 2023) (considering what it means to electronically transmit an image); *United States v. Robles*, No. ACM 40280, 2023 CCA LEXIS 353, at *16–21 (A.F. Ct. Crim. App. Aug. 18, 2023) *review denied*, *United States v. Robles*, 2023 CAAF LEXIS 863 (C.A.A.F. Dec. 12, 2023) (considering what images are sexually explicit); *United States v. Hiser*, 82 M.J. 60, 66–67 (C.A.A.F. 2022) (considering what it means to have a “connection to a military mission or military environment”); *United States v. Page*, 80 M.J. 760, 766–68 (N-M Ct. Crim. App. 2021) (considering an issue of information transmitted with an image).

⁵¹ MCM, *supra* note 10, M.R.E. 412(a).

⁵² *Id.* M.R.E. 412(d).

⁵³ *See id.* M.R.E. 413.

as in MRE 412, but MRE 413 then provides a specific list of offenses to which it applies.⁵⁴ MRE 412 contains no such specific listing of applicable offenses.

MRE 412 is not limited in its applicability to only those offenses often referred to as “sexual offenses,” such as rape, sexual assault, and any such attempt to commit those acts. Nor is it specifically limited to those enumerated punitive articles such as Article 120 through Article 120c, UCMJ, which were the type of offenses included in the 1988 amendments to FRE 412.⁵⁵ Modeling the changes that first appeared in the 1994 amended FRE 412,⁵⁶ MRE 412 does not denote any enumerated criminal offenses to which it applies. Instead, the rule applies to “any sexual misconduct,” which is punishable under the UCMJ, state, or federal law. This parallels the language in the Advisory Committee Notes, which states that the federal rule applies in all cases involving sexual misconduct.⁵⁷

Step two is to determine the definition of “sexual misconduct.” MRE 412 does not provide a definition. There is no specific definition in the MCM or within the federal rule. However, there are a few other uses of the words in the MCM. The term is used in the title of Article 120c, “Other sexual misconduct,” to categorize three specific offenses outside of those prohibited in Articles 120 through 120b.⁵⁸ However, “sexual misconduct” is not defined by that punitive article. The other times “sexual misconduct” is referred to in the MCM, it is used

⁵⁴ *Id.* MRE 413 provides:

- (d) Definition. As used in this rule, ‘sexual offense’ means an offense punishable under the Uniform Code of Military Justice, or a crime under federal or state law (as ‘state’ is defined in 18 U.S.C. § 513), involving:
- (1) any conduct prohibited by Article 120;
 - (2) any conduct prohibited by 18 U.S.C. chapter 109A;
 - (3) contact, without consent, between any part of the accused’s body, or an object held or controlled by the accused, and another person’s genitals or anus;
 - (4) contact, without consent, between the accused’s genitals or anus and any part of another person’s body;
 - (5) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
 - (6) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

⁵⁵ See FED R. EVID. 412 advisory committee’s note to 1994 amendment.

⁵⁶ See FED R. EVID. 412(a).

⁵⁷ FED R. EVID. 412 advisory committee’s note to 1994 amendment.

⁵⁸ See UCMJ art. 120c. The offenses proscribed by the article include (1) indecent viewing, visual recording, or broadcasting, (2) forcible pandering, and (3) indecent exposure.

generically and not to delineate a list of sexual offenses.⁵⁹ The same is true of the federal rule.⁶⁰

Since the rule itself does not provide the definition, nor can one be found within the MCM, the words must be understood by their ordinary meaning.⁶¹ FRE 412 is construed similarly for terms that are not explicitly defined.⁶² Looking outside of the military context reveals that the words “sexual misconduct” are not legal terms but are used to refer to any misconduct involving sexual behavior.⁶³ Neither *Black’s Law Dictionary*⁶⁴ nor *Ballentine’s Law Dictionary*⁶⁵ contains a definition for “sexual misconduct.” A Google search of a definition for sexual misconduct garners numerous results from universities describing their policies prohibiting several specific types of sexual misconduct.⁶⁶ These definitions describe a broad class of behavior that is sexual in character.⁶⁷

The next step is to determine whether wrongful distribution of an intimate visual image is “sexual misconduct.” It is helpful to consider two other

⁵⁹ See, e.g., MCM, *supra* note 10, app. 17 (“Forcible *sexual misconduct* previously addressed under Article 125 (MCM 2016) is now addressed in Articles 120 and 134 (Animal abuse).” (emphasis added)).

⁶⁰ FED R. EVID. 412 advisory committee’s note to 1994 amendment (“Rule 412 extends to . . . witnesses . . . whose testimony about other instances of *sexual misconduct* . . . Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a ‘victim of alleged *sexual misconduct*.’” (emphasis added)).

⁶¹ See *United States v. Bergdahl*, 80 M.J. 230, 249 (C.A.A.F. 2020) (“In the absence of any specific statutory definition, we look to the ordinary meaning of the word.” (quoting *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015))).

⁶² *United States v. Shaw*, 824 F.2d 601, 608 (8th Cir. 1987) (“In construing the meaning of Rule 412(b)(2)(A), a court ‘must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.’” (quoting *Park ‘n Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985))).

⁶³ *Sexual Harassment*, RAINN, <https://bit.ly/4egRUwj> (“Sexual misconduct is a non-legal term used informally to describe a broad range of behaviors, which may or may not involve harassment.”).

⁶⁴ See generally BLACK’S LAW DICTIONARY (3d Pocket ed. 2006) (lacking a definition for “sexual misconduct”).

⁶⁵ See generally BALLENTINE’S LAW DICTIONARY (3d ed. 1969) (lacking a definition for “sexual misconduct”).

⁶⁶ See, e.g., *What is Sexual Misconduct?*, COVENANT COLLEGE, <https://bit.ly/3XxlzvT> (“Sexual Misconduct is conduct of a sexual nature or conduct based on sex or gender that is nonconsensual or has the effect of threatening, intimidating, or coercing a person. The College prohibits the following specific conduct . . . : 1. Sexual Harassment; 2. Sexual Assault; 3. Dating Violence; 4. Domestic Violence; 5. Stalking; 6. Retaliation.”); *What is Sexual Misconduct?*, CLARK COLLEGE, <https://bit.ly/3TjV5vq> (“Sexual misconduct is a type of violence that uses power, control, and/or intimidation to harm another. It includes sexual harassment, sexual assault, domestic violence, dating violence, and stalking. It occurs when there is an absence of consent.”); *P&P, Section 9.4.1.2: Sexual Misconduct – Further Definitions of Sexual Misconduct & Intimate Partner Violence*, MIT INSTITUTE DISCRIMINATION & HARASSMENT RESPONSE OFF., <https://bit.ly/3MzaaWf> (“Sexual misconduct is a broad term that includes sexual assault (rape, sexual fondling, incest or statutory rape) as well sexual exploitation and sexual harassment.”).

⁶⁷ *Id.*

terms defined in MRE 412 that inform what amounts to “sexual misconduct.” While MRE 412 applies in cases involving “any sexual misconduct,” the rule prohibits evidence of other “sexual behavior” and evidence of “sexual predisposition.” MRE 412 defines “sexual behavior” as “any sexual behavior not encompassed by the alleged offense.”⁶⁸ “Sexual predisposition” is defined as a victim’s manner of dress, speech, or lifestyle that *may* have a sexual connotation.⁶⁹ These are incredibly expansive definitions and can inform the meaning of “sexual misconduct.”

The Advisory Committee’s Notes to the 1994 federal amendment also provide insight into what the definition of “sexual behavior” encompasses. “[S]exual behavior connotes *all* activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that *imply* sexual intercourse or sexual contact.”⁷⁰ The Committee’s Notes cite several cases where courts concluded that conduct that did not explicitly involve sexual behavior nonetheless implied “sexual behavior,” which was enough for courts to consider it covered by the rule.⁷¹

The definition of “sexual predisposition” is even more broad than “sexual behavior.” Again, the focus is on dress, speech, or lifestyle “that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder.”⁷² The word connotation is defined as “something suggested by a word or thing.”⁷³ Some have concluded, “This must mean that evidence of ‘sexual predisposition’ includes behavior that does not amount to sexual contact or lead to sexual arousal, but still reveals something more general about a victim’s sexuality.”⁷⁴ “Sexual predisposition” appeals to something more significant and insidious, such as stereotyping or insinuating.⁷⁵

With the ideas of “sexual behavior” and “sexual connotation” in mind, Article 117a must be examined to determine whether it prohibits “sexual behavior” or whether the conduct it prohibits has a “sexual connotation.” Since the ordinary meaning of “sexual misconduct” applies, we must necessarily look at the content of the offense to ascertain whether it is sexual misconduct. Here,

⁶⁸ MCM, *supra* note 10, M.R.E. 412 (emphasis added).

⁶⁹ *Id.* (emphasis added).

⁷⁰ FED R. EVID. 412 advisory committee’s note to 1994 amendment (emphasis added).

⁷¹ *See id.* (citing *United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 418 (1992) (finding use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (finding birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (finding evidence of venereal disease inadmissible)).

⁷² FED R. EVID. 412 advisory committee’s note to 1994 amendment.

⁷³ *Connotation*, MERRIAM-WEBSTER.COM DICTIONARY, <https://bit.ly/3z5Z4ot>.

⁷⁴ CHARLES A. WRIGHT ET AL., 23 FED. PRAC. & PROC. EVID. § 5374.1 (2d ed. 2019).

⁷⁵ *Id.*

while the offense prohibits sharing intimate images without permission, it is only because the images contain sexually explicit content that the prohibition exists. While it is possible for a non-explicit photo shared without permission to be a violation of the UCMJ through Article 134, Article 117a does not prohibit such sharing. It only prohibits sharing those images that contain “sexually explicit conduct.”⁷⁶ This is “sexual behavior,” as defined by MRE 412, and can undoubtedly be used to show a victim’s “sexual predisposition.”

Another way to demonstrate the textual argument for including Article 117a is to compare it with Article 120c, Indecent Viewing.⁷⁷ Article 120c does not prohibit sexual acts, but it does prohibit “sexual behavior,” and yet it is considered sexual misconduct, such that a conviction requires sex offender registration.⁷⁸ Article 120c can be distilled to prohibit three types of conduct: (1) seeing someone naked without consent, (2) photographing or recording someone naked without consent, and (3) broadcasting or distributing the photo or video without consent.⁷⁹ This broadcasting or distributing is the same *actus reus* prohibited by Article 117a. The only difference is that in Article 117a, the victim knew the accused possessed the intimate images, and in Article 120c, the victim did not. How can the determination of whether one offense is treated as a “sexual offense” so that MRE 412 applies depends on whether or not the victim knew the accused possessed the intimate image? The determination of whether it is a “sexual offense” must rely instead on the content of the offense, on the actual behavior involved, and whether it contains anything sexual.

It can be concluded on this basis that Article 117a prohibits a type of sexual misconduct because the behavior it criminalizes has sexual content and is sexual behavior—“sexually explicit conduct.”⁸⁰ This concept fits within the ordinary meaning of the words “sexual misconduct.” The sharing of the photo and the content of the photo cannot be separated. It is the content of the photo that makes the sharing illegal. The ultimate conclusion that cogently follows is that because Article 117a prohibits a specific type of sexual misconduct, it is a “sexual offense.” Since MRE 412 applies in cases where a “sexual offense” is alleged, it can be concluded that MRE 412 applies to allegations of Article 117a.

⁷⁶ UCMJ art. 117a(b)(6) (“SEXUALLY EXPLICIT CONDUCT.—The term ‘sexually explicit conduct’ means actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, bestiality, masturbation, or sadistic or masochistic abuse.”).

⁷⁷ UCMJ art. 120c.

⁷⁸ See U.S. DEP’T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2, app. 4 (11 Mar. 2013).

⁷⁹ UCMJ art. 120c(a)(1)–(3).

⁸⁰ *Id.*

2. MRE 412 Applies to Some Article 134 Offenses

MRE 412 has broad applicability. As stated before, it applies in “any proceeding involving an alleged sexual offense[.]”⁸¹ Some offenses are commonly recognized as sexual offenses, particularly those UCMJ articles in the 120-series. This series of punitive articles criminalize the type of conduct that gave rise to the first rape-shield laws, such as rape and sexual assault. Notably, a conviction for one of these sex offenses results in sex offender registration, which is partly why they are commonly referred to as “sex offenses.”⁸² There is no question about whether MRE 412 applies when an offense in the 120-series is alleged, despite the lack of specificity about the definition of sexual offense. But MRE 412 also applies to other punitive provisions outside of those recognized sexual offenses. It applies to offenses involving sexual misconduct covered by Article 134, including indecent conduct,⁸³ sexual harassment,⁸⁴ and pandering and prostitution.⁸⁵

The commonality among these other offenses is their concern with sexual behavior. Consider the offense of indecent conduct, which prohibits actions that contain a “form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.”⁸⁶ The offense of sexual harassment prohibits “sexual advances, demands or requests for sexual favors, [and] engag[ing] in other conduct of a sexual nature[.]”⁸⁷ Pandering and prostitution prohibit sexual acts in exchange for money or other compensation.⁸⁸ Sexual behavior is at the heart of what these offenses prohibit just as Article 117a.

There are two other categories of offenses to which MRE 412 applies that are not specifically enumerated sexual offenses in the UCMJ: federal sexual offenses and state sexual offenses. Known as “Clause 3 offenses” because of the

⁸¹ MCM, *supra* note 10, M.R.E. 412(a).

⁸² See U.S. DEP’T OF DEF., INSTR., 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY PAROLE AUTHORITY (11 Mar. 2013) (C4, 19 Aug. 2020) (providing the list of UCMJ offenses that require sex offender registration).

⁸³ See, e.g., *United States v. Seeto*, 2018 CCA LEXIS 518, at *21–22 (A.F. Ct. Crim. App. Oct. 26, 2018) (authorizing a rehearing in a conviction for Article 134, Indecent Conduct, where the accused was convicted of ejaculating on the victim’s stomach).

⁸⁴ *United States v. Porter*, 2000 CCA LEXIS 307, at *3 (N-M Ct. Crim. App. Aug. 10, 2000) (acknowledging the trial court’s MRE 412 hearing in a case where sexual harassment was alleged); see also FED R. EVID. 412 advisory committee’s note to 1994 amendment (explaining that FRE 412 applies in any civil case including those for claims of sexual harassment).

⁸⁵ See SCHLUETER ET AL., *supra* note 46, § 7.18. Though there are no reported cases where a court has specifically applied MRE 412 to the offense, the crime prohibits certain sexual acts. The provision adopts the “sexual act” definition of sexual defined in Article 120 of the MCM.

⁸⁶ MCM, *supra* note 10, pt. IV, ¶ 104(c)(1).

⁸⁷ *Id.* ¶ 107a(b)(1).

⁸⁸ *Id.* ¶ 106(b)(1).

language of the article enabling them to be charged, Article 134 permits federal and state crimes to also be charged as violations of the UCMJ.⁸⁹ By implication, MRE 412 applies to those Article 134 offenses that incorporate federal sexual offenses⁹⁰ and state sexual offense crimes under the Assimilated Crimes Act.⁹¹

Since MRE 412 applies to more than just those commonly recognized sex offenses, and Article 117a is one of those offenses, MRE 412 should also apply to Article 117a. Like these other offenses where MRE 412 applies, Article 117a is concerned with sexual activity or sexual behavior. More specifically, it is concerned with ensuring the privacy of sexual activity or sexual behavior between those consenting adults who choose to record their actions for their private use. While each of these other offenses has a distinct element, act, or subject in view, they all share an essential commonality that warrants the protections provided by MRE 412. Because Article 117a shares that commonality, MRE 412 should apply.

Finally, there is at least one state, Hawaii, that regards WDII as a registerable sex offense.⁹² And there is another that requires sex offender registration after a second conviction.⁹³ These examples lend support to MRE 412’s applicability to cases where Article 117a is charged because if MRE 412 applies to “any sexual misconduct . . . punishable under state law,” then it would apply if the Hawaii criminal statute was charged since it is an offense requiring sex offender registration. Notwithstanding the charging of the state crime, the fact that some states regard it as a registerable offense supports the position that Article 117a deals with sexual misconduct.

3. Policy Interests Align

The policy rationale behind MRE 412 closely aligns with Article 117a. As mentioned above, the history and the intent behind MRE 412 (and FRE 412) align with the purpose of Article 117a. The purpose of both provisions is to protect the privacy and dignity of victims by increasing the protections afforded them and to encourage the reporting of misconduct. The reasoning that gave rise to the first rape-shield law and FRE 412 was the desire to protect victims from attacks on their sexual character, which would cause shame and embarrassment.⁹⁴ FRE 412

⁸⁹ *Id.* ¶ 91 (criminalizing “crimes and offenses not capital”).

⁹⁰ *See generally* UCMJ art. 134; *see, e.g.*, *United States v. Kearns*, 73 M.J. 177, 179 (C.A.A.F. 2014) (upholding appellant’s conviction for violating 18 U.S.C. § 2423(a), which was charged as a violation of clause 3 of Article 134).

⁹¹ 18 U.S.C. § 13 (1996).

⁹² HAW. REV. STAT. § 711-1110.9 (2018); HAW. REV. STAT. § 701-846e (2024).

⁹³ IDAHO CODE § 18-6605 (2022); *id.* § 18-8304 (2022).

⁹⁴ *See* WEINSTEIN, *supra* note 20.

was enacted to encourage the prosecution of such crimes.⁹⁵ With Article 117a, the impetus for the law was the desire to protect victims from those who would share their intimate images to shame and embarrass them.⁹⁶

If MRE 412 did not apply in Article 117a cases, the purposes of both would be thwarted. Consider the potential chilling effect on victims' reporting WDII if other intimate images of them could be introduced during a trial. Victims could experience even more shame and embarrassment by reporting the crime than not reporting it. This scenario would circumvent the protections and purpose provided by MRE 412. Therefore, not applying MRE 412 would frustrate the purpose of Article 117a and could prevent victims from coming forward to report this crime. At the very least, it could subject them to the same embarrassment and ridicule that MRE 412 was designed to prohibit.

The wide application of MRE 412 is supported by the broad definition of "sexual behavior" as defined in the original rule.⁹⁷ But the drafters could not foresee the rise of a new form of character attack on women using the internet and social media. Nor could they foresee the type of sexual behavior that arose with the creation of the internet, social media, and smartphones. Nevertheless, the rule was intended to prevent the introduction of any sexual behavior other than what was alleged.⁹⁸ Applying MRE 412 to Article 117a furthers the purposes of the rule and the offense by protecting victims from shame and embarrassment. It encourages the reporting of the crime prohibited by Article 117a.

The broad applicability of the rule is demonstrated in the 1994 Notes of the Advisory Committee, which stated:

The reason for extending the rule to *all criminal cases* is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report

⁹⁵ WRIGHT ET AL., *supra* note 75, § 5372 ("Rape' is one of the most heinous and fastest growing crimes in this country. According to the [Federal Bureau of Investigation], since 1962 forcible rapes have increased 62 percent. Yet rape is one of the most underreported violent crimes. Even where the crime is reported victims are often unwilling to proceed with the prosecution. In New York City only one-tenth of all rapes are actually reported and another study in Denver found that over 40 percent of rape victims were unwilling to cooperate with the prosecution." (citing 124 CONG. REC. S18580 (daily ed. Oct. 12, 1978) (remarks of Mr. Biden))).

⁹⁶ See 163 CONG. REC. H1598-599 (daily ed. Mar. 8, 2017) (statement of Rep. Speier) ("This is not about sex or fun or boys will be boys. This is about [M]arines deliberately trying to degrade, humiliate, and threaten fellow marines [sic]."); 163 CONG. REC. H3052 (daily ed. May 2, 2017) (statement of Rep. Lee, "Not only do such actions threaten our mission, they strip our brave servicemembers who are women of their dignity.").

⁹⁷ 1984 MCM, *supra* note 8, M.R.E. 412(d) ("[T]he term 'past sexual behavior' means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.").

⁹⁸ *Id.*

criminal acts *is not confined to cases that involve a charge of sexual assault*. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.⁹⁹

Extending the protections of MRE 412 to victims of Article 117a is equally obvious. Article 117a is a crime, recognized nearly nationwide, that involves significant privacy interests of victims. The strong social policy of protecting victim privacy and encouraging reporting has not been confined to sexual assault or a crime that involves a physical sexual act. This same policy compelled Congress to quickly prohibit the behavior exhibited in the “Marines United” scandal. MRE 412 should be applied because it gives this social policy full effect.

4. Some Victims Counsel Programs Treat Article 117a as an Eligible Offense

Another consideration in determining whether Article 117a is a “sex offense” is how the military’s victim legal counsel organizations treat the offense. Is it one that triggers the special protections intended by Congress in mandating the military to create these programs?¹⁰⁰ Some military services treat Article 117a as an offense that entitles a Service member to be represented by a victims’ legal counsel, special victims’ counsel, or victims’ counsel.¹⁰¹

Only certain offenses entitle Service members to representation by a victim’s counsel. These are set out in statute and military service regulations. One of the authorizing statutes, 10 U.S.C. § 1044e, authorizes legal counsel to victims of “sex-related offenses.”¹⁰² A “sex-related offense” is defined as a violation of Articles 120, 120b, and 120c, as well as an attempt to commit any one of the offenses in violation of Article 80.¹⁰³ Legal assistance for victims of “sexual assault” is also codified at 10 U.S.C. § 1565b.¹⁰⁴ “Sexual assault,” as defined by the provision, covers “the offenses of rape, sexual assault, forcible sodomy,

⁹⁹ FED. R. EVID. 412 advisory committee’s note to 1994 amendment (emphasis added).

¹⁰⁰ The requirement for the military departments to provide victims of sex assault with protections was enacted with the FY2011 NDAA. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 581(a), Dec. 31, 2011, 125 Stat. 1430, codified at 10 U.S.C. § 1565b (2011) (requiring the military departments to establish regulations to the provision of legal services to victims of sexual assault).

¹⁰¹ The Marine Corps and Navy refer to these attorneys as Victims’ Legal Counsel. The Army and Coast Guard call them Special Victims’ Counsel. The Air Force refers to them as Victims’ Counsel.

¹⁰² 10 U.S.C. § 1044e (2015).

¹⁰³ *Id.* § 1044e(h).

¹⁰⁴ This statute requires more than just legal assistance for victims of sexual assault.

aggravated sexual contact, abusive sexual contact, and attempts to commit such offenses, as punishable under applicable Federal or State law.”¹⁰⁵

Despite these limited definitions, some military services have expanded this benefit to victims of Article 117a. In the Air Force Victim Counsel Program regulations, Article 117a is explicitly included as an eligible offense, although for Article 117a, additional criteria must be met. The Coast Guard has also included victims of Article 117a as those eligible to receive the services of a special victims’ counsel. The Navy’s Victim Legal Counsel Program may also take a broader view of who an eligible victim is. Although their manual states that they provide representation to those victims of “sex offenses,”¹⁰⁶ which aligns with the federal definition of “sex-related offense,”¹⁰⁷ their public-facing website claims that they provide representation to victims of domestic violence and Article 117a.¹⁰⁸

Most of the military’s victim counsel organizations explicitly provide legal representation to victims of Article 117a and none are prohibited from doing so. Congress requires these organizations to provide legal services to victims of sex-related offenses. Their provision of legal services to victims of this offense supports treating Article 117a as a sexual offense.

5. Article 117a is a “Covered Offense”

Another indicator of whether Article 117a should be considered a sexual offense is whether it is one of the small number of offenses to be handled solely by the new offices of special trial counsel. Created by the Fiscal Year 2022 National Defense Authorization Act, these new prosecutorial offices will decide whether allegations of certain “covered offenses” will be prosecuted.¹⁰⁹ Article 117a is one of these thirteen “covered offenses.”¹¹⁰

The creation of these new offices was the culmination of Defense Secretary Lloyd Austin’s 90-Day Independent Review Commission (IRC) on

¹⁰⁵ 10 U.S.C. § 1565b(c)(1) (2022).

¹⁰⁶ U.S. DEP’T OF NAVY, JAGINST 5810.3A, NAVY VICTIMS’ LEGAL COUNSEL PROGRAM MANUAL, ch. 1-1 (23 Apr. 2018).

¹⁰⁷ 10 U.S.C. § 1044e(h).

¹⁰⁸ *Victims’ Legal Counsel Program FAQ*, U.S. DEP’T NAVY, <https://bit.ly/3YeEaMz> (“In order to be eligible to receive legal services from the VLC Program, you must be a victim of a sexual offense or domestic violence and otherwise eligible for legal services from a military attorney Common domestic violence offenses, such as Article 128 - Assault and Article 130 - Stalking which are covered when they relate to domestic violence. Victims of Article 117a - Wrongful Broadcast or Distribution of Intimate Visual Images are also eligible for our services.”).

¹⁰⁹ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1692 (2021) (codified at 10 U.S.C. § 824a).

¹¹⁰ *Id.*

Sexual Assault in the Military that occurred in 2021.¹¹¹ For years, there were discussions and attempts to change how sexual assaults were prosecuted in the military,¹¹² but the IRC’s report was the push advocates for reform needed to make changes. One of the report’s recommendations was for increased accountability for offenders of Article 117a.¹¹³ As one of the “covered offenses,” Article 117a will receive the same prosecutorial review as the crimes of murder, rape, and child pornography.¹¹⁴

Its grouping with Articles 120, 120b, 120c, and 134 (Sexual Harassment) requires an examination of the commonalities among these offenses. The IRC Report recognized that sexual harassment and sexual assault exist on a “continuum of harm.”¹¹⁵ The IRC Report also identified a link between cyberharassment and sexual assault.¹¹⁶ “Not infrequently, special victims can experience multiple crimes that overlap with sexual assault.”¹¹⁷ These crimes will now be handled similarly because of their content. They all capture various aspects and modes of sexual misconduct

B. Arguments Against Applying MRE 412 to Article 117a

1. Article 117a is not a “Sexual Offense”

The most straightforward argument against applying MRE 412 to Article 117a is that Article 117a is not a “sexual offense” as defined by the rule.¹¹⁸ Article 117a is not a sexual offense because it is not sexual misconduct. Article 117a is not sexual misconduct because the prohibited act, the *actus reus*, is sharing images without permission. The prohibited act is not a sexual act. Even though the images it prohibits from being shared contain sexually explicit conduct, the illegal act is sharing, broadcasting, or distributing the image. The sexually explicit conduct

¹¹¹ Memorandum from Sec’y of Def to Senior Pentagon Leadership, Dep’t of Def et al., subject: Immediate Actions to Counter Sexual Assault and Harassment and the Establishment of a 90-Day Independent Review Commission on Sexual Assault in the Military (26 Feb. 2021).

¹¹² See Press Release, Kirsten Gillibrand, Senator, U.S. Senate, Gillibrand Hails Historic Military Justice Reforms in Defense Bill (Dec. 7, 2022), <https://bit.ly/4gFbFj8>.

¹¹³ INDEPENDENT REVIEW COMMISSION, SEXUAL ASSAULT IN THE MILITARY REPORT, HARD TRUTHS AND DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 27 (Jul. 2, 2021) [hereinafter IRC REPORT] (“The Military Services must commit to holding Service members accountable who engage in cyberharassment, the *nonconsensual distribution of intimate visual images*, or other crimes or violence perpetrated through technology, and providing remedies to victims.” (emphasis added)).

¹¹⁴ UCMJ art. 1(17) (defining “covered offense”).

¹¹⁵ IRC REPORT, *supra* note 114, at 22.

¹¹⁶ *Id.* at 29 n.68 (“Cyberharassment is also linked to sexual assault. DoD’s own surveys indicate that one-third of victims who report experiencing sexual assault felt they had been the target of retaliation through online ostracism or maltreatment.”).

¹¹⁷ *Id.* at 19.

¹¹⁸ MCM, *supra* note 10, M.R.E. 412(d).

itself is not unlawful. Possessing the intimate image of an adult is not a crime as long as the image was obtained with permission. It is not illegal to possess images someone has shared voluntarily. It is not even a crime to possess intimate images of an adult if they were wrongly shared. Instead, it is the broadcasting or distributing of the image that is prohibited.

a. The Text Does Not Support Applying MRE 412

The phrase “sexual misconduct,” used in its ordinary sense, refers to crimes that are sexual. Indeed, as defined by the rule, a “sexual offense” is any sexual misconduct punishable under law, whether under the UCMJ, a state’s criminal code, or a federal law. One definition of misconduct in Black’s Law Dictionary is “unlawful or improper behavior.”¹¹⁹ When considered alongside the adjective “sexual,” its range does not extend to any offense or crime that has a sexual element, a sexual aspect, or facts that involve sexual activity. Instead, this phrase is primarily limited to misconduct, where the *actus reus* is sexual conduct or, more broadly, sexual relations.¹²⁰

A few examples of other sexual offenses will illustrate the point. Consider the offense of rape. The *actus reus* is a sexual act committed by unlawful force. In an allegation of sexual assault, the crime is a sexual act (for example, touching a sexual organ) when the other party is unconscious. Stalking can involve the fear of sexual assault. Two of the specific offenses criminalized in Article 120c of the UCMJ all have an illegal sexual act. In forcible pandering, it is forcing someone to engage in prostitution—in sexual acts for money—that is the *actus reus*.¹²¹ With indecent exposure, the act of exposing oneself is the *actus reus*.¹²²

Similarly, with the Article 134 offense of child pornography, the crime—whether possessing, distributing, or producing—is centered on sexually explicit conduct with children.¹²³ While the images themselves are illegal, the target of the offense is sexually abusing children who cannot consent to sexual acts. With Article 117a, sharing the images without consent is unlawful. Sexually explicit conduct is not the focus.

¹¹⁹ BLACK’S, *supra* note 65.

¹²⁰ *Id.* (defining “sexual relations” as, “1. Sexual intercourse. 2. Physical sexual activity that does not necessarily culminate in intercourse. Sexual relations usu. Involve the touching of another’s breast, vagina, penis, or anus. Both person (the toucher and the person touched) are said to engage in sexual relations”).

¹²¹ UCMJ art. 120c(b).

¹²² *Id.* art. 120c(c).

¹²³ UCMJ art. 134.

Even for offenses outside of what is commonly referred to as a sexual offense, those prohibited in the 120 series of offenses, the *actus rei*, are sex acts. The criminal act is the sex act itself. This conduct is why MRE 412 applies. With the new offense of sexual harassment, punishable under Article 134, the *actus reus* is conduct of a sexual nature.¹²⁴ The actual conduct is prohibited. Likewise, pandering and prostitution criminalize actual sexual acts.

Admittedly, there are other possible applications of MRE 412 where the *actus reus* of the charged offense is not sexual. Still, these are rare and likely only to arise when the trial counsel has not charged an offense where the *actus reus* is prohibited sexual activity. In the federal case where the court upheld the application of FRE 412 to a federal charge of kidnapping, sexual activity was intrinsic to the facts of the case.¹²⁵ In those cases where prohibited sexual conduct is intrinsic evidence, even if not a charged offense, MRE 412 still applies because the rule applies not only to “sexual offenses” but also in any cases involving “sexual misconduct” whether or not it is charged. The sexual misconduct just has to be punishable under the law, but it does not have to be charged. MRE 412 could be amended to include the sexual conduct prohibited by Article 117a within the definition of “sexual offense.”¹²⁶

b. The Context Does Not Support Applying MRE 412

The legislative history does not support applying MRE 412 to Art. 117a. This is because there is no mention of it in any of the testimonies or remarks by members of Congress. There was no consideration at all about whether Article 117a would be considered a sexual offense. There was no mention of whether a Service member convicted of the offense would be required to register as a sex offender.¹²⁷ Additionally, not one member of Congress referred to Article 117a as a “sexual offense.”¹²⁸

Another contextual aspect to consider is the placement of Article 117a after Article 117, not as a new Article 120d. Ostensibly, the drafters placed the

¹²⁴ MCM, *supra* note 10, pt. IV, ¶ 107a.c.(1) (“Whether ‘other conduct’ is ‘of a sexual nature’ is dependent upon the circumstances of the act or acts alleged and may include conduct that, without context, would not appear to be sexual in nature.”).

¹²⁵ See *United States v. Nelson*, 82 M.J. 336, 345 (C.A.A.F. 2022) (defining intrinsic evidence as “inextricably related in time and place to the offenses charged or whether it is extrinsic to those offenses.” (citing *United States v. Thomas*, 11 M.J. 388, 392 (C.M.A. 1981))).

¹²⁶ California amended its rape-shield law to include online and digital sharing of intimate images within its definition of “sexual conduct.” However, the rule still only applies in the prosecution of traditional sexual offenses. That is, despite the new definition of “evidence of sexual conduct” in the California rape-shield law, the rule does not apply to its revenge porn law. See CAL. EVID. CODE § 782(b)(2), (c) (West 2022).

¹²⁷ See generally *supra* Part II.B.

¹²⁸ PRIVATE Act, *supra* note 41.

new criminal provision in the location within the UCMJ where it logically fit. In other words, it was placed with similar provisions. Article 117a comes after Article 117, which prohibits provoking speeches or gestures between Service members. The purpose of this provision is to prevent conflict between Service members and promote good order and discipline and military efficiency.¹²⁹ Article 117 targets words that cause conflict. Article 117a targets actions that cause conflict. Article 117 and Article 117a have similar ends: to prevent conduct, words, and deeds that harm good order and discipline in the military services.

An additional argument is that Congress could have amended MRE 412 to specify that it applies in cases where Article 117a is charged. Congress clearly communicated which offenses were covered by MRE 413. MRE 413 has a different definition for “sexual offense” than MRE 412. Its definition includes the precise list of offenses to which it applies. Article 117a is not one of the offenses delineated by MRE 413. The fact that Congress did not amend MRE 412 to clarify to which specific offenses it applies supports the position that Congress did not consider Article 117a a sexual offense.

2. Conflating “Sexual Offense” and “Sexual Behavior”

Applying MRE 412 to Article 117a confuses the category of offenses to which it applies and the type of conduct it prohibits. MRE 412 describes the types of offenses to which it applies. The rule’s prohibitions apply to “any proceeding involving an alleged sexual offense.”¹³⁰ As previously discussed, “sexual offense” means “any sexual misconduct punishable under military, federal, or state law.”¹³¹ The rule prescribes two types of evidence about a victim: (1) other sexual behavior and (2) sexual predisposition.¹³² Sexual behavior evidence is broadly defined as “any sexual behavior not encompassed by the alleged offense.”¹³³ Sexual predisposition evidence is that which “refers to a victim’s mode of dress, speech, or lifestyle . . . that may have a sexual connotation for the fact finder.”¹³⁴

Article 117a occupies a grey zone. It is a crime that is not a “sexual offense,” but it potentially contains evidence of “sexual behavior” and “sexual predisposition.” This causes one to conflate the offense’s content with the offense’s classification.

¹²⁹ See SCHLUETER ET AL., *supra* note 46, § 5.50 (“The Article is designed to prevent the use of violence by the person to whom such speeches and gestures are directed, and forestall the commission of an offense by an otherwise innocent party.”).

¹³⁰ MCM, *supra* note 10, M.R.E. 412(a).

¹³¹ *Id.* M.R.E. 412(d).

¹³² *Id.* M.R.E. 412(a).

¹³³ *Id.* M.R.E. 412(d).

¹³⁴ *Id.*

To illustrate the point, take the example of an accused who is charged with a violation of Article 120, Sexual Assault. The accused cannot use evidence of the victim’s images containing sexually explicit conduct unless one of the exceptions applies. Similarly, an accused cannot use sexually explicit images shared by the victim to imply the victim has a sexual predisposition when an Article 120 offense is charged. A correct application of MRE 412 would prohibit such evidence. However, the prohibited evidence, which is also an offense under Article 117a, cannot be read back into MRE 412 as a sexual offense. Just because a crime consists of sexual behavior does not make it a sexual offense.

3. Some Victims’ Counsel Programs Do Not Treat it as an Eligible Offense

The definition of “victim” contained in the UCMJ is broad and includes anyone “who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of [a UCMJ offense.]”¹³⁵ But not every victim is entitled to legal counsel. The military services do not uniformly provide special victims’ counsel or victims’ legal counsel to victims of all crimes. By statute, only victims of “sex-related” offenses are entitled to receive legal services.¹³⁶

Article 117a is not an offense that uniformly entitles a victim to legal counsel. This lack of entitlement is because it is not a sexual offense or a sex-related offense. If it were a sexual offense, then the military services would be required to provide legal counsel to a victim. The Marine Corps does not automatically grant a victim of Article 117a with legal counsel. Eligible Marines are those victims of “sex-related offenses” as defined above, domestic violence offenses, and a catch-all other offenses category.¹³⁷ A victim of Article 117a can be detailed to a victim’s legal counsel in the Marine Corps, but it is neither required nor prohibited.

The Army takes a slightly different approach.¹³⁸ Its special victims’ counsel are eligible to represent victims of “sex-related offenses” and crimes involving domestic violence.¹³⁹ For “sex-related offenses,” their definition generally tracks what is contained in the federal statute.¹⁴⁰ Victims of domestic

¹³⁵ 10 U.S.C. § 806b.

¹³⁶ 10 U.S.C. § 1044e(h).

¹³⁷ U.S. MARINE CORPS, ORDER 5800.16 -V4, MARINE CORPS VICTIMS’ LEGAL COUNSEL ORGANIZATION 13 (26 Aug. 2021) (“Other crime victims with an opportunity to be heard under MRE 412, 513, or 514, or regarding other rights provided by statute, regulation, or case law, subject to counsel availability and if approved by the CVLC.”).

¹³⁸ The Army refers to attorneys who represent victims of crimes as Special Victim Counsel.

¹³⁹ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-7.c (20 Apr. 2024) [hereinafter AR 27-10].

¹⁴⁰ *Id.* para. 3-6.b. This paragraph states:

violence crimes are represented by both legal assistance attorneys and special victims' counsel.¹⁴¹ There is no mention of providing services to victims of Article 117a. Even though the military services differ on this issue, the reason they differ is that Article 117a is not, by definition, a sex-related offense. Those military services that do provide coverage for Article 117a victims do so as a policy matter, not a legal requirement.

MRE 412 makes clear that when there is a motion before a court on the issue of sexual behavior or sexual predisposition, the victim must be given a "reasonable opportunity to . . . be heard" through a special victims' counsel.¹⁴² The fact that all victims of Article 117a are not entitled to a special victims' counsel supports the position that MRE 412 does not apply to Article 117a. If victims of Article 117a were entitled to be represented by a special victims' counsel, MRE 412 would seemingly permit them to be heard on pertinent issues.

IV. MRE 412 PROVIDES A BETTER FRAMEWORK TO DETERMINE EVIDENCE ADMISSIBILITY

As previously discussed,¹⁴³ before the creation of FRE 412, courts sifted evidence using rules 401¹⁴⁴ and 403.¹⁴⁵ Because relevance is a low standard and the balancing test was weighted towards admission, courts were usually required to admit evidence of a victim's sexual history.¹⁴⁶ Legislators across the country determined that these longstanding evidence rules were not stringent enough to adjudicate sex offense cases fairly.¹⁴⁷ In the fifty years since the creation of the

For the purpose of this subparagraph, sex-related offenses include a violation of the following sections of the UCMJ: (1) Article 120: Rape and sexual assault. This includes rape, sexual assault, aggravated sexual contact, and abusive sexual contact. (2) Article 130: Stalking. (If committed prior to 1 January 2019, Article 120a—see appendix 22, MCM, 2019). (3) Article 120b: Rape and sexual assault of a child. This includes rape, sexual assault, and sexual abuse of a child. (4) Article 120c: Other sexual misconduct. This includes indecent viewing, visual recording, or broadcasting. (5) Article 125: Forcible sodomy; bestiality, if committed prior to 1 January 2019 (see appendixes 21 and 22, MCM, 2019). (6) Article 80: Attempt (any attempt to commit these offenses).

¹⁴¹ AR 27-10, *supra* note 139.

¹⁴² MCM, *supra* note 10, M.R.E. 412(c)(2).

¹⁴³ WEINSTEIN, *supra* note 200.

¹⁴⁴ MCM, *supra* note 10, M.R.E. 401.

¹⁴⁵ MCM, *supra* note 10, M.R.E. 403.

¹⁴⁶ Frank Tuerkheimer, *A Reassessment and Redefinition of Rape-shield Laws*, 50 OHIO ST. L. J. 1245, 1245-46 (1989); Galvin, *supra* note 21. *See, e.g.*, WEINSTEIN, *supra* note 20, § 412.02 n. 21 (citing *Hicks v. Hiatt*, 64 F. Supp. 238, 249 (M.D. Pa. 1946) (granting service member's habeas corpus petition due to his inability to present evidence of the victim's chastity at trial); *Gish v. Wisner*, 288 F. 562, 562 (5th Cir. 1923) ("[T]he rule is established by the great weight of authority that the general reputation for chastity of the complaining witness, who claims to be the victim, is material as bearing upon the vital question of her consent or nonconsent.")).

¹⁴⁷ Galvin, *supra* note 21, at 767.

first rape-shield law, judges across the country, including in the military, have demonstrated the ability to balance the constitutional rights of the accused and the interests of the victim. With the rise of social media and smartphones, enabling scandals like Marines United, legislators again responded to victims’ cries by criminalizing WDII. The question is: What rules are best situated to evaluate evidence in Article 117a cases? The framework provided by MRE 412 is the fairest way to resolve evidentiary disputes in Article 117a cases.

A. *MRE 401 and MRE 403 Cannot Protect Victim Interests*

The traditional framework provided by MRE 401 and MRE 403 is insufficient to protect the rights of victims in Article 117a cases, just as they were inadequate before the enactment of rape-shield laws. Because evidence is relevant if it has “any tendency” to make a consequential fact more or less probable, a defense counsel would have a very low threshold to meet to convince a military judge that evidence of prior or subsequent intimate image recording by a victim is relevant evidence.¹⁴⁸ Relevant evidence can only be excluded if its prejudicial effects outweigh its probative value.¹⁴⁹ Looking closely at the language of MRE 403, the rule starts by saying a “military judge may exclude,” meaning even if prejudicial effects substantially outweigh the probative value, it is within the military judge’s discretion whether to rule it inadmissible.¹⁵⁰ Under this standard, evidence is relevant if it helps the accused’s case even in the slightest way.¹⁵¹ A defense counsel would likely argue that evidence of a victim’s prior or subsequent history of sharing intimate images is relevant to the issue of whether the victim consented to the broadcast or distribution and whether the victim retained a reasonable expectation of privacy. Since the government is required to prove the accused shared images without consent, evidence that the accused believed he had consent is relevant under MRE 401.¹⁵² Suppose the accused knew the victim posted other sexually explicit images on a subscriber-based pornographic website. Certainly, this fact would have more than the slightest tendency to challenge the element of consent. The same scenario applies to the reasonable expectation of privacy issue. Whether a victim previously posted intimate images online logically relates to a present expectation of privacy. It is unlikely the prejudicial effect on the victim will outweigh the probative value to the trier of fact in

¹⁴⁸ 1 MILITARY RULES OF EVIDENCE MANUAL § 401.02 (LexisNexis 2024) [hereinafter MRE MANUAL] (“Applying Rule 401 means the military judge should find any evidence that can help, even a little bit in rationally deciding disputed issues, to be relevant and potentially helpful to the finder of fact.”).

¹⁴⁹ MCM, *supra* note 10, M.R.E. 403.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* M.R.E. 401.

¹⁵² *Id.*

deciding these key questions.¹⁵³ As explained below, this evidence would likely be excluded under the MRE 412 rubric.

B. MRE 412 Can Protect Victim Interests

The framework provided by MRE 412(b) is a better way to determine the admissibility of evidence in Article 117a cases. The three exceptions to the prohibition on evidence of other sexual behavior are well suited to evaluate the type of evidence that an accused is likely to offer in defense. The first exception would permit an accused to provide evidence that someone else was the source of the physical evidence. For example, defendants could offer evidence that the alleged victim also shared the intimate image allegedly shared by them with another person. This other sexual behavior would be relevant if the accused argued that this other recipient was the person who distributed the intimate image. The second exception would permit the accused to offer evidence of “specific instances of a victim’s sexual behavior” with the accused if offered to prove consent.¹⁵⁴ An example of this exception could include previous distribution by the accused with the victim’s consent. The constitutional exception could permit an accused to offer evidence in line with the established parameters of existing MRE 412 case law, which would uphold the accused’s constitutional rights and prevent relevant but not constitutionally required evidence. Examples of this could include a victim’s spoken desire to make money by sharing intimate images,¹⁵⁵ a victim’s bias or motive to lie,¹⁵⁶ prior false allegations of WDII, or when an accused testifies about conversations with the victim about intimate images shared with others.¹⁵⁷ However, the MRE 412 safeguards would prohibit the introduction of a victim’s history of posting intimate images, which could be relevant under MRE 401. MRE 412 would likely exclude evidence that the victim maintained an OnlyFans¹⁵⁸ page if the accused was unaware of the page until after the alleged crime unless the accused could tie the page to a material fact of their relationship.

¹⁵³ MRE MANUAL, *supra* note 148, § 403.02 (“The rule is constructed to favor the admission of evidence. As a result, exclusion of otherwise relevant testimony is the exception not the rule.”).

¹⁵⁴ MCM, *supra* note 10, M.R.E. 412(b).

¹⁵⁵ FED. R. EVID. 412 advisory committee’s note to 1994 amendment. This hypothetical was provided by the Advisory Committee as a possible exception to the rule.

¹⁵⁶ *Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (finding the lower court violated the Confrontation Clause by preventing the defendant from questioning the witness about a prior sexual relationship when offered as evidence of motive to lie).

¹⁵⁷ *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (explaining that the right to testify in one’s own defense is based on the 14th Amendment’s right to due process of law and the 6th Amendment’s compulsory process clause).

¹⁵⁸ OnlyFans is a fee based pornographic website. See ONLYFANS, <https://bit.ly/3NUcxmT>.

V. CONCLUSION

The protections and rights afforded to victims of crimes involving sexual misconduct have slowly increased over the past fifty years. Beginning with the creation of the first rape-shield law in the 1970s to the creation of the independent offices of special trial counsel in the military in 2022, victims’ rights have gone from nascent to ascendant. During this time, our legislative and judicial systems have adapted the justice system, seeking to make it more responsive and just. Today, as a result of the proliferation of smartphones, sexual misconduct is not limited to what happens in the bedroom. Article 117a is Congress’ response to this new problem.

MRE 412 should apply in Article 117a cases because the text of the rule permits it, and the context surrounding the creation of the rule and amendments to the rule supports it. “Sexual misconduct” is an intentionally broad category of offenses governed by the ordinary and plain meanings of the words. The definition of sexual offenses in MRE 412 is noticeably broader than the definition of “sexual offense” in MRE 413.¹⁵⁹ “Sexual offense” in MRE 413 is limited to specifically enumerated offenses.¹⁶⁰ “Sexual offense” in MRE 412 is not.¹⁶¹ Since the enactment of rape-shield laws, judges have looked at the content of the offense to determine whether it applies.¹⁶² Article 117a is concerned with sexually explicit content, which should fall under the expansive definition of sexual misconduct found in MRE 412.

Article 117a aims to protect victims’ privacy interest in sexually explicit images and videos of themselves. Victims of this offense should receive the protections afforded to victims of other sexual crimes. By policy, the military services are providing victims of this offense with increased attention and resources. They should receive the same support and protection in the courts. The text and context surrounding MRE 412 and Article 117a strongly favor applying the rule to the crime. Providing victims of Article 117a with the protections afforded by MRE 412 would advance both provisions’ legislative purposes.

¹⁵⁹ MCM, *supra* note 10, M.R.E. 412(d).

¹⁶⁰ *Id.* M.R.E. 413 (d).

¹⁶¹ *Id.* M.R.E. 412 (d).

¹⁶² FED R. EVID. 412 advisory committee notes to 1994 amendment.

BEYOND WARSHIPS: INTEGRATING OTHER VESSELS INTO NAVAL OPERATIONS

Lieutenant Commander Sarah D. Padway, JAGC, USN*

This Article takes a normative look into the current and potential future uses of non-warships in naval operations. Because only warships may conduct “belligerent acts,” the central discussion of this Article is around vessel categorization and the definition of a “belligerent act,” a definition that I argue is in flux given advancing technology and vessel capabilities. So long as a non-warship’s actions do not rise to the level of “belligerent act,” that vessel may provide support to a naval operation. This Article contributes to literature by proposing a means for states to assess whether a non-warship’s actions rise to the level of “belligerent act” to utilize non-warships in line with international law. I also provide an alternative for states looking to protect merchant vessels during periods of armed conflict, bringing back letters of marque so private vessels can augment a state’s navy, freeing up warships to fight. Throughout this Article, I draw upon the significant writing done surrounding private military companies’ participation in land warfare as a means to predict the impact of increased non-warship participation in future naval operations.

INTRODUCTION

Civilian involvement in the military in both land and naval warfare is constantly evolving, from administrative and logistical support, to assistance during combat operations, to civilians considered directly participating in hostilities. Even before traditional navies, there were instances where civilians either chose to help a ruling government’s fleet or were conscripted to provide assistance.¹ As technology, warfare, and states’ militaries’ roles in national

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¹ For example, the French use of privateers against British trade in 1700s and 1800s. *See, e.g.*, KATERINA GALANI & GELINA HARLAFTIS, NEW PERSPECTIVES ON THE GREEK WAR OF INDEPENDENCE 137 (Y. Cartledge & A. Varnava, eds., 2022). When Arab Muslims took over Egypt,

security evolve, so too have the roles of civilians. Civilians no longer simply work in production plants designing, manufacturing, and supplying the military. Civilians play more active roles in developing new technology, analyzing intelligence, and even advising commanders. As on land, in the maritime regime, even during peacetime, we see civilian vessels support state navies.

Much has been written about the impact that increased civilian participation has on land warfare and how it is changing the landscape of the laws of armed conflict. The maritime realm, however, brings a unique set of issues. The interdependence between states, combined with the increased global nature of maritime commerce and the evolving and escalating threats thereto, dictates that navies will increasingly rely on merchant vessels, or other non-warships, to provide assistance during naval operations. Vessel categorization will be critical in determining what privileges and immunities a specific ship enjoys. The concept of the belligerent act, a privilege granted only to warships is central to this categorization. Knowing what constitutes a belligerent act and what does not constitute a belligerent act is fundamental in determining what a vessel can, and cannot, do within the bounds of international law, while supporting naval operations. The unique maritime setting requires an in-depth exploration of historical precedent, along with recognition of evolving factors, to establish future civilian maritime roles in line with international law.

Throughout this Article, I will utilize current examples of civilian vessel integration into states' navies to illustrate potential areas of concern. Below are several examples I utilize throughout, each demonstrating a different form of non-warship integration into naval operations.

The BEHSHAD is a "general cargo vessel" owned by Rahbaran Omid Darya, an Iranian ship management company, but believed to be utilized by both Iran and the Houthis, a non-state actor.² In January 2024, after years in the Red Sea, the BEHSHAD moved to the Gulf of Aden and has since "followed an unorthodox, slow and meandering course around those waters close to the entrance to the Red Sea."³ Iran claims that the BEHSHAD is involved in "combating piracy," but the vessel's move into the Gulf of Aden coincided with an increase in Houthi attacks on vessels in that area.⁴ Following a reported U.S. cyber attack on the BEHSHAD, there was a period of relative calm, but, upon its

they had no understanding of the sea, and utilized Egyptians, harnessing their maritime capabilities. Myriam Wissa, *The Conscription of Egyptian Christian Sailors in Medieval Muslim Naval Warfare: Taking the Long View*, 8 J. MIDDLE E. AFR. 397, 397–98 (2017).

² *Behshad*, BALTICSHIPPING.COM, <https://bit.ly/3TYkbQW>.

³ Robert Wright, *The Mysterious Iranian Ship Accused of Lining Up the Next Houthi Targets*, FINANCIAL TIMES (Mar. 9, 2024), <https://on.ft.com/3NiM5Da>.

⁴ *Id.*

return to the Gulf of Aden, reports show another increase in targeted Houthi attacks.⁵

The second example involves the People's Republic of China's (P.R.C.) "maritime militia." This "militia" operates in the South China Sea and consists largely of two types of vessels, Maritime Militia Fishing Vessels (MMFVs) and Spratly Backbone Fishing Vessels (SBFVs).⁶ While the SBFVs are intended to provide a greater degree of deniability for the P.R.C., the two subsets largely function in a similar manner. Both play a role in defending Chinese national sovereignty and maintaining a "charge to assist the PLA [People's Liberation Army] in combat if required."⁷ China has been operating its maritime militia since as far back as 1974, when the militia was used during an operation to seize the western Paracel Islands.⁸ These vessels operate in a "legal gray zone" where their conduct obfuscates their status, potentially leading to concerns regarding their targeting and eligibility for prisoner of war (POW) status in any future hostilities.⁹

Finally, in March of 2022, it was reported that the United States deployed three "spy ships" into "sensitive waters near China."¹⁰ The ships were deployed to increase both "submarine and anti-submarine warfare capabilities" against China.¹¹ The three vessels are civilian, manned, and naval auxiliary vessels, referred to as United States Naval Ships (USNS), *not* commissioned warships.¹² The three ships were deployed to conduct underwater probing and reconnaissance following the USS CONNECTICUT's collision with an uncharted seamount in October, 2021, in the South China Sea.¹³

This Article will analyze non-warship integration into naval operations through the framework of vessel categorization and the definition of belligerent acts. Ultimately, I intend to provide a means for states to assess their current uses of non-warships so that they may ascertain future uses of non-warships and appropriate responses to other states' use of non-warships.

⁵ *Id.*

⁶ MMFVs are fishing vessels "using funds dedicated to maritime militia affairs," while SBFVs are "a subset of domestic fishing vessels" meeting minimum requirements to operate in the Spratly Islands in support of the Chinese government. GREGORY B. POLING ET AL., PULLING BACK THE CURTAIN ON CHINA'S MARITIME MILITIA 12–13 (Center for Strategic & International Studies Nov. 2021).

⁷ *Id.* at 13.

⁸ *Id.* at 3.

⁹ *Id.* at 14.

¹⁰ Liu Xuanzun, *US Navy Deploys 3 Spy Ships Near China at Once 'in Support of Submarine Warfare'*, GLOBAL TIMES (Mar. 24, 2022, 6:26 PM), <https://bit.ly/3U124tz>.

¹¹ *Id.*

¹² *Id.* See also *Ship Naming in the United States Navy*, NAVAL HIST. & HERITAGE COMMAND (Apr. 23, 2019, 2:56 PM), <https://bit.ly/4gWWIZX>.

¹³ Xuanzun, *supra* note 10.

This Article is divided into six parts. I begin in Part I with a review of the history of civilian vessel and naval auxiliary participation in naval operations, introducing the concept of prize law and privateering. In Part II, I discuss vessel categorization, exploring the different categories and privileges and immunities for each. In Part III, I discuss the current wide-ranging definition of belligerent acts and propose a methodology to assist states in determining the boundaries for lawful conduct. Part IV consists of a normative look at how international law applies differently in maritime versus land warfare. Part V introduces a potential alternative to current vessel categorization by exploring bringing back letters of marque and reprisal (hereinafter letters of marque) as a means to sidestep the question of belligerent acts, and investigates the potential pitfalls and areas of concern inherent in this approach. I also suggest the concept of private vessels providing escort services, permitting defensive responses to active threats. Part VI provides a discussion of the varying strategic and political considerations states will need to bear in mind when determining how to use non-warships, comparing literature on the use of Professional Military Companies (PMCs) in the land warfare realm. Finally, I conclude by providing a look to the future and how vessel categorization and a changing definition of belligerent acts could impact the future of non-warship integration into state naval operations.

I. HISTORY OF CIVILIAN VESSELS AND NAVAL AUXILIARIES IN NAVAL OPERATIONS

The use of naval auxiliaries, merchant vessels, and civilian mariners during conflict can be traced back to medieval times.¹⁴ While the concept of “armed conflict” did not exist in a traditional sense, both civilian mariners and their merchant vessels were used in naval battles, whether voluntarily or through conscription.¹⁵

A. Prize Law and Privateering

Prior to the Paris Declaration of 1856, states with smaller navies relied heavily on privateers as a means of supplementing their navies.¹⁶ Privateers were privately-owned vessels outfitted as warships and authorized by a state to interfere with enemy shipping at sea.¹⁷ Privateers were commonly authorized through letters of marque, which generally included an expectation that they would conform to international law regarding naval warfare.¹⁸ Privateers received

¹⁴ See GALANI & HARLAFTIS, *supra* note 1.

¹⁵ See, e.g., WISSA, *supra* note 1, at 397–98.

¹⁶ David J. Bederman, *Privateering*, in OXFORD PUBLIC INTERNATIONAL LAW (Oxford Univ. Press 2023).

¹⁷ *Id.*

¹⁸ *Id.* See also WILLIAM M. MARINE, THE BRITISH INVASION OF MARYLAND 1812-1815 at 17–18 (Louis Henry Dielman et al. eds., 1913).

commissions and were regulated by domestic laws within the state issuing their letters of marque.¹⁹ This method offered states a means of “plausible deniability” if the privateers violated the letters of marque, by violating international law or any other terms of the letters.²⁰ States utilized privateers to quickly and efficiently wage economic war without building up a navy.²¹

Privateers who captured enemy vessels were subject to prize law, a concept that does not exist in land warfare.²² Prize law is only applicable to civilian objects and legalizes “the capture and seizure of third parties’ private property during armed conflict.”²³ Prize law requires that any captured vessel be adjudicated by a domestic prize court as part of a condemnation proceeding.²⁴

In Europe, French privateers in a concept known as “*guerre de course*,” captured hundreds of British ships, deeply impacting British commerce, most heavily between 1689 and 1815.²⁵ The Greeks also utilized privateers during the Greek War of Independence, primarily for naval blockades in the Ionian and Aegean seas.²⁶ The United States heavily utilized privateers during the War of 1812, due to its navy’s much smaller composition relative to the United Kingdom.²⁷ Privateers were critical to U.S. success, capturing between 1,200 and 2,000 British merchant vessels during the war.²⁸

Privateering ceased after the Paris Declaration of 1856, and many in the international community feel it is now prohibited as a matter of customary international law.²⁹ The reasons for privateering’s decline are manifold, including:

¹⁹ Bederman, *supra* note 16.

²⁰ *Id.*

²¹ Alexander Tabarrok & Alex Nowrasteh, *Privateers! Their History and Future*, 2 FLETCHER SEC. REV. 55, 56, 60 (2015).

²² See Marcel Schulz, *Prize Law and Contraband in Modern Naval Warfare*, in OPERATIONAL LAW IN INTERNATIONAL STRAITS AND CURRENT MARITIME SECURITY CHALLENGES 211, 219 (J. Schildknecht et al. eds, 2018).

²³ *Id.*

²⁴ These proceedings are governed by the domestic law of the state. James Kraska et al., *Newport Manual on the Law of Naval Warfare*, 101 INT’L L. STUD. 1, 160–62 (2023).

²⁵ GALANI & HARLAFTIS, *supra* note 1, at 137.

²⁶ *Id.* at 138.

²⁷ Bederman, *supra* note 16; Frederick C. Leiner, *Yes, Privateers Mattered*, U.S. NAVAL INST.: NAVAL HIST. MAG. (Mar. 2014), <https://bit.ly/3Btlvof>.

²⁸ Leiner, *supra* note 27 (“Privateering drew on the resources of the civilian world, and without calling upon a beleaguered and insolvent government for funds or direction, privateers allowed the profit-making motive, and the mass of American people, to be harnessed to the war effort.”).

²⁹ While the United States is not a signatory to the Paris Declaration, U.S. law criminalizes arming or outfitting a private “vessel of war” or serving on privateers. Kraska et al., *supra* note 24, at 48; Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1, 15 MARTENS NOUVEAU RECUEIL (ser. 1) 791, reprinted in 1 AMERICAN J. OF INT’L L. SUPP. 89 (1907) [hereinafter Paris Declaration]. *But see*, Brandon Schwartz, *U.S. Privateering is Legal*, U.S. NAVAL INST.: PROC. (Apr. 2020), <https://bit.ly/3TYSvv6> (“[T]he United States can respond by noting that historical U.S.

(1) states' improved ability to collect tax revenue and thus fund a navy, (2) technological improvements making privateering less effective, and (3) misalignment between the state's national interests and the privateer's incentives, threatening national security, among other issues.³⁰ In the U.S., less opposition to a standing army and navy served as a fourth reason for privateering's decline.³¹ While privateering was essentially outlawed in 1856, the concept of prize law is still a valid means of preventing free movement during periods of armed conflict.³²

B. The World Wars

Prior to World War I, leading naval powers met at The Hague to agree upon rules of warfare.³³ The meetings resulted in the Hague Conventions, a series of documents outlining, inter alia, the current laws of naval warfare.³⁴ A later meeting in London produced the London Declaration of 1909, although the London Declaration was never ratified by any signatories.³⁵ Both Allied and Central Powers relied on maritime transportation to obtain access to resupply resources during World War I.³⁶ As a result, both sides brought the war to the sea, and did not restrict themselves to targeting warships, largely disregarding

rejection of the prohibition blocked a general customary prohibition from forming under the doctrine of specially affected states Even if a general custom has formed, the United States can argue that it has reserved a dormant right to privateer through the persistent objector rule.”); Mark Cancian & Brandon Schwartz, *Unleash the Privateers!*, U.S. NAVAL INST.: PROC. (Apr. 2020), <https://bit.ly/3XSMMmBT> (“[D]espite pervasive myths to the contrary, U.S. privateering is not prohibited by U.S. or international law.”).

³⁰ We still see the misalignment between a state's national interests and privateer's incentives in PMCs today. See, e.g., Tabarrok & Nowrasteh, *supra* note 21, at 6–7.

³¹ Tabarrok & Nowrasteh, *supra* note 21, at 6–7.

³² Wissa, *supra* note 1, at 213–14. However, President McKinley made a statement that the United States would no longer participate in the letters of marque practice and the United States has not issued a letter of marque since the introduction of the Paris Declaration. See Kraska et al., *supra* note 24, at 48.

³³ Michael J. Crawford, *The U.S. Understanding of the Laws of Naval Warfare in the 18th and 19th Centuries*, NAVAL HISTORY & HERITAGE COMMAND (Sep. 10, 2019, 12:42 PM), <https://bit.ly/4gXfBw8>.

³⁴ Convention No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, 205 Consol. T.S. 305 [hereinafter Hague VI]; Convention No. VII Relating to the Conversion of Merchant Ships into War-ships, Oct. 18, 1907, 205 Consol. T.S. 319 [hereinafter Hague VII]; Convention No. IX Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 542 [hereinafter Hague IX]; Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396, T.S. No. 544 [hereinafter Hague XI]; Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545 [hereinafter Hague XIII].

³⁵ *Declaration of London*, 15 INT'L L. STUD. 93, 93 (1915).

³⁶ Michael B. Miller, *Sea Transport and Supply*, INT'L ENCYCLOPEDIA OF THE FIRST WORLD WAR, <https://bit.ly/4fcRGqT> [hereinafter Miller, *Sea Transport and Supply*].

agreements made at The Hague.³⁷ Additionally, the United States' intervention into the war in 1917 required it to ship both supplies and approximately two million men into the European theater.³⁸ The Allied Powers also utilized blockades and blacklists in an effort to deny the Central Powers access to resources.³⁹

While still technically governed by the Hague Conventions, World War II saw a rise in the use and targeting of merchant vessels.⁴⁰ The United States, Japan, and other belligerents recognized that merchant ships functionally served as warships and were subject to international rules of law and warfare.⁴¹ By early October 1939, the Germans issued an order to attack all enemy merchant ships without warning.⁴² Both sides then engaged in the same "unrestricted submarine warfare" that had been condemned by the United States during World War I.⁴³

C. *Post-World Wars*

After World War II, the ratification of the Geneva Conventions increased protections for civilians, including within the context of naval warfare.⁴⁴ However, there is still evidence that merchant vessels remain involved in assisting their flag states to varying degrees.⁴⁵ For example, the United Nations (U.N.) intercepted several Democratic Republic of Korea deep-sea fishing vessels equipped with radio transmitters, and where appropriate, gave those captured POW status.⁴⁶

This integration brought naval warfare to its current state, with specific limitations on non-warships and actions warships can take against non-warships. However, through technological advances, changing international relations, and the increased involvement of "proxies," these norms are shifting. Given the

³⁷ Eric W. Osborne, *Naval Warfare*, INT'L ENCYCLOPEDIA FIRST WORLD WAR, <https://bit.ly/3TYxUqK>.

³⁸ Miller, *Sea Transport and Supply*, *supra* note 36.

³⁹ *Id.*

⁴⁰ Sally V. Mallison & W. Thomas Mallison, *Chapter III: The Naval Practices of Belligerents in World War II: Legal Criteria and Developments*, 65 INT'L L. STUD. 87, 91 (1993) [hereinafter *Naval Practices of Belligerents*].

⁴¹ *Id.* at 91.

⁴² *Id.*

⁴³ Sally V. Mallison & W. Thomas Mallison, *Chapter IX: Naval Targeting: Lawful Objects of Attack*, 64 INT'L L. STUD. 241, 248–49 (1991) [hereinafter *Naval Targeting*] (stating that immediately after the attack on Pearl Harbor, the Chief of Naval Operations sent a message to the Commander of the Pacific Fleet to "[e]xecute against Japan unrestricted air and submarine warfare"); Crawford, *supra* note 33.

⁴⁴ See, Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, arts. 12, 13, 16 [hereinafter GC II].

⁴⁵ See, e.g., *Naval Targeting*, *supra* note 43, at 261.

⁴⁶ *Id.*

current trends, this Article explores whether these vessel delineations are still accurate, examines the definition of “belligerent act,” and makes recommendations to accommodate the further use of non-warships in accordance with international law.⁴⁷

II. VESSEL CATEGORIZATION

Because targeting at sea is vessel-based, the importance of proper vessel categorization cannot be overstated. During conflict, vessel categorization determines privileges and immunities (if any), targeting options, and whether belligerent acts are authorized by, or against, the vessel.⁴⁸ Vessel actions during peacetime can also impact a vessel’s categorization during armed conflict.⁴⁹ The scope of a non-warship’s conduct is further complicated by the definition of “belligerent act.” This section will briefly lay out the current status of vessel categories in preparation for a discussion of belligerent acts.

The pertinent vessel types for this Article include warships, naval auxiliary vessels, maritime militia, and merchant vessels.⁵⁰ Warships, as defined by the U.N. Convention on the Law of the Sea (UNCLOS) are ships, “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.”⁵¹ Non-warships can also be converted into warships provided they meet specific criteria.⁵² These converted ships are not the same as privateering because they become part of the state’s naval force, are no longer under a private master, and fall under military chain of command.⁵³

⁴⁷ There are risks to these shifting norms, similar to those faced in a land-based context, discussed in Part VI, *infra*.

⁴⁸ Rob McLaughlin, *The Future Law of Naval Warfare*, in *THE FUTURE LAW OF ARMED CONFLICT* 141, 143 (Matthew C. Waxman & Thomas W. Oakley eds., 2022).

⁴⁹ *Topic: The Use of Roll-On/Roll-Off (RORO) Ferries in Military Operations*, USINDOPACOM J06 (Jan. 25, 2023), <https://bit.ly/4h2yg9b> (“[a] state’s conduct in peacetime is liable to influence how other states will respond to like conduct in conflict or how other states will behave in future conflicts.”). See also James Kraska and Michael Monti, *The Law of Naval Warfare and China’s Maritime Militia*, 91 INT’L L. STUD. 450, 451, 465–66 (2015).

⁵⁰ Subcategories and immunities for hospital ships are beyond the scope of this Article.

⁵¹ United Nations Convention on the Law of the Sea, art. 29, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. This definition remains largely the same as Hague VII, with the exception being that UNCLOS broadened the definition, incorporating vessels belonging to any branch of the armed forces. See Hague VII, *supra* note 34.

⁵² The State must announce such conversion as soon as possible. Kraska et al., *supra* note 24, at 39–40.

⁵³ Wolff Heintschel von Heinegg, *The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century—Some Select Issues*, in *YEARBOOK OF INT’L HUMANITARIAN L.* 72 (T.D. Gill et al. eds., 2014).

Both warships and other ships “owned or operated by a State and used only on government non-commercial service” have “complete immunity from the jurisdiction of any state other than the flag state.”⁵⁴ For example, the United States’ USNS ships operating in the South China Sea and providing submarine and anti-submarine warfare capabilities fall into this category.⁵⁵ Also in this category, similar to USNS ships, are government-owned or -operated auxiliary general intelligence (AGI) vessels, used by Russia and China.⁵⁶ Warships and naval auxiliary vessels are given sovereign immunity; however, only warships are permitted to conduct belligerent acts under the law of naval warfare.⁵⁷ Under the laws of naval warfare, auxiliary vessels can be targeted as lawful military objectives at any time.⁵⁸

The term “maritime militia” is not a legal term of art, but is commonly used in the maritime industry to describe civilian vessels, operated by civilians but augmenting a state’s naval forces.⁵⁹ This category of vessel is most similar to PMCs on land, in that they provide assistance both in times of peace and conflict, and as a result, may blur the lines between combatant and civilian. The People’s Republic of China’s (P.R.C.) MMFVs are considered a maritime militia.⁶⁰ Based on the activities of the SBFVs, they too would likely qualify as a maritime militia, given their integration and the support the P.R.C. provides these vessels. Similarly, Vietnam operates a maritime militia as an “ostensibly paramilitary force with a self-defense function.”⁶¹ Vietnam’s maritime militia is largely comprised of local fishermen, comparable to the SBFVs, which can make it difficult to distinguish between maritime militia and fishing vessels.⁶² As a maritime militia, these

⁵⁴ UNCLOS, *supra* note 51, art. 96.

⁵⁵ The United States defines naval auxiliaries as ships, “other than warships, that are owned by or under the exclusive control of the armed forces.” U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 2.3.1 (2022) [hereinafter U.S. NAVAL COMMANDER’S HANDBOOK].

⁵⁶ See, e.g., Andrew Greene, *Chinese ‘Spy Ships’ Expected to Sit Off Darwin and Central Queensland During Talisman Sabre Military Exercises*, ABC.NET (Jul. 20, 2023, 2:09 PM), <https://ab.co/4etu15k>; Patricia Kime, *Coast Guard Tracking Russian Intelligence Ship 100 Miles Off Hawaii*, MILITARY.COM (Jan. 19, 2023), <https://bit.ly/4gYBsTY>.

⁵⁷ Kraska et al., *supra* note 24, at 37. The concept of a “belligerent act” is further discussed in Part III, *infra*.

⁵⁸ *Id.* at 141.

⁵⁹ *Id.* at 48–49.

⁶⁰ POLING ET AL., *supra* note 6, at 12–13.

⁶¹ Prashanth Parameswaran, *What’s Next for Vietnam’s Maritime Militia?*, DIPLOMAT (Jan. 28, 2020), <https://bit.ly/4eApHRP>.

⁶² See Yan Yan, *Is Vietnam Sending Its Maritime Militia to China’s Coast?*, DIPLOMAT (Mar. 5, 2020), <https://bit.ly/4gWH6FV>.

fisherman are not permitted to conduct belligerent acts, however, their vessels can relatively easily be converted into warships during periods of armed conflict.⁶³

Finally, a merchant vessel is defined as a “ship that is not a warship or [other state] ship and that is used . . . for commercial trade, fishing purposes or for passenger transport. Noncommercial privately-owned vessels (such as yachts) fall into the category of merchant vessels.”⁶⁴ Merchant vessels can be categorized as “enemy” or “neutral” during periods of naval warfare. In general, neutral merchant vessels are always subject to visit and search by belligerent warships and must obey those orders.⁶⁵ Unless specifically exempted, an enemy merchant vessel is always subject to capture when located beyond neutral waters.⁶⁶

In a similar manner to land warfare, interpretations of how broadly “military objective” can be read vary by state. A neutral merchant vessel could be treated as an enemy merchant vessel based on whether its cargo is perceived as contraband.⁶⁷ For example, in naval warfare the United States permits capture and, if resisted, attack, on enemy merchant vessels considered “war-sustaining” or “war-supporting.”⁶⁸ Most other states, however, have a narrower view, and do not recognize “war-sustaining” contributions,⁶⁹ taking the position that such merchant vessels are not “military objectives” and can only be interfered with “by establishing a lawful blockade.”⁷⁰

Current naval operations highlight the complexity of the categorizations and how non-warships are being seamlessly integrated into naval operations, regardless of their perceived category. The BEHSHAD, for example, when not in an armed conflict, would be categorized as a merchant vessel.⁷¹ There is no

⁶³ Kraska et al., *supra* note 24, at 51.

⁶⁴ *Id.* at 54.

⁶⁵ However, neutral merchant vessels traveling in a convoy with warships of the same flag may not be searched provided the neutral state warship certifies that it is not carrying contraband and provides other information it is entitled to during a visit and search. See John Astley & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 144–45 (1997).

⁶⁶ Von Heinegg, *supra* note 53, at 84. See also Hague VI, *supra* note 34, arts. 1–3. Most states provide specific guidance for how a merchant vessel should be handled. Von Heinegg, *supra* note 53, at 85.

⁶⁷ If, for example, the neutral vessel contains supplies that will be used by the enemy military.

⁶⁸ U.S. NAVAL COMMANDER’S HANDBOOK, *supra* note 55, at ¶ 8.6.2.2. The United States also considers an enemy merchant vessel not to be “innocently employed” if it meets criteria to give it war-sustaining or war-supporting character. *Id.*

⁶⁹ “War-sustaining” actions include the export of goods such as crude oil, allowing the enemy to earn revenue that contributes to the war-fighting effort. See Kraska et al., *supra* note 24, at 138–39.

⁷⁰ *Id.* at 119 (stating that a blockade “is a belligerent operation intended to prevent vessel traffic from all States from entering or leaving specified coastal areas that are under the sovereignty, occupation, or control of an enemy”).

⁷¹ Assuming the Houthis consider themselves to be engaged in a non-international armed conflict, the BEHSHAD is arguably similarly categorized when assisting the Houthis with targeting. Given

prohibition on merchant vessels aiding in naval operations during peacetime.⁷² However, presuming the Houthis consider themselves to be in a non-international armed conflict with Israel or Yemen,⁷³ the BEHSHAD gathering information and passing it to the Houthis for purposes of targeting puts the vessel in the “kill chain,” rendering it targetable under the laws of naval warfare.⁷⁴ Because the BEHSHAD is registered as a civilian vessel, these actions could also fall under the definition of piracy with regard to the Houthis’ non-international armed conflicts.⁷⁵ The BEHSHAD could then be subject to seizure by any warship on the high seas, and subsequent criminal prosecution. As an Iranian-flagged vessel, the BEHSHAD’s actions could also bring about issues of state responsibility, which raises the question of whether Iran can or should be found liable for the BEHSHAD’s actions.

The P.R.C.’s maritime militia patrolling the South China Sea brings about similar questions of vessel categorization. These vessels have been known to interfere with fishing, seabed exploration, and other lawful activities of vessels nearby, frequently maneuvering in unsafe manners, risking collision.⁷⁶ While it is clear that the P.R.C. is directing the maritime militia, these actions place the vessels within a “gray zone” with regard to whether they should be considered civilians or combatants,⁷⁷ paralleling states’ uses of PMCs on land.

the events in April 2024 between Iran and Israel, it is also arguable that the two countries are engaged in an international armed conflict.

⁷² The law of naval warfare explicitly limits the conduct of “belligerent acts” to warships during times of naval warfare, and UNCLOS only affords sovereign immune rights to warships and other government ships operated for non-commercial purposes. Neither realm explicitly prohibits a merchant vessel from conducting actions that do not amount to a “belligerent act,” although such vessels would not be afforded sovereign immune rights. Kraska et al., *supra* note 24, at 2; UNCLOS, *supra* note 51, art. 32.

⁷³ A discussion of this premise is beyond the scope of this Article.

⁷⁴ See, e.g., NEW ZEALAND DEFENCE FORCE, MANUAL OF ARMED FORCES LAW, VOLUME 4: LAW OF ARMED CONFLICT, DM 69, para. 10.6.19 (2d ed. 2019) [hereinafter NEW ZEALAND MANUAL]; FEDERAL MINISTRY OF DEFENCE (GERMANY), ZDV 15/2, LAW OF ARMED CONFLICT MANUAL 147 (2013) [hereinafter GERMAN MANUAL]; Norwegian Ministry of Defence, Manual of the Law of Armed Conflict 10.35 (2013, English ed. 2018) [hereinafter NORWEGIAN MANUAL].

⁷⁵ Generally, prize law and the law of maritime neutrality do not apply to non-international armed conflicts, unless “there is a recognition of belligerency or the conflict ‘has all the trappings of an international armed conflict.’” Kraska et al., *supra* note 24, at 30. Therefore, attacks on merchant vessels by non-State organized armed groups do not have a basis in the law of naval warfare and could be assessed under the crime of piracy pursuant to the law of the sea. See Kraska et al., *supra* note 24, at 30–31; UNCLOS, *supra* note 51, arts. 101(a), (c) (defining piracy, in part, as “illegal acts of violence or detention” and “act of inciting or of intentionally facilitating” those acts).

⁷⁶ POLING ET AL., *supra* note 6, at 13–14.

⁷⁷ *Id.* at 14. It is long held custom, as explained in the U.S. Supreme Court case, *The Paquete Habana*, that “small coastal fishing vessels and small boats engaged in local coastal trade are exempt from attack.” McLaughlin, *supra* note 48, at 146 (citing *The Paquete Habana*, 175 U.S. 677 (1900)). The P.R.C. use, especially of the SBFVs, in patrolling the South China Sea threatens to blur the lines of this “long held custom.” *Id.* at 146.

Ultimately, we are at a point of potential change within the maritime regime. While privateering was outlawed with the Paris Declaration, states still use auxiliary vessels, civilian merchant vessels, and other non-warships in a variety of ways crossing into the gray zone.⁷⁸ Arguably, the concept of the naval auxiliary is already being broadened; many of these civilian vessels could be considered naval auxiliaries while assisting in naval operations. Gaps in international law regulating the actions of non-warships have arisen since the original establishment of these laws. One way to close these gaps involves clarifying of the scope of permitted conduct for such vessels. Vessel categorization matters because it determines whether the vessel can conduct a belligerent act. We now turn to the definition of “belligerent act” and what constitutes permissible versus impermissible action by a non-warship.

III. WHAT IS A BELLIGERENT ACT?

“Belligerent acts” include engaging in hostilities, visiting, searching, and diverting enemy or neutral vessels, inspecting and capturing enemy vessels, and establishing and enforcing a blockade, among others.⁷⁹ Per the laws of naval warfare, while all vessels being used by the government for non-commercial purposes are eligible for sovereign immunity,⁸⁰ only warships are permitted to engage in belligerent acts.⁸¹ The concept that only a warship may engage in these acts is clear, but the definition of a “belligerent act,” and therefore what would be an impermissible action by a non-warship, is being impacted by technological developments. In order for a state to appropriately utilize non-warships in naval warfare, that state must clearly understand and communicate the restrictions and limitations to vessels under its purview. This is applicable during peacetime and armed conflict alike, as a non-warship is always prohibited from conducting a belligerent act.

The *Newport Manual on the Law of Naval Warfare* includes “gathering intelligence” in its list of belligerent acts that would render an enemy or neutral merchant vessel a military objective, and thus targetable.⁸² Separately, it includes “being incorporated into or assisting the enemy’s intelligence or military data-gathering systems” as distinct actions rendering a merchant vessel a military

⁷⁸ Rob McLaughlin, *The Law of the Sea and PRC Gray-Zone Operations in the South China Sea*, 116 AM. J. INT’L L. 821, 821, 825 (2022) [hereinafter *PRC Gray-Zone*].

⁷⁹ Kraska et al., *supra* note 24, at 37.

⁸⁰ States can limit sovereign immunity, if they so choose. *See, e.g.*, Navy Admin. Message, 165/21, 041827Z Aug. 21, Chief of Naval Operations, subject: Sovereign Immunity Policy, ¶ 7 (limiting assertion of sovereign immunity of voyage-chartered and foreign flagged vessels operating under U.S. contract).

⁸¹ UNCLOS, *supra* note 51, arts. 101, 110; Kraska et al., *supra* note 24, at 37–38.

⁸² Kraska et al., *supra* note 24, at 142.

objective.⁸³ The result is that both directly gathering and assisting in gathering intelligence renders a merchant vessel targetable. However, given the potentially overbroad definition of “intelligence,” classifying “gathering intelligence” as a belligerent act could limit a broad array of actions exclusive to warships. Many state military manuals include reference to a merchant vessel becoming targetable based on being incorporated into, or assisting with, intelligence or military data-gathering systems,⁸⁴ however, they do not include “gathering intelligence” amongst their lists of belligerent acts.⁸⁵

The umbrella terms of “military attacks,” “conducting hostilities,” and “offensive attacks” have been used to delineate what is a belligerent act, but these terms still leave room for interpretation.⁸⁶ For instance, what constitutes an “attack” in cyberspace or with regard to electronic surveillance? Does the act of monitoring an enemy’s economic activity or social behaviors to ascertain intent mean that the vessel has engaged in a belligerent act?

We can look to developing international law in cyberspace as a means to determine at what point an act becomes belligerent. The *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (*Tallinn Manual*) defines a “cyber attack” as an operation, offensive or defensive, “that is reasonably expected to cause injury or death to persons or damage or destruction to objects.”⁸⁷ The *Tallinn Manual* further defines attacks as “acts of violence against the adversary, whether in offence or defence,”⁸⁸ and utilizes a broader definition of “causing injury,” to include “reasonably foreseeable consequential damage, destruction, injury, or death.”⁸⁹ This definition is intended to include both incidental and consequential impacts caused by the manipulation of a cyber system. For example, a cyber attack’s destruction of a central processing unit that

⁸³ *Id.*

⁸⁴ See, e.g., INT’L INST. HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 60(c) (Louise Doswald Beck ed., 1995) [hereinafter SAN REMO MANUAL]; GERMAN MANUAL, *supra* note 74, at 147 (“it is incorporated into or assisting the enemy’s intelligence and communication system”); NEW ZEALAND MANUAL, *supra* note 74, § 10.6.19; NORWEGIAN MANUAL, *supra* note 74, § 10.35 (“being incorporated into or assisting the enemy’s intelligence collection”).

⁸⁵ See, e.g., SAN REMO MANUAL, *supra* note 84, ¶ 60(a) (including in belligerent acts laying mines, cutting undersea cables, engaging in visit and search of neutral merchant vessels); GERMAN MANUAL, *supra* note 74, at 147 (includes mine laying or clearance, taking measures based on the law of prize); NORWEGIAN MANUAL, *supra* note 74, § 10.35 (listing hostile actions that would render an enemy merchant vessel subject to attack including mine laying, cutting undersea cables, engaging in visit and search, or attacking).

⁸⁶ See NORWEGIAN MANUAL, *supra* note 74, § 10.19; Raul Pedrozo, AUTONOMOUS VESSELS IN MARITIME AFFAIRS 72 (Springer Int’l Pub. 2023); Kraska et al., *supra* note 24, at 37.

⁸⁷ TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 415 (Michael N. Schmitt ed., 2017) [hereinafter TALLINN MANUAL 2.0].

⁸⁸ *Id.*

⁸⁹ The effects must also be greater than *de minimis* damage or destruction. *Id.* at 416.

results in a dam releasing water causing damage to property and life would be included as “reasonably foreseeable” damage.⁹⁰

A cyber operation rising to the level of cyber attack could be a “belligerent act,” and thus impermissible by any vessel other than a warship. But other vessels could provide means of cyber support not rising to the level of a “belligerent act.” While only warships can visit and search enemy and neutral vessels, a non-warship could work in conjunction with the warship conducting a cyber operation on an enemy or neutral vessel, as long as the assistance does not rise to the level of an “attack.” An example is cyber actions slowing the vessel, misdirecting it, or impacting its navigation systems, preventing the ship from maneuvering away from the warship. The vessel has not been destroyed or severely damaged. During peacetime, the same standards apply. A non-warship could assist in a naval operation as long as it does not rise to the level of a belligerent attack. Individuals on the non-warship could conduct a cyber action on another vessel, as long as it does not rise to the level of “cyber attack.” States have not established uniform standards in this area; international law is still developing with regard to the threshold of destruction or severe damage and what is tolerable without reaching the level of an “attack.”⁹¹

This cyber “attack” threshold could be translated to electronic warfare (EW) actions by non-warships. EW includes actions taken to control the electromagnetic spectrum through “operation security, EW, psychological operation, military deception, and physical strike.”⁹² These actions can amount to: (1) electronic attack, controlling the enemy’s electromagnetic spectrum, (2) electronic protection, used in defense of personnel, facilities, and equipment, and (3) electronic warfare support, recognizing and responding to threats in order to support surveillance and reconnaissance.⁹³ While EW can be considered armed force, specifically electronic attack, similarities exist between EW and cyber in that both have the capability to manipulate a system (be it via power, energy, or through cyberspace), impacting the physical world or physical actions.⁹⁴

Vessels could serve as a platform to conduct a variety of EW operations. To implement the cyber “attack” threshold, a state could compare EW actions to whether it is “reasonably expected to cause injury or death to persons or damage

⁹⁰ *Id.*

⁹¹ Michael N. Schmitt, *Terminological Precision and International Cyber Law*, LIEBER INSTITUTE (Jul. 29, 2021), <https://bit.ly/3U1C9Sp>.

⁹² Seungcheol Choi et al., *Method for Effectiveness Assessment of Electronic Warfare Systems in Cyberspace*, 12 SYMMETRY 1, 2 (2020).

⁹³ *Id.*

⁹⁴ Major Thomas R. Burks, *Cyberspace, Electronic Warfare, and a Better Jus Ad Bellum Analogy*, 82 A.F.L. REV. 1, 10, 12 (2022).

or destruction to objects.”⁹⁵ An EW action that jams an enemy’s radio to prevent the vessel from communicating with other enemy vessels, thereby allowing a warship to interdict, would not rise to a level of belligerent act because there was no damage or destruction. If, on the other hand, the EW action overloaded and overwhelmed a circuit, thereby destroying an enemy vessel’s circuit board and rendering the vessel unable to navigate and exposed to significant harm or destruction, that would reach the level of “belligerent act.” During peacetime, a non-warship could still utilize EW to assist a warship in conducting a naval operation, or conduct EW actions, so long as they do not constitute a “belligerent act.”⁹⁶ Similar to other means and methods of warfare, states need to consider the foreseeable outcome of the action to determine whether it constitutes a “belligerent act.”

Beyond cyber and EW, states need to be cognizant of “gray zone” actions they may request of non-warships. These actions should all fall below the level of a belligerent act because they are not occurring during naval warfare; however, they often walk the line and could be conceived as crossing the threshold. For example, if vessel A intentionally maneuvers around vessel B, forcing vessel B to go in a certain direction, but the maneuver results in vessel A colliding with vessel B, vessel B’s state could perceive this as a belligerent act, depending on the severity of damage and danger of the maneuver. Were collision and severe damage “reasonably foreseeable”? Or, take the example of the South China Sea where various states are taking actions to “claim” the rocks, islands, shoals, and other features.⁹⁷ State A could conceivably view state B’s vessel anchoring at a rock as equivalent to “conducting hostilities” if it perceives the rock as state A’s sovereign territory. The intrusion onto state A’s rock would be equivalent to an intrusion onto sovereign territory.⁹⁸ These scenarios could escalate quickly; a state should be able to defend its use of a particular vessel, and explain why the action does or does not constitute a belligerent act.

As with other areas of international law, the broad definition of “belligerent act” leaves much to interpretation. States must be ready to articulate standards in conjunction with use of a specific vessel (warship or not) when conducting naval operations, specifically in the “gray zone.”

⁹⁵ TALLINN MANUAL 2.0, *supra* note 87, at 415.

⁹⁶ For example, a non-warship conducting EW to jam another vessel’s radio frequencies while a warship it is working with launches and recovers aircraft.

⁹⁷ Ben Dolven, Caitlin Campbell, & Ronald O’Rourke, CONG. RSCH SERV., IF10701, CHINA PRIMER: SOUTH CHINA SEA DISPUTES (2023).

⁹⁸ Per UNCLOS, state B can lawfully conduct innocent passage through the rock’s territorial sea, however, the act of anchoring serves as the potential “belligerent act” as a violation of state A’s sovereignty. UNCLOS, *supra* note 51, arts. 17–19, 121.

IV. LAND AND MARITIME INTERNATIONAL LAW DIFFERENCES

International law provides standards for civilian participation in military activities both on land and at sea, and these standards are further structured to address actions during both peacetime and armed conflict.⁹⁹ This section provides a brief background of the international law pertaining to civilians and civilian companies both on land and at sea, highlighting similarities and differences that will play a role in the future of naval warfare if civilian participation increases. This framework emphasizes how vessel categorization impacts a navy's ability to integrate non-warships, and demonstrates where and how the definition of "belligerent act" becomes important.

A. *Civilian Participation in Armed Conflict*

During armed conflict, the biggest differentiation between land and maritime warfare is the concept that at sea, it is not the individual, but the vessel's characterization that matters. If a vessel is a warship or auxiliary, it is always targetable regardless of the makeup of the crew.¹⁰⁰ Whereas on land, in general, individuals make up the main targeting calculus.¹⁰¹

Because targeting at sea is vessel-based, the land approach can be analogized to the maritime context, allowing civilian merchant vessels to maintain some protections. However, these protections are not absolute, and civilian merchant vessels are always subject to inspection for war supplies and related contraband.¹⁰²

While customary international law applies to all armed conflicts, specific provisions cover civilian protection, in international armed conflict via the 1977

⁹⁹ *E.g.*, GC II, *supra* note 44; Convention (III) Relative to the Treatment of Prisoners of War, art.4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

¹⁰⁰ U.S. NAVAL COMMANDER'S HANDBOOK, *supra* note 55, ¶ 5.3.3. The Handbook further explains:

At sea, the principle of proportionality is applied using a vessel-based construct, which evaluates whether any anticipated harm to surrounding civilian vessels or objects is excessive in relation to the expected military advantage in attacking a target vessel Except for exempted ships identified in 8.6.3, and absent specific knowledge, an individualized proportionality assessment is not required once the vessel has been deemed a lawful military objective.

Id.

¹⁰¹ On land, when targeting roads, bridges, etc. that constitute military objects, the mere presence of civilians on the road, bridge, etc. does not render the objects immune from attack, but military planners must consider civilians presence *on/in* the actual object through the principle of proportionality. DEP'T OF ARMY & U.S. MARINE CORPS TRAINING & EDUC. COMMAND, FM 6-27/MCTP 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE ¶ 2-25–26 (2019).

¹⁰² See UNCLOS, *supra* note 51, art. 110; Astley & Schmitt, *supra* note 65, at 144–45.

Additional Protocol (AP I) to the Geneva Conventions, and in a non-international armed conflict via Common Article III to the four Geneva Conventions of 1949, for parties to those treaties.¹⁰³ While AP I, Article 49(3) states that the provisions in articles 48 through 67 are not applicable to armed conflict at sea,¹⁰⁴ naval warfare is still governed by customary rules such as the principle of distinction and the rule of proportionality. Thus, parties to an armed conflict must distinguish between civilians and combatants and between civilian objects and military objectives. The rule of proportionality mandates that the incidental and involuntary harm caused to the civilian population during military operations must not be excessive in relation to the direct military advantage to be gained.¹⁰⁵ Additionally, basic customary international law regarding targeting, including the avoidance of unnecessary destruction, the Martens Clause, and the prohibition on direct attacks against the civilian population, all apply to naval warfare.¹⁰⁶

While targeting principles vary, the basic definitions of “combatant,” “armed forces,” and “civilians,”¹⁰⁷ can be transferred to, and utilized within, the maritime domain, providing a framework to define individuals onboard a vessel. However, given that targeting at sea predominantly applies to attacks against objects (vessels), the classification of the *object* being targeted is central to the

¹⁰³ Much of these treaties is deemed customary international law, applicable to all, regardless of whether a state is party to the treaty. *See, e.g.*, OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 19.20.1 (31 Jul. 2023) [hereinafter U.S. DoD LAW OF WAR MANUAL].

¹⁰⁴ However, AP I is applicable to “attacks from the sea or from the air against objectives on land.” Protocol Additional to the Geneva Conventions of Aug. 12 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 49(3), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Kraska et al., *supra* note 24, at 6; SAN REMO MANUAL, *supra* note 84, § III, para. 9.

¹⁰⁵ *Rule 14: Proportionality in Attack*, INT’L COMM. RED CROSS: INT’L HUMANITARIAN L. DATABASE, <https://bit.ly/4ewSoze>.

¹⁰⁶ *Naval Targeting*, *supra* note 43, at 286. The Martens Clause is the principle that when a situation is not covered under an existing rule, the parties to the conflict are still bound by the principles of International Humanitarian Law, such as the principle of humanity. These principles apply in naval warfare just as they apply in land warfare. Convention (II) With Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803, U.N.T.S. 403; *Naval Targeting*, *supra* note 43, at 286.

¹⁰⁷ Combatant is defined as “all members of the armed forces of a party to the conflict . . . except medical and religious personnel.” *Rule 3: Definition of Combatants*, INT’L COMM. RED CROSS: INT’L HUMANITARIAN L. DATABASE, <https://bit.ly/4eVh9Vy>; *see also* AP I, *supra* note 104, at art. 43(2). Armed Forces, “consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.” *Rule 4: Definition of Armed Forces*, INT’L COMM. RED CROSS: INT’L HUMANITARIAN L. DATABASE, <https://bit.ly/3zOgSop>; *see also* AP I, *supra* note 104, at art. 43(1). Civilians, “are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.” There is an exception for civilians considered to be acting as “*levee en masse*.” *Rule 5: Definition of Civilians*, INT’L COMM. RED CROSS: INT’L HUMANITARIAN L. DATABASE, <https://bit.ly/4eWm6xs>; *see also* AP I, *supra* note 104, at art. 50.

validity of the conduct.¹⁰⁸ To this end, International Humanitarian Law (IHL) applicable to the distinction between civilian objects and military objectives and the definition of a “military objective” are instructive.¹⁰⁹

1. Direct Participation in Hostilities

While civilians lose protection from attack if they are considered “directly participating in hostilities,”¹¹⁰ a civilian object can also lose protection if it is used as a military objective.¹¹¹ Following this line of thought, civilian merchant vessels can lose protection if used to transport contraband or participate in belligerent acts.¹¹² “Direct participation in hostilities” can be defined as “conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations.”¹¹³

The concept of “direct participation in hostilities” applicable in land warfare can be compared to naval warfare concepts.¹¹⁴ In the land warfare context, direct participation in hostilities has a three-pronged requirement: (1) a belligerent nexus; (2) a threshold of harm; and (3) direct causation of the harm or damage.¹¹⁵

¹⁰⁸ See Kraska et al., *supra* note 24, at 2. However, once a ship is captured, individuals are treated distinctly dependent upon their status. Kraska et al., *supra* note 24, at 52–54, 57 (differentiating treatment of armed forces, persons accompanying the forces, noncombatants, and personnel onboard captured enemy merchant vessels).

¹⁰⁹ The principle of distinction between civilian objects and military objectives states that parties to a conflict must distinguish between civilian objects and military objectives, and that attacks may only be directed against military objectives. Military objectives are defined as, “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization . . . offers a definite military advantage.” *Rule 7: The Principle of Distinction Between Civilian Objects and Military Objectives*, INT’L COMM. RED CROSS: INT’L HUMANITARIAN L. DATABASE, <https://bit.ly/47Ws5zO>; *Rule 8: Definition of Military Objectives*, INT’L COMM. OF THE RED CROSS: INT’L HUMANITARIAN L. DATABASE [hereinafter ICRC Rule 8], <https://bit.ly/3XXzeLH>. A civilian object is any object that is not a military object. *Rule 9: Definition of Civilian Objects*, INT’L COMM. RED CROSS: INT’L HUMANITARIAN L. DATABASE, <https://bit.ly/3zXqpJJ>.

¹¹⁰ AP I, *supra* note 104, art. 51(3).

¹¹¹ ICRC Rule 8, *supra* note 109. Outside the maritime realm, in all aspects of the military, there has been an increase in civilian participation in what are traditionally considered “military” functions. This is especially prevalent in areas such as artificial intelligence (AI), cyber, and space. See, e.g., Bruno Macaes, *How Palantir is Shaping the Future of Warfare*, TIME (July 10, 2023, 1:30 PM), <https://bit.ly/3ByYAYZ>.

¹¹² Kraska et al., *supra* note 24, at 2.

¹¹³ INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 12 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE], <https://bit.ly/3PLWU1Z>.

¹¹⁴ While targeting in naval warfare centers around the object (vessel) being targeted, given advances in technology and the different potential uses of merchant vessels, a shift to a framework similar to direct participation in hostilities applicable to the vessel as a whole could be applied.

¹¹⁵ Nils Melzer, *Civilian Participation in Armed Conflict*, in THE LAW OF ARMED CONFLICT AND THE USE OF FORCE 216 (Frauke Lachenmann & Rudiger Wolfrum, eds., Oxford Univ. Press 2017).

Some states adhere to the temporal concept of the “revolving door,” where civilians “lose and regain protection against direct attack in parallel with the intervals of their engagement.”¹¹⁶ The United States, however, rejects the “revolving door” principle, stating that persons engaged in a pattern of directly participating in hostilities do not regain protection in periods when they are not taking a direct part in hostilities.¹¹⁷

During a non-international armed conflict, the status of a member of an organized armed group depends on whether the individual’s continuous function in a group “involve[es] his or her direct participation in hostilities,” also referred to as the “continuous combat function.”¹¹⁸ Only those individuals whose “continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.”¹¹⁹ All others participating in an organized armed group serving in non-combat roles, and/or who only directly participate in hostilities on a spontaneous or sporadic basis, are targetable only while “directly participating in hostilities.”¹²⁰ The temporal aspect of direct participation in hostilities is not settled customary international law. Given technological advances, the limitations of “direct participation in hostilities” as a standard are currently being widely debated.¹²¹

Despite the fact that AP I does not apply to naval warfare, these temporal issues translate to the maritime context.¹²² While there are specific rules on targeting civilian vessels,¹²³ we can compare the temporal aspect of land warfare to maritime warfare and analogize it to a similar concept in naval warfare. For example, uses of the BEHSHAD could call into question the temporal aspect of direct participation. Is the BEHSHAD directly participating in hostilities only while actively assisting Houthi targeting, the entire time it is positioned in the Gulf of Aden, or until it returns to port? States following the “revolving door”

¹¹⁶ ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 70.

¹¹⁷ U.S. DOD LAW OF WAR MANUAL, *supra* note 103, at ¶ 5.8.4.2.

¹¹⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 113, at 34.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *E.g.*, cyber, space, and unmanned aerial weapons (drones). *See e.g.*, David Wallace, et al., *Direct Participation in Hostilities in the Age of Cyber: Exploring the Fault Lines*, 12 HARV. NAT’L SEC. J. 164 (2021); Jonathan Horowitz, *One Click from Conflict: Some Legal Considerations Related to Technology Companies Providing Digital Services in Situations of Armed Conflict*, 24 CHI. J. INT’L L. 305 (2024); Francis Grimal and Michael J. Pollard, “Embodied AI” and the Direct Participation in Hostilities: A Legal Analysis, 51 GEO. J. INT’L L. 513 (2020).

¹²² The concept of direct participation in hostilities as described in AP I is considered customary international law, applicable in both international and non-international armed conflict. Amichai Cohen & David Zlotogorski, *PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW* 138 (Oxford Univ. Press 2021). This section will delve into how these temporal issues can apply in the maritime context.

¹²³ Kraska et al., *supra* note 24, at 141–45.

principle might consider the BEHSHAD to be targetable only while actively providing targeting assistance, whereas the United States might consider it targetable until such time as it is no longer capable of assisting the Houthis. Alternatively, the BEHSHAD could be considered to be maintaining a “continuous combat function,” such that even if a state follows the “revolving door” theory, they may still consider the BEHSHAD targetable the entire time it remains in the Gulf of Aden.

Similarly, the SBFVs could bring up “direct causation” questions during international armed conflict. If these vessels function similarly to the P.R.C.’s fishing vessels during the “Battle of the Paracels” with South Vietnam in 1974,¹²⁴ the SBFVs meet the direct causation threshold by providing “war-supporting” functions. This is similar to the United States’ targeting of Salim Hamdan, Osama bin Laden’s driver, who also transported weapons for al-Qaeda and received weapons training.¹²⁵

The key distinction is the concept of targeting in naval warfare. Targeting at sea is different than on land because at sea the focus of the target is a platform/object, such as ships and aircraft, as opposed to the individuals operating the platform/object or those on board.¹²⁶ As such, vessels in general are separated into the different categories. However, despite the differences in targeting, merchant vessels, both enemy and neutral, maintain similar protections against attack as long as they do not engage in actions amounting to “directly participating in hostilities.”¹²⁷ The key difference is that the warship maintains the option to visit and search, as long as they are outside neutral waters, regardless of whether the vessel is “directly participating in hostilities.”¹²⁸ This stop, board, and search procedure expands the aperture of naval warfare, bringing more vessels into a potentially hostile setting.¹²⁹

2. Individual Status in Circumstances of Capture

Geneva Convention III, Article 4(A)(2) allows individuals categorized as “members of other militias and members of other volunteer corps” to be treated

¹²⁴ The vessels operated around Vietnamese-held islands, depositing troops onto unoccupied islands, ultimately providing forces to assault and overwhelm Vietnamese forces. POLING ET AL., *supra* note 6, at 3–4.

¹²⁵ Jay C. Jackson, *Applying the U.S. and ICRC Standards for Direct Participation in Hostilities to Civilian Support of U.S. Military Operations*, 70 A.F.L. REV. 53, 102–03 (2013) (noting that Salim Hamdan may have lost protection based on membership in an organized armed group).

¹²⁶ Kraska et al., *supra* note 24, at 2. However, civilians on board vessels are considered when determining which actions to take. This requires citation.

¹²⁷ *Naval Targeting*, *supra* note 43, at 288.

¹²⁸ See Kraska et al., *supra* note 24, at 172.

¹²⁹ The visit and search process, as comparable to land “checkpoints,” is discussed in Part IV.A.iii, *infra*.

as prisoners of war if they meet specified criteria.¹³⁰ These conditions apply to groups as a whole; members of the militias are not assessed individually.¹³¹ Geneva Convention II uses the same language in stating, “members of other militias and members of other volunteer corps” who are wounded, sick and shipwrecked should be treated as prisoners of war.¹³²

Scholars who have written about militias and other volunteer land warfare corps believe it is unlikely PMCs would meet the criteria to be considered “other militia or volunteer corps.”¹³³ Instead, they are considered civilians providing support functions.¹³⁴ In the P.R.C. maritime militia scenario, there is still debate as to whether individuals operating those vessels would be eligible for POW status if captured.¹³⁵ There may be some situations in which civilian vessels more easily fall under the combatant category, given the organization of some civilian vessels.¹³⁶

Finally, naval warfare draws on land warfare in its determination of POW status, specifically with regard to Geneva Convention II, which covers wounded, sick, and shipwrecked members of the armed forces. If a warship is captured, civilian mariners, contractors, or other civilians authorized to accompany the force are entitled to POW status.¹³⁷ Similarly, officers and crews of naval auxiliaries, that are not considered combatants, nonetheless receive POW status if their vessel is captured.¹³⁸ Individuals’ treatment on captured enemy merchant vessels varies. The officers and crew of enemy merchant vessels are granted POW status pursuant to Geneva Convention II Article 13(4) and Geneva Convention III

¹³⁰ The militia or volunteer corps must be: (a) commanded by a person responsible for subordinates; (b) have a distinctive, recognizable sign; (c) carry arms openly; and (d) conduct operations in accordance with the laws and customs of war. GC III, *supra* note 99.

¹³¹ Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L. L. 511, 527 (2005) [hereinafter *Humanitarian Law and DPH by PCs*].

¹³² GC II, *supra* note 44.

¹³³ Shannon Bosch, *Private Military and Security Contractors: A Face-Off with the Notion of Direct Participation in Hostilities in International Armed Conflicts*, J. JURID. SCI., 2012, at 3–4; *Humanitarian Law and DPH by PCs*, *supra* note 131, at 531.

¹³⁴ See, e.g., Bosch, *supra* note 133, at 1, 3; *Humanitarian Law and DPH by PCs*, *supra* note 131, at 531.

¹³⁵ “[I]n most cases, their status as civilians or combatants is purposely obfuscated, placing them in a legal gray zone.” POLING ET AL., *supra* note 6, at 14.

¹³⁶ Land-based PMCs often fail at the requirement that they operate independently because they are providing services specifically for the armed forces (e.g., security, building infrastructure, etc.). However, a civilian vessel could meet such criteria by operating independently from any other vessels, or in a different location than other vessels. See *Humanitarian Law and DPH by PCs*, *supra* note 131, at 528–29. This concept is discussed further in Part V.A., below.

¹³⁷ GC III, *supra* note 99, art. 4(A)(4).

¹³⁸ Kraska et al., *supra* note 24, at 52.

Article 4(A)(4).¹³⁹ Private passengers, as long as they are not members of the enemy's armed forces,¹⁴⁰ "are subject to the discipline of the captor and are to be landed at a convenient port as soon as possible."¹⁴¹ The final vessel category, neutral merchant vessels, similarly divides the occupants. Enemies found on board a neutral vessel may be interned until their status can be identified.¹⁴² If the neutral merchant vessel is captured as a prize, the officers and crew are not POWs, and are to be repatriated as soon as is reasonably feasible.¹⁴³ However, if the vessel directly participates in hostilities, or serves as an auxiliary to the enemy, the officers and crew can be held as POWs.¹⁴⁴ Separately, neutral nationality crew members may not be made POWs unless they personally have committed hostile actions.¹⁴⁵

3. Difference with Land Warfare

An important differentiation between land and maritime warfare is the concept of prize law, which does not exist in land warfare. While privateering was essentially outlawed with the Paris Declaration of 1856,¹⁴⁶ the concept of prize law is still a valid means of preventing free movement of vessels during periods of armed conflict.¹⁴⁷ Prize law is only applicable to civilian objects and makes "the capture and seizure of third parties' private property during armed conflict" legal.¹⁴⁸ Prize law requires that any captured vessel, aircraft, or goods be adjudicated by domestic prize court as part of condemnation proceedings.¹⁴⁹

Prize law is a means to prevent the enemy from obtaining necessary supplies in support of the war effort, while adhering to IHL by not attacking merchant vessels, thus avoiding disproportionate civilian casualties. It is also viewed as a means of economic warfare that is not readily available in land-based conflicts. Depending on the actions of the individuals on the merchant vessel before and during the visit, search, and capture process, these individuals could be seen as displaying hostile actions, exhibiting hostile intent, or directly

¹³⁹ Per Hague XI, if these individuals did not take part in hostilities, they should not be held as POWs if they meet certain requirements. Hague XI, *supra* note 34, arts. 6, 8; Kraska et al., *supra* note 24, at 57.

¹⁴⁰ They would be entitled POW status as members of or accompanying the armed forces.

¹⁴¹ Kraska et al., *supra* note 24, at 57.

¹⁴² *Id.* at 58–59.

¹⁴³ *Id.* at 58.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Paris Declaration, *supra* note 29.

¹⁴⁷ Wissa, *supra* note 1, at 213–14; Kraska et al., *supra* note 24, at 48.

¹⁴⁸ Schulz, *supra* note 22, at 219.

¹⁴⁹ These proceedings are governed by the domestic law of the state. Kraska et al., *supra* note 24, at 160–62.

participating in hostilities, making the vessel a lawful object of targeting and attack.

While “checkpoints” are prevalent in land warfare, there is no similar legal authority for militaries to seize civilian property at such checkpoints.¹⁵⁰ There is no “international” equivalent on land to maritime prize law proceedings that would permit adjudication of civilian items seized.¹⁵¹ In fact, checkpoints on land cause increased confusion and terrify civilians due to the uncertainty of whether they will be exposed to violence at the checkpoint.¹⁵² The lack of an equivalent procedure on land makes sense when considering the disparity in the transportation of goods on land compared to the quantities involved in the global maritime shipping industry. Thus, prize law applicable in the maritime theater brings a significantly more impactful form of economic warfare.

The ability to capture a merchant vessel and subject its contents to prize adjudication significantly expands possible belligerent actions while maintaining adherence to IHL. This also places merchant vessels in a more precarious position during armed conflict, raising questions as to whether merchant vessels should be armed or contain their own private security teams.¹⁵³ Blurring the lines of distinction creates a substantial negative consequence in increased usage of non-warships in naval operations. It would become more difficult to distinguish between a non-warship that is “directly participating in hostilities” and one that is simply a merchant vessel. This could result in states inadvertently targeting merchant vessels as military objectives, thereby placing the lives of civilians onboard *true* noncombatant vessels at risk.

Even during peacetime, states must be cognizant of the ways in which they utilize merchant vessels and other non-warships during naval operations. For example, the P.R.C. maritime militia currently operates in a gray zone, intending to “sow confusion and dissonance,” specifically as to how the vessels are categorized.¹⁵⁴ By creating such a pattern in peacetime, they have set a precedent

¹⁵⁰ The UN defines a checkpoint as “any staffed physical impediments to travel within a territory.” Justin Schon, *The Centrality of Checkpoints for Civilians During Conflict*, 18 CIV. WARS 281, 281 (2016).

¹⁵¹ Civilian items seized during land conflicts would be subject to the domestic law of the state, whereas maritime conflicts generally occur on the high seas, not subject to the domestic laws of any state, necessitating the international concept of prize law. See *Constitutional Rights in Wartime*, JUSTIA, <https://bit.ly/4g3S6zz> (last visited Dec. 28, 2024).

¹⁵² *Id.* at 282.

¹⁵³ Stacy Flippin & Meghan Smorol, *A Call to Arms: Evolving Law and Culture to Protect Our Merchant Maritime Fleet*, DEF. TRANSP. J. ONLINE (Feb. 3, 2020), <https://bit.ly/4eSJDPM>.

¹⁵⁴ *PRC Gray-Zone*, *supra* note 78, at 824, 830.

whereby a state could consider the vessels to be naval auxiliaries, targetable in a situation of armed conflict.¹⁵⁵

The letters of marque, discussed in Part V, could also create confusion like prize law. Merchant vessels engaging in privateering under letters of marque would be perceived as directly participating in hostilities and therefore lawful objects of attack. States need to take this consequence into consideration. States should make abundantly clear to the vessel owner and master (if different) the repercussions involved in participating in naval operations, so that they understand crews' risks and exposure to armed conflict.

B. International Law Applicable to Peacetime Naval Operations

Both on land and at sea, civilians, PMCs, civilian merchant vessels, and other non-warships are increasingly integrated into military operations during peacetime.¹⁵⁶ UNCLOS serves as the major source of international law pertaining to peacetime naval operations and is generally thought to reflect customary international law.¹⁵⁷ UNCLOS sets forth a vessel categorization scheme affording different rights, privileges, and immunities.¹⁵⁸ There is an overarching principle within UNCLOS that the seas must be used for “peaceful purposes.”¹⁵⁹ However, while there are disagreements regarding what constitutes a “peaceful purpose,” UNCLOS does not expressly prohibit military activities on the high seas,¹⁶⁰ and most states utilize Article 2(4) of the U.N. Charter to define whether an activity is “peaceful.”¹⁶¹

¹⁵⁵ “Admiral John Richardson, head of the US navy, said he told his Chinese counterpart, vice-admiral Shen Jinlong, in January that Washington would not treat the coast guard or maritime militia—fighting boats that work with the military—differently from the Chinese navy, because they were being used to advance Beijing’s military ambitions.” Demetri Sevastopulo, *US Warns China on Aggressive Acts by Fishing Boats and Coast Guard*, Financial Times (Apr. 28, 2019), <https://bit.ly/4h6bXiU>. See also, *PRC Gray-Zone*, *supra* note 78, at 835 (quoting the Financial Times article, stating that the U.S. Navy recently made similar assertions, “when it declared that maritime militia vessels would, in the event of armed conflict at sea, prima facie be considered targetable auxiliaries, rather than merchant vessels”).

¹⁵⁶ See, e.g., *supra*, Introduction (describing the use of Chinese fishing vessels in the South China Sea, USNS ships for surveys, and the *BEHSHAD* in the Red Sea and Gulf of Aden).

¹⁵⁷ 169 countries have ratified UNCLOS, and, while the United States has not ratified the convention, President Ronald Reagan’s 1983 Ocean Policy Statement proclaimed that UNCLOS reflects customary international law in all aspects except those related to seabed mining. Astley & Schmitt, *supra* note 65, at 121–22; *Statement on United States Oceans Policy*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (Mar. 10, 1983), <https://bit.ly/4azLHv6>.

¹⁵⁸ UNCLOS, *supra* note 51, art. 32.

¹⁵⁹ *Id.* arts. 88, 56(2), 141, 240, 242, 246.

¹⁶⁰ UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY, VOLUME III 91 (Nordquist, et al., eds., Kluwer Acad. Pub. 1985).

¹⁶¹ James Kraska, *Intelligence Collection and the International Law of the Sea*, 99 INT’L L. STUD. 602, 609 (2022) [hereinafter *Intelligence Collection and Int’l LoS*]. The U.N. Charter governs law of

While UNCLOS differentiates certain privileges and immunities for warships and other governmental ships used for non-commercial service, it does not comment or advise on other vessels working with a state's navy.¹⁶² While there is a separate scheme governing naval warfare, state actions and use of civilian vessels during peacetime play a role in wartime categorization, and thus, states need to be aware of how non-warship activities could be perceived.¹⁶³ For example, since 2016, the P.R.C. has required that civilian ferries be built in such a way that they meet defense standards and accommodate military vehicles.¹⁶⁴ These "roll-on, roll-off ferries" have participated in Chinese naval exercises more than 1000 miles from normal crossing routes.¹⁶⁵ Similar to the fishing vessels participating in the P.R.C.'s maritime militia, transferring the legitimate peacetime use of these ferries into an armed conflict scenario, where they transport military vehicles and supplies, creates a distinction issue. While legal under international law to utilize these vessels in exercises because it is not a "belligerent act," this "dual purpose" increases the chances that P.R.C. merchant vessels could be seen as directly participating in hostilities during naval warfare if operating in conformity with current integration in P.R.C. exercises.

C. *The Maritime "Gray Zone"*

The use of non-warships in naval operations is not unique to the 21st century. However, new technologies and innovative uses of non-warships challenge established notions of maritime and international law and requires ongoing analysis to establish acceptable conduct.

International law pertaining to maritime operations is premised on a world where only two paradigms exist: peacetime, where the law of the sea applies, and armed conflict, applying the law of naval warfare.¹⁶⁶ There are certain

the use of force in international relations and is applicable at sea. *Id.* at 609, 631–32; U.N. Charter art. 2(4).

¹⁶² However, merchant vessels are not permitted to stop other vessels, including ships suspected of conducting piracy. UNCLOS, *supra* note 51, art. 107. Merchant vessels are subject to boarding, questioning, and even criminal prosecution by a coastal state if deemed to have violated its domestic laws while in its territorial seas. ROBIN CHURCHILL ET AL., *THE LAW OF THE SEA* 155–56 (Manchester Univ. Press, 4th ed. 2022).

¹⁶³ See, e.g., Kraska and Monti, *supra* note 49 (concluding that China's use of fishing vessels in its maritime militia "exploits a seam in the law of naval warfare, which protects coastal fishing vessels from capture or attack unless they are integrated into the enemy's naval force," and risks erasing the distinction between warships and other ships in naval warfare).

¹⁶⁴ Associated Press, *China Using Civilian Ships to Enhance Navy Capability, Reach*, VOA NEWS (Sept. 24, 2022, 12:38 PM) <https://bit.ly/4ewLIHP>.

¹⁶⁵ Courtney Mabeus, *Chinese Navy Using Commercial Car Ferries to Launch Amphibious Landing Craft*, USNI NEWS (July 26, 2021, 5:27 PM), <https://bit.ly/3BLgGGX>.

¹⁶⁶ See James Kraska, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare*, EJIL: TALK! (Dec. 3, 2018), <https://bit.ly/3BwCciS> ("Exploring the legal circumstances of the incident

areas of the world's oceans where states are arguably currently engaging in naval warfare.¹⁶⁷ Other large swaths of the sea are not involved in outright naval warfare, but are also not operating in a true "peacetime" environment.¹⁶⁸

One needs only to look at the ongoing tensions within the South China Sea, where multiple states are engaged in conduct falling below the level of an armed attack. Yet these states attempt to assert control over various areas under the ruse of supporting the "freedom of navigation." In May 2023, the Philippines placed navigational buoys in five disputed areas near the Spratly Islands, an area that the Philippines claims as its exclusive economic zone (EEZ)—the same area is also claimed by Vietnam.¹⁶⁹ The Philippines stated that the buoys were intended "to improve safety of navigation" and should be of no concern, but Vietnam viewed this action as a violation of its sovereign rights.¹⁷⁰ Meanwhile, Chinese and Philippine coast guard vessels clashed near the disputed Second Thomas Shoal in March 2024.¹⁷¹ Each country accused the other of causing minor collisions and damage.¹⁷² To add to the tension, the United States sent a warship near the disputed Paracel Islands in the South China Sea, in November 2023, on a "freedom of navigation" operation.¹⁷³ The Paracel Islands are claimed by China, Vietnam, and Taiwan, and the action was intended by the United States to counter "excessive claims of maritime interests."¹⁷⁴ All of these actions, while falling below the threshold of armed attack, are nonetheless provocative in a sensitive area of the world's oceans.

States need to be cognizant of current maritime rules, laws, and regulations, recognizing that peacetime missions are not "little more than less-violent subsets of similar wartime tasks."¹⁷⁵ International law creates a dichotomy

requires selection between peacetime rules of the law of the sea and the law of naval warfare, which applies to international armed conflicts.").

¹⁶⁷ For example, the Black Sea where Russia and Ukraine are involved in an international armed conflict. The same might be said for the Red Sea and Gulf of Aden where the Houthis are operating. Rob McLaughlin, *Houthi Operations in the Red Sea and LOAC?*, LIEBER INST. (Jan. 8, 2024), <https://bit.ly/47Z9EdU>.

¹⁶⁸ E.g., *PRC Gray-Zone*, *supra* note 78, at 821 (discussing China's actions, and the Philippine response, to claims for islands in the South China Sea, which does not equate to an international armed conflict, but still constitutes rising tensions and increased hostilities over the disputed islands).

¹⁶⁹ *Vietnam Rebukes China, Philippines Over South China Sea Conduct*, REUTERS (May 18, 2023, 7:23 AM), <https://bit.ly/4ga3c6r> [hereinafter *Vietnam Rebukes China, Philippines*].

¹⁷⁰ *Id.*

¹⁷¹ Jim Gomez, *Philippine and Chinese Vessels Collide in Disputed South China Sea and 4 Filipino Crew are Injured*, ASSOCIATED PRESS (Mar. 5, 2024, 2:33 PM), <https://bit.ly/4dydzPT>.

¹⁷² *Id.*

¹⁷³ *U.S. Destroyer Sails South China Sea "Freedom of Navigation" Operation*, KYODO NEWS (Nov. 26, 2023, 10:46 PM), <https://bit.ly/4dBSzry> [hereinafter *U.S. Destroyer Sails South China Sea*].

¹⁷⁴ *Id.*

¹⁷⁵ Ivan T. Luke, *Naval Operations in Peacetime: Not Just "Warfare Lite,"* 66 NAVAL WAR COLL. REV. (SPRING), 11, 11 (2013).

where a state is either in an armed conflict, or not. International law dictates that a single shot does not create a situation of armed conflict such that IHL and the law of naval warfare would apply.¹⁷⁶ Specifically during peacetime operations, legitimacy is key, and that depends on operating within, and abiding by, the correct maritime paradigm for a given situation.¹⁷⁷ This requires an emphasis on proper vessel categorization and maintaining a clear understanding of what is a belligerent act.

V. AN ALTERNATIVE: BRINGING BACK LETTERS OF MARQUE

One way to incorporate civilian vessels, while not running afoul of the prohibition on belligerent acts would be to bring back the concept of letters of marque during periods of armed conflict.¹⁷⁸ This would bring back a version of privateering, under the auspices of prize law. Letters of marque would not need to take a specific form; they could be in the same form as a standard contract commonly utilized today, the difference being that in naval warfare they could authorize a vessel to conduct belligerent acts.

A peacetime letter of marque is unnecessary because a contract in its current form suffices. The government could decide to contract with a private vessel solely for non-commercial purposes, in which case it would maintain immunities per UNCLOS.¹⁷⁹ Alternatively, the contract could specify that a vessel would continue carrying out its normal private function, but also conduct activities on behalf of the state during opportune times, depending upon the specific request.¹⁸⁰ States would need to ensure that the civilian vessels understand their purpose and the strict limitations of the contract, to ensure that these vessels

¹⁷⁶ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27) [hereinafter *Nicaragua*].

¹⁷⁷ Luke, *supra* note 175.

¹⁷⁸ This concept would be separate and distinct from the National Defense Reserve Fleet (NDRF), which consists of approximately 100 vessels serving as a reserve for national defense and national emergencies. *National Defense Reserve Fleet and Service*, U.S. DEP'T TRANSP., <https://bit.ly/3XWyAht>. The Civil Reserve Air Fleet (CRAF) provides a good comparison. The CRAF consists of aircraft from U.S. airlines that are contractually committed to augment U.S. Department of Defense airlift requirements in emergencies, "when the need for airlift exceeds the capability of military aircraft." *Civil Reserve Air Fleet*, AIR MOBILITY COMMAND, <https://bit.ly/3YhCpyb>.

¹⁷⁹ UNCLOS, *supra* note 51, art. 96.

¹⁸⁰ For example, a state looking for a means of passive intelligence collection could conceivably contract to place equipment on the vessel for purposes of collection and the merchant vessel could nonetheless continue its merchant journey. See, e.g., *Intelligence Collection and Int'l LoS*, *supra* note 161, at 603 ("[I]n terms of the international law of the sea, intelligence collection that occurs outside of the territorial sea is lawful. Furthermore, even intelligence collection by a foreign ship inside the territorial sea, while a violation of State sovereignty, may not violate the law of the sea, per se.").

do not exceed lawful authority, perform an *ultra vires* belligerent act, and thereby create an incident resulting in unwanted conflict.

A. *Letters of Marque During Armed Conflict*

During armed conflict, letters of marque could function in a similar manner to their pre-Paris Declaration role,¹⁸¹ but instead of serving an offensive function, they could be employed to protect merchant vessels and ensure continued shipping while freeing up warships to conduct belligerent acts. Parallels can be drawn between the PMCs operating in Iraq and the proposed letters of marque during naval warfare. Just as many PMCs provided protection functions,¹⁸² so too can these vessels. The key difference between a traditional contracted state vessel and one operating pursuant to a letter of marque is that the letter of marque could conceivably grant authority for a vessel to conduct actions traditionally viewed as “belligerent acts.”

One difference between PMCs and civilian vessels operating under letters of marque is the latter’s ability to be considered combatants and thus afforded POW rights, if captured. Under the third Geneva Convention, persons can be given POW rights if they meet certain criteria to be considered “other militia or volunteer corps” under Article 4(A)(2) so long as they are operating independently from the armed forces.¹⁸³ It is unlikely that PMCs would meet the independent prong of this requirement.¹⁸⁴ Civilian vessels, however, could still meet the requirement of “belonging to a Party,”¹⁸⁵ but remain independent of the armed forces. While they would be acting in concert with military forces, these civilian vessels act separately, under their own mission, specific to their letter of marque. Even merchant vessels operate in a command structure, with the ship’s master being overall responsible.¹⁸⁶ Civilian vessels could meet the second requirement of the Geneva Convention’s criteria by utilizing the automatic identification system (AIS) to signal that they are operating as a militia.¹⁸⁷

¹⁸¹ A privately-owned vessel outfitted as a warship, and authorized by a “recognized national government” via commission. The privateers were required to conform to the conduct of the laws of naval warfare. Bederman, *supra* note 16.

¹⁸² PMCs have been employed to guard convoys and embassy personnel, to name a few. Bosch, *supra* note 133, at 21.

¹⁸³ GC III, *supra* note 99, at art. 4(A)(2). The specific requirements to be considered “other militia or volunteer corps” are discussed in Part IV.A.2.

¹⁸⁴ “Many contractors and subcontractors would run afoul of this provision in that they provide services specified by the armed forces; thus, they are not meaningfully independent.” *Humanitarian Law and DPH by PCs*, *supra* note 131, at 529.

¹⁸⁵ GC III, *supra* note 99, art. 4(A)(2).

¹⁸⁶ *Id.* art. 4(A)(2)(a).

¹⁸⁷ AIS is a “short-range coastal tracking system” originally developed to share identification and positioning to vessels and shore stations. The International Maritime Organization (IMO) Convention for the Safety of Life at Sea (SOLAS) regulation, “requires all vessels of 300 GT and above engaged on international voyages and all passenger ships irrespective of size to carry AIS

So long as the vessel openly carries arms, it meets the third requirement. The P.R.C.'s maritime militia, specifically the MMFVs, easily meet this requirement by nature of the vessels' designs. Conversely, if a merchant vessel were utilizing its cargo units, or other forms of obfuscation, to hide the fact that it is carrying arms, it would not meet the third requirement.¹⁸⁸ The final requirement is that these groups operate "in accordance with the laws and customs of war."¹⁸⁹ As long as the letters of marque inform the merchant vessels of the requirement to follow the laws and customs, they meet the criteria. To protect itself, a state utilizing privateers should mandate that the ship's master and key crew members understand the laws of war, specifically the laws of naval warfare.

Letters of marque provide a quick, cost-effective option to increase the reach of a navy. A letter of marque also serves as a distinct authorization from the state, eliminating ambiguities that may be caused if the state simply wrote additional tasks into a contract. In fact, others have also recommended this concept.¹⁹⁰ Letters of marque can be catered to specific naval operations and operate in largely the same manner as PMCs have in land warfare.¹⁹¹

B. Risks in Bringing Back Privateering

There are risks to restoring privateering and letters of marque, including the concept of "plausible deniability." Many of these concerns mirror the concerns related to increased use of PMCs on land.¹⁹² However, the United States, for example, has reached a point where letters of marque could provide a means of

onboard." *AIS (Automatic Identification System) Overview*, NATO OTAN ALLIED MARITIME COMMAND, <https://bit.ly/3U0HKbw>.

¹⁸⁸ Raul Pedrozo, *China's Container Missile Deployments Could Violate the Law of Naval Warfare*, 97 INT'L L. STUD. 1160, 1161 (2021).

¹⁸⁹ GC III, *supra* note 99, art. 4(A)(2)(d).

¹⁹⁰ See, e.g., Todd Emerson Hutchins, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates*, 99 CAL. L. REV. 819 (2011); Cancian & Schwartz, *supra* note 29. In 2015, Ian Rice and Douglas Borer recommended bringing back letters of marque to aid in the fight against violent extremist organizations in Iraq and Syria. See Ian C. Rice & Douglas A. Borer, *Bring Back the Privateers*, THE NATIONAL INTEREST (Apr. 22, 2015), <https://bit.ly/3ZW3SYG> ("There are insufficient ground forces to alter the territorial status quo the Islamic State has created. By authorizing private forces with letters of marque, Congress will begin to address the pressing need to engage in ground combat against VEO militants.").

¹⁹¹ The U.S. military relies on civilian launch facilities, such as SpaceX, to launch military satellites into orbit. See, e.g., Sandra Erwin, *SpaceX Launches U.S. Missile-Defense Satellites*, SPACENEWS (Feb. 14, 2024), <https://bit.ly/4eS7gb9>. Anduril, a defense start-up just signed a contract with U.S. Special Operations Command to "deliver, advance, and sustain" counter-unmanned systems capabilities, including "counter-drone capability" through an artificial intelligence platform "designed to autonomously identify and classify threats. Andrew Eversden, *Anduril Nets Biggest DoD Contract to Date: Signifier or Outlier for Defense Start-Ups?*, BREAKING DEFENSE (Jan. 24, 2024, 2:33 PM), <https://bit.ly/3Ydh4Xz>.

¹⁹² Including "deprivileging" the state's role in the security sphere, the concept of *pecunia nervus belli*, and diffusing state responsibility, all discussed at length in Part VI, *infra*.

stability, outweighing the risks.¹⁹³ Much the same way privateers were utilized to increase a state's naval capacity in the 18th and 19th centuries, the United States would benefit from private vessel assistance to achieve the ship levels needed to meet requirements.¹⁹⁴

However, it is not guaranteed that other countries would even recognize a letter of marque, especially those party to the Paris Declaration. If a merchant vessel carrying a letter of marque is involved in hostilities and subsequently captured by a state that does not recognize the letter, they could be treated as unprivileged belligerents. The officers and crew could be detained, and even private passengers would be subject to discipline by the captor.¹⁹⁵ If the captor does not recognize the vessel as conducting legitimate state action, it could be classified as a pirate vessel.

The concept of piracy also becomes a concern regardless of whether a state utilizes letters of marque. A non-warship involved in a naval operations in contravention of international law could be viewed as committing acts of piracy, and would thereby be subject to capture by any other state's warship.¹⁹⁶ For example, a state could consider the P.R.C.'s SBFV fleet engaged in acts of piracy. The key is whether the vessels are operating "for private ends," under the UNCLOS definition of piracy. A "fleet" of private fishing vessels could be perceived as acting in furtherance of their own fishing gains and profit. If a vessel is not recognized as a state vessel, its actions that constitute "violence" could be recognized as being for private ends given that the actions are not associated with a state.¹⁹⁷

U.S. practice during the Civil War serves as an example of the risks involved in a state not recognizing letters of marque. Confederate President Jefferson Davis issued letters of marque to Confederate vessels at the start of the

¹⁹³ States party to the Paris Declaration would need to rescind their signature to return to the practice.

¹⁹⁴ Per the most recent Battle Force Ship Assessment and Requirement, the U.S. Navy requires 381 ships, and as of July, 2023, the U.S. Navy had 299 ships. Sam Lagrone, *Navy Raises Battle Force Goal to 381 Ships in Classified Report to Congress*, U.S. NAVAL INSTITUTE (July 18, 2023, 6:12 PM) <https://bit.ly/4gTlxWN>.

¹⁹⁵ U.S. NAVAL COMMANDER'S HANDBOOK, *supra* note 55, § 8.6.2.1.

¹⁹⁶ UNCLOS, *supra* note 51, art. 101.

Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft; and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

¹⁹⁷ See UNCLOS, *supra* note 51, art. 101.

Civil War.¹⁹⁸ President Lincoln countered with a proclamation stating that these Confederate-issued letters of marque were “pretend” because the “United States did not recognize the Confederacy as a legitimate nation.”¹⁹⁹ As a result, anyone manning these vessels were treated as pirates.²⁰⁰

Regardless of whether states utilize letters of marque, if they seek to incorporate non-warships into naval operations, they need to be cognizant of corresponding risks to non-warships. Merchant vessels in particular, do not have sovereign immunity, so even if they are given a letter of marque, they could still be subject to search. Further, if the searching state does not recognize letters of marque, the vessel could be captured and brought into domestic court.

VI. STRATEGIC AND POLITICAL CONSIDERATIONS

The rise of PMCs and military dependence on private companies in state actions at sea creates gray areas within existing international laws and vessel categorization. These gray areas require a discussion of the potential normative impacts of the uses of vessels in naval operations. While civilian participation provides advantages, states need to be cognizant of the potential downsides. The impact spreads beyond the battlefield; as President Dwight Eisenhower said, “[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.”²⁰¹ In this section I will apply observations made regarding the impact of land-based PMCs to the maritime setting.

A. *States Risk Losing Monopoly on the Right to Use Force*

In his piece, *Corporate Warriors: The Rise of the Privatized Industry and Its Ramifications for International Security*, P.W. Singer dives into the growing PMC industry, positing that “the state’s role in the security sphere has become deprivileged, just as it has in other international arenas such as trade and finance.”²⁰² Further, it has been noted that the increase of PMCs currently causes states to lose one of its essential attributes, “the monopoly on the right to use force

¹⁹⁸ Jennifer Gonzalez, *Pirates, Privateers, and Civil War Maritime Laws*, LIBRARY OF CONGRESS BLOGS (May 28, 2020), <https://bit.ly/480w4eY>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Eisenhower’s Farewell Address, 1961*, PBS.ORG AMERICAN EXPERIENCE, <https://to.pbs.org/4dli9LA> (last visited Oct. 8, 2024).

²⁰² P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INT’L SEC. 186, 187 (2001).

within international law.”²⁰³ Examples exist around the world of PMCs influencing state security actions.²⁰⁴

These very real concerns also apply to the maritime regime. Allowing a civilian vessel to participate in naval operations naturally removes some decision-making power from the state. Just as in land warfare, a civilian shipping company could use its strength to influence a weaker state, pushing them into taking actions beneficial to the company’s profit, but detrimental to state security. States with rules and regulations governing the use of these PMCs are at risk of being influenced by working with a company located within their territory as opposed to another territory.²⁰⁵ States desiring to utilize private shipping vessels in naval operations need to be cognizant of the pressure that could be placed on their governments depending on the arrangements reached.

Virtually all areas considered “exclusive domain of the military” have become corporate, including hiring, training, planning, and combat, thus threatening trickle-down effects.²⁰⁶ Weapons maintenance and supply have become completely privatized in many states, causing the entire military machine to break down if PMC employees leave or go on strike.²⁰⁷ Production of an entire line of vessels or weapons could be halted in the event of a labor issue at a PMC.

The Newport News Shipyard and the U.S. Navy’s development of a “monopoly-monopsony” relationship provides an excellent example. As the relationship grew from its initial stages helping to design aircraft carriers in the post-World War II era, “[c]ontractors assumed more responsibility at earlier stages of design and engineering work.”²⁰⁸ The utter dependency both ways is cause for

²⁰³ Pauline Collins, *The New Autonomous Corporate Warriors and Their Implications for Humanity*, 9 Y.B. N.Z. JURIS. 15, 34 (2006).

²⁰⁴ See, e.g., Singer, *supra* note 202, at 206 (exploring rumors that Executive Outcomes helped oust the leader of Sierra Leone in 1996 in favor of a local general with whom they had a better working relationship); David Evans, *Corporate Profit and Modern War: National Militaries Are Now Merely the Paymasters for Private Corporations*, PEACE MAGAZINE, Jul-Sep 2005, at 13 (describing Haliburton’s Root and Brown Corporation pushing boundaries for what corporations can do in military operations, “because they were employed to write the official rulebook . . . on the use of the private military services.”); COUNCIL OF THE EUR. UNION GEN. SECRETARIAT, THE BUSINESS OF WAR – GROWING RISKS FROM PRIVATE MILITARY COMPANIES (Aug. 31, 2023) (demonstrating that even the EU is concerned about weakening state sovereignty and potential rivalry over delegation of functions to PMCs).

²⁰⁵ See, e.g., *Private Security Contractors: DOD Needs to Better Identify and Monitor Personnel and Contracts*, U.S. GOV’T ACCOUNTABILITY OFF. (Jul. 29, 2021), <https://bit.ly/3Yg01Ec> (In the United States, 32 C.F.R. § 159 regulates PMCs operating in contingency operations, humanitarian or peace operations, or other military operations or exercises, yet the GAO released a report in 2021 citing concerns over the Department of Defense’s use of PMCs).

²⁰⁶ Evans, *supra* note 204.

²⁰⁷ Singer, *supra* note 202, at 206.

²⁰⁸ David Ress, *The Navy and Newport News: A Case Study of a Monopoly-Monopsony Duet*, 30 WAR IN HIST. 320, 327 (2023).

concern.²⁰⁹ While the U.S. Navy works with other shipbuilding companies, extensive work with one company raises concerns that Department of Defense decisions may become influenced by the desires of that company.²¹⁰ This problem is not new; states have consistently looked to private industry for manufacturing purposes.²¹¹ This problem will persist because a state's complete control of all defense-related production would result in state-owned businesses. Such state domination of the means of production is not consistent with a democratic society or a competitive economy which generates advanced technologies from privately-owned businesses. This need not become a major problem; it is simply a concern that states need to be cognizant of when working with civilian shipping companies.

Relatedly, an increase in reliance on commercial shipping companies' vessels risks an increase in *pecunia nervus belli* (money nourishes war).²¹² This is not unique to the maritime realm; in fact, "so central to North America's economy is the defense industry that to separate ourselves from its influence might risk economic collapse."²¹³ In land warfare, when PMCs have personnel in conflict zones, these individuals generally operate solely in the interests of their employer.²¹⁴ Thus, military power risks being determined by the ability to pay, giving private organizations influence over government policy and public goals.²¹⁵ These companies are not concerned with foreign policy or security, unless and until it impacts their profits.²¹⁶ A state utilizing letters of marque, for example, would need to understand this mindset when deciding which civilian shipping companies to work with and provide letters of marque. These private transnational shipping companies are most concerned with their bottom line. Specifically in instances of letters of marque, where the privateers make a profit from the sale of the ships and cargo captured, states must be mindful that the actions may be for the benefit of the company and not the state. Shipping companies could become dependent on conflict for profits, countering the assumption that non-state actors are peace-oriented.²¹⁷

²⁰⁹ *Id.*

²¹⁰ See generally Singer, *supra* note 202.

²¹¹ World War II provides a great example, where the War Production Board converted peacetime manufacturers into manufacturing plants for weapons and military equipment, even helping to stimulate the economy post-depression. See David Vergun, *During WWII, Industries Transitioned From Peacetime to Wartime Production*, U.S. DEP'T DEF. (Mar. 27, 2020), <https://bit.ly/3BC1xIb>.

²¹² Singer, *supra* note 202, at 209.

²¹³ Evans, *supra* note 204.

²¹⁴ Collins, *supra* note 203, at 34.

²¹⁵ *Id.* See also Evans, *supra* note 204 ("The line between business and the military has become obscure, as military armies spawn giant successful corporations (such as China's COSCO) and resource corporations are accused by the UN of promoting and fueling civil war for profit.").

²¹⁶ Collins, *supra* note 203, at 35.

²¹⁷ Singer, *supra* note 202, at 210.

B. *PMCs Diffusing Responsibility*

Ultimately, both in land and maritime warfare, the concern with PMCs is that they threaten to obfuscate responsibility.²¹⁸ States need to be ready to answer questions from their constituency, and on the world stage, regarding the use of PMCs to evade public policy restrictions.²¹⁹ PMCs can provide the cover of plausible deniability, making it easier to shift blame in the event that an action goes awry.²²⁰ If a state intends to implement a politically unpopular foreign policy, we sometimes see them turning to PMCs to achieve results.²²¹ Governments recognize the importance of public relations campaigns because they rely on the continued support of their constituency to wage wars.²²²

In the maritime realm, we are already seeing this take place. The BEHSHAD has long been suspected of providing support to Iran, although it is registered as a commercial cargo ship.²²³ This registration provides a layer of separation between Iran and the actions that the BEHSHAD takes, creating plausible deniability in response to the international community. For example, if the BEHSHAD is found to be providing intelligence to the Houthis, Iran has shielded its connection to the Houthis.²²⁴

C. *Lack of Oversight*

Another issue regarding transparency and control involves questions of actual state oversight of PMC operations.²²⁵ A civilian who commits an offense is answerable only to either the national law of the state in which he or she is temporarily based or the law of the state of their nationality where that state has passed legislation permissible under international law to impose extraterritorial jurisdiction.²²⁶ In many instances, the contracts for PMCs on land create barriers

²¹⁸ *Id.* at 215–16.

²¹⁹ *Id.*

²²⁰ *Id.* at 218 (referencing Dyncorp’s “antidrug” operations in Colombia). When governments wage war by proxy, one step removed, media attention is not attracted to the activities of PMCs in the same manner as when a state’s national military is deployed into a conflict zone. *See also* Collins, *supra* note 203, at 33.

²²¹ Collins, *supra* note 203, at 30.

²²² *Id.* at 37.

²²³ Susie Coen, *Iran Warns US Not to Target Ship ‘Providing Intelligence to Houthis,’* TELEGRAPH (Feb. 6, 2024, 7:41 PM) <https://bit.ly/47TDvo9> (Noting that the BEHSHAD’s owners have been sanctioned by the U.S. Treasury Department as it is suspected to be a front for “state-run Islamic Republic of Iran Shipping Lines.”).

²²⁴ Iran could deny any connection to intelligence sharing between the BEHSHAD and the Houthis because the BEHSHAD is not a state-owned vessel, and the state conceivably does not have control over it.

²²⁵ Collins, *supra* note 203, at 30.

²²⁶ *Id.* at 31.

between individuals working for the company and the government.²²⁷ This shield or lack of a direct link often results in a failure to prosecute individuals, sometimes due to lack of jurisdictional clarity.²²⁸ It can also send a message to those impacted within conflict zones that IHL can be disregarded if a state military is not involved.²²⁹ IHL is made by states, for states, making it less easily applicable to corporate entities.²³⁰ As PMC use rises, IHL enforcement becomes more difficult.²³¹ Of course, it is also possible that a PMC, or, in our case, a civilian vessel, will act in an *ultra vires* manner, causing potentially catastrophic consequences.

If navies utilize letters of marque, they should include a requirement to abide by international law. The question then becomes how states ensure that the ships' masters know and understand international law applicable to the sea, and, in turn, what impact this has on state responsibility. Does a state lose some of its plausible deniability by taking affirmative actions to ensure the ship's master comports with international law, or do they simply include the requirement in a letter of marque and leave it up to those operating the vessel to learn on their own?

These concerns reflect the ultimate fear that the use of merchant vessels may blur the lines between civilian and military objects and cause a return to the unrestricted maritime warfare that occurred in World War II. IHL rules, specifically the Geneva Conventions, were drafted in an attempt to eliminate such actions and regulate warfare. A return to unrestricted maritime warfare risks toppling current rules-based international order.

VII. CONCLUSION

Civilian involvement is changing state interaction and military behavior. Incorporating non-warships into naval operations provides an opportunity to supplement, and expand upon, existing naval power in peacetime and armed conflict. Just as these changes provide opportunities, so too must states be clear-eyed and have a full understanding of the ripple effects.

Impacts span far beyond naval warfare. What states do during peacetime also has a lasting effect on how their navies will be perceived, and targeted, in the event of armed conflict. Participation in peacetime naval operations that do not constitute an "armed attack" could nonetheless confuse the character of a merchant vessel, or even bring about claims that a vessel is illegally participating

²²⁷ Singer, *supra* note 202, at 215.

²²⁸ Robert Beckhusen, *A Decade Later, Contractor Pays Out Millions for Iraq Prisoner Abuse*, WIRED (Jan. 9, 2013, 12:45 PM), <https://bit.ly/3NipLKa>.

²²⁹ See, e.g., Collins, *supra* note 203, at 38; Beckhusen, *supra* note 228.

²³⁰ Collins, *supra* note 203, at 39.

²³¹ *Id.* at 45.

in piracy. States could bring back letters of marque; although, as discussed, this practice involves a variety of risks, not least of which is obfuscating responsibility.

However, there are ways for states to protect themselves and ensure they uphold international laws and norms in all naval operations. Maintaining a clear concept of vessel categorization and providing direct guidance to non-warships when acting on behalf of the state helps protect the state. Maintaining a consistent definition of a “belligerent act” throughout all means and methods of warfare and integration creates clarity in the extent to which non-warships can participate in naval operations. Regardless of how a state integrates non-warships, maintaining clear messaging through these lenses ensures consistency throughout the wide array of naval operations.

Just as on land, states need to fully understand who they work with. The issues with PMCs do not simply go away because actions occur at sea. States must heed President Eisenhower’s warning and ensure that the military-industrial complex does not have a disproportionate impact on a state’s security actions.

Ultimately, the use of non-warships in naval operations can provide substantial benefits, if utilized in an appropriate manner, with an awareness of potential implications on future scenarios, and keeping international law at the forefront.

HEMP TO HELLFIRES: ENVIRONMENTAL LAWFARE AS AN ASSET FOR NATIONAL SECURITY

Lieutenant Commander Colin Hood, JAGC, USN*

American lawmakers have expressed a fear of environmentalism stymying governmental progress and military readiness, labelling the issue as “environmental lawfare.” This Article analyzes environmental lawfare to learn from these fears and turn such lawfare against American adversaries. The Article first compares traditional environmental legal and military planning paradigms and vocabularies to make the two more interoperable. It then defines “environmental lawfare” by drawing on past scholarship. Finally, the Article recommends applications of environmental lawfare and concludes with recommendations for military strategists to apply environmental lawfare to practice.

I. INTRODUCTION

Governments maintain arsenals to defend their sovereignty and enforce their foreign policy interests abroad.¹ Even so, military force is normally the last step in a series of escalations.² Nations will initially rely on diplomatic, informational, and economic tools (known as “DIME”) to achieve their strategic goals.³ There is also an interplay between these tools. The military’s presence abroad, for example, is a facet of diplomacy (military diplomacy or “soft power” projection) that affects foreign relations without firing a single shot.⁴

The military must then have weapons at its disposal to project soft power, weapons that are very different from the tanks and bombs with which it is

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¹ See Amy Ebitz, *The Use of Military Diplomacy in Great Power Competition: Lessons Learned from the Marshall Plan*, BROOKINGS (Feb. 12, 2019), <https://bit.ly/4exhQV2>.

² *Id.*

³ *Id.*

⁴ See MATTHEW WALLIN, MILITARY PUBLIC DIPLOMACY: HOW THE MILITARY AFFECTS FOREIGN AUDIENCES 1–3 (Am. Sec. Project 2015).

normally associated. One of those weapons is the law. The military's use of the law to achieve objectives is known as *lawfare*. In his seminal work on the subject, Major General (Maj. Gen.) Charles Dunlap Jr., USAF (Ret.) defines lawfare as "the use of law as a means of accomplishing what might otherwise require the application of traditional military force."⁵ Even though lawfare has only become a talking point in American policy circles in the last few decades, it has existed in China since at least the 1960s.⁶

One aspect of lawfare that has not been developed is environmental lawfare. This Article first examines the relationship between the federal government, military, and environmental groups to establish a jointly interoperable paradigmatic foundation for environmental lawfare operations. It then analyzes the scholarship on lawfare before positing a formal definition of the term "environmental lawfare." The Article concludes with a discussion of potential uses of environmental lawfare and recommendations, to include environmental lawfare principles in military planning.

II. INCREASING THE INTEROPERABILITY OF MILITARY AND ENVIRONMENTAL PARADIGMS

Warfighters and environmentalists must work together to develop environmental lawfare tactics. These groups have fundamentally different ways of pursuing objectives because the foundations of their thought processes, or paradigms, are different. Therefore, a hurdle to the advancement of environmental lawfare is interoperability. This section analyzes the foundations of military and environmental paradigms and makes recommendations to increase interoperability.

The divide between these paradigms can be stark, as was clear on a foggy Wednesday in April 2018. That morning, forty-three congressmen met in Washington, D.C. to discuss a threat to national security. The Committee on Natural Resources (CNR) meeting was titled "The Weaponization of the National Environmental Policy Act (NEPA) and the Implications of Environmental Lawfare."⁷ The CNR's chairman, Rob Bishop (R-Utah), opened the hearing with a speech that used words like "bulletproof" to stress the committee's concerns over how NEPA was being "weaponized" to "paralyze" the Government.⁸ His

⁵ Major General Charles J. Dunlap Jr., *Lawfare 101: A Primer*, 97 MIL. REV. 8, 9 (2017), <https://bit.ly/47TqWcc>.

⁶ Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085, 1092–94 (2021), <https://bit.ly/3YfHM0P>.

⁷ *The Weaponization of the National Environmental Policy Act and the Implications of Environmental Lawfare: Hearing Before the House Committee on Natural Resources*, 115th Cong. 115–44 (2018), <https://bit.ly/4dC5Gcr> [hereinafter CNR Hearing].

⁸ *Id.* at 2 (statement of Rep. Rob Bishop, Chairman, H. Comm. on Nat. Res.).

chief concerns were civilian environmental groups stymying military readiness with lawsuits. Still, the bellicose language made it clear that weaponizing environmentalism could be a real threat to political stability and thus, national security. Congressman Raul Grijalva (D-Arizona) said during the hearing that environmental protection “is not a weapon, it is a shield.”⁹ If environmental groups really discovered a way of turning a shield into a weapon, then surely the military could wield that weapon against its enemies.

The military is primed to do this because environmental interests, especially climate change, are already part of America’s National Security Strategy (NSS). The latest NSS, published in October 2022, contains several provisions incorporating environmental protections.¹⁰ For example, the NSS began with an overall goal to “set our world firmly on a path toward a brighter and more hopeful tomorrow.”¹¹ Part IV of the NSS, concerning the protection of sea, air, and space, also lists strategies to “support environmental protection.”¹² As Secretary of Defense (SecDef) Lloyd Austin stated: “There is little about what the Department does to defend the American people that is not affected by climate change.”¹³ Executive Order 14008 also explicitly requires the SecDef to analyze the threats climate change presents and incorporate those threats into planning.¹⁴ Department of Defense (DoD) climate risk analysis also states that “climate hazards can lead to impacts due to natural or social vulnerabilities, which have security implications for DoD.”¹⁵

Whereas planning for climate change contingencies is reactive, responsive, and defensive, environmental lawfare could be used proactively to prosecute adversaries. Therefore, to use lawfare effectively as a tool of war, warfighters and military planners, not just specialists, need to understand environmental concepts, themes, and language. If the national security apparatus ignores these lessons, it might tragically, as The Wharton School of the University of Pennsylvania professor Sara Light put it, “be left with the impression that the military always stands opposed to environmental protection.”¹⁶

⁹ *Id.* at 3 (statement of Rep. Raul M. Grijalva, Ranking Member, H. Comm. on Nat. Res.).

¹⁰ See generally PRESIDENT OF THE U.S., NAT’L SEC. STRATEGY (2022).

¹¹ *Id.* at 2.

¹² *Id.* at 45.

¹³ U.S. DEP’T OF DEF., OFF. OF THE UNDERSECRETARY FOR POL’Y (STRATEGY, PLANS & CAPABILITIES), DEPARTMENT OF DEFENSE CLIMATE RISK ANALYSIS: OCT. 2021 REPORT TO THE NATIONAL SECURITY COUNCIL 5 (2021) [hereinafter DoD Climate Risk Analysis].

¹⁴ Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7621–22 (Jan. 27, 2021).

¹⁵ DoD Climate Risk Analysis, *supra* note 13, at 8.

¹⁶ Sarah E. Light, *The Military-Environmental Complex*, 55 B.C. L. REV. 879, 879 (2014).

A. *The Language and Paradigms of National Defense*

Environmental lawfare must be interoperable with the national security apparatus. Military culture is relatively insular and, like most government agencies, exhibits its own form of bureaucratic inertia and resistance to outside influence.¹⁷ That culture is partly developed by the Chairman of the Joint Chiefs of Staff (CJCS), who is responsible for the NSS and enhancing joint service capabilities.¹⁸ Joint service readiness includes a requirement that officers study Professional Military Education (PME),¹⁹ including *Joint* PME (JPME). JPME is meant to instill officers with Desired Leadership Attributes (DLAs), one of which is to “Understand the security environment and contributions of all instruments of national power.”²⁰ The result is that even though a member of the U.S. Army might refer to a helicopter as a “chopper” while a member of the U.S. Navy would say “helo,” when the two services are conducting operations together they both have a baseline knowledge of each other’s structure and capabilities.

The JPME curriculum teaches officers basic military strategy with readings from classical military strategists such as Sun Tzu and Carl von Clausewitz. The former’s *The Art of War* espouses concepts like planning and interpreting the physical environs of battle and uses of energy to increase the momentum of an armed force.²¹ The latter’s *On War* defines war as “an act of violence intended to compel our enemies to our will,” which “arms itself with the inventions of Art and Science to contend against violence. Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany it without essentially impairing its power.”²²

Warfighters and military planners, therefore, possess a vocabulary that emphasizes classical military concepts such as “the center of gravity,” “lines of communication,” and the difference between strategic and tactical objectives. Warfighters and military planners are also taught to consider diplomatic, informational, military, and economic powers to leverage against enemies to achieve strategic objectives.

¹⁷ See Antoine Faure-Grimaud & David Martimort, *Regulatory Inertia*, 34 RAND J. ECON. 413, 413–30 (2003) (asserting that the independence of a regulatory bureaucracy from political principals maintains stability and prevents dramatic changes to the institution according to the will of incumbent political principals).

¹⁸ See 10 U.S.C. § 153(a) (2021).

¹⁹ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 1800.01F, OFFICER PROFESSIONAL MILITARY EDUCATION POLICY (May 15, 2020).

²⁰ *Id.* at encl. (A), para. (5).

²¹ See SUN TZU, *THE ART OF WAR* (Lionel Giles trans., Allandale Online Pub. 2000) (6th cent. B.C.).

²² 1 CARL VON CLAUSEWITZ, *ON WAR* 23 (J.J. Graham trans., Kegan Paul, Trench, Trubner & C. new & rev. ed. 3d impression in 3 vol. 1918).

JPME emphasizes joint planning, leveraging the strengths of the various branches of service to achieve tactical and strategic objectives. To that end, the military utilizes a joint planning process consisting of seven steps: (1) plan initiation, (2) mission analysis, (3) developing course of action, (4) wargaming and analysis, (5) comparing courses of action, (6) approving courses of action, and (7) developing orders to implement the course of action.²³ The end product of this process is a plan for subordinate units to understand the objectives and direction of military leaders. The planning process also emphasizes understanding the strategic environment, fostering civilian-military dialogues, and risk mitigation.²⁴ Environmental lawfare tactics must therefore subscribe to these processes, and the environmentalists who help develop those tactics must be familiar with them.

B. The Language and Paradigm of Environmentalism

Unlike military planners, environmentalists do not have a syllabus dictating the tools of their trade. Instead, an environmentalist's vocabulary is a creation of the literature, issues, laws, and legal opinions that shape the environmental policy status quo. "Environmentalism" encompasses everything from wildlife conservation to eco-terrorism, replete with diffuse goals and opinions, especially those shaped by politics. For example, while sixty-seven percent of the U.S. population believes the federal government is doing too little to reduce the effects of climate change, ninety percent of Democrats subscribe to that opinion but only thirty-nine percent of Republicans do.²⁵ Additionally, "[p]eople who self-identify as liberal were more likely to want to purchase renewable energy from their utility when they learned that the Department of Defense was actively using renewable energy technology."²⁶ These statistics imply that a person's political leanings influence their opinions towards the environment and the DoD. Conversely, military members by operation of law "should not engage in partisan political activity, and . . . avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement."²⁷ Warfighters should therefore recognize the political leanings of environmentalists and environmentalists should recognize that warfighters must remain politically neutral. Successful interoperability in the regard depends on both parties practically assessing these realities and incorporating it into their planning.

²³ CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUB. 5-0: JOINT PLANNING, at III-10-11 (Dec. 1, 2020).

²⁴ See *id.* at xiii–xiv.

²⁵ CARY FUNK & MEG HEFFERSON, PEW RSCH. CTR., U.S. PUBLIC VIEWS ON CLIMATE AND ENERGY 2 (Nov. 25, 2019).

²⁶ Sarah Light, *The Surprising Role the Military Plays in Environmental Protection*, KNOWLEDGE AT WHARTON (Jul. 29, 2014), <https://wharton/3XUAizP>.

²⁷ U.S. DEP'T OF DEF., DIRECTIVE 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES para. 4 (Feb. 19, 2008).

Environmental law practitioners are adept at this. They recognize the value of risk assessment and the use of control technologies to provide scientifically supportable proposals in line with their political objectives. This is because the long-standing tension between environmental and economic requirements results in legal structures that balance those requirements, manage risk, and seek to develop technology that helps both the environment and the economy.²⁸ The Clean Air Act, for example, differentiates between different levels of scientific and technological pollution control technologies depending on which pollutant is involved and how polluted an area is.²⁹ Environmentalists' ability to recognize risk, adapt responses to economic and environmental factors, and apply appropriate solutions through careful consideration of scientific data is one of their greatest strengths. A similar paradigm, applied to environmental lawfare, could also shape the way warfighters see problems and apply solutions. An example might be a use of force question where there are collateral damage considerations. Incorporating environmentalist paradigms can help make balanced decisions for a particular response's distinction, proportionality, and necessity assessment.³⁰ In this regard the DoD's Law of War manual provides warfighters with direction for certain environmental aspects of warfighting (such as destruction of cultural property and the weaponization of herbicides).³¹ However, an environmentalist would take the analysis further, assessing law of war concepts like necessity, proportionality, etc., through a comprehensive lens, applying risk mitigation and best available science.

Environmentalists will be familiar with the seminal writings on environmental themes. These may include Rachel Carson's *Silent Spring*, Garrett Hardin's *The Tragedy of the Commons*, Henry David Thoreau's *Walden*, Upton Sinclair's *The Jungle*, and even children's books like Maurice Sendak's *Where the Wild Things Are*.³² Common thematic elements of these writings include the conflict between capitalistic economic ideals and environmental conservation, the importance of biological diversity, the preservation of the natural environment, and humanity's role in conserving natural resources.

Major environmental laws, such as NEPA and the Clean Water Act (CWA), provide the legal framework for environmental planning. NEPA, like other environmental laws, requires the assessment, ex ante, of the risk a project

²⁸ See generally Nadezhda M. Mityakina et al., *The Modern Paradigm of Rational Environmental Use as a Trend of Environmental Legal Regulation*, 34 NEXO REVISTA CIENTIFICA 1250 (2021).

²⁹ See 42 U.S.C. §§ 7521–7651o (1990).

³⁰ See generally U.S. DEP'T OF DEF, LAW OF WAR MANUAL (2023).

³¹ *Id.* §§ 5.18, 6.17.

³² See RACHEL CARSON, *SILENT SPRING* (Houghton Mifflin 1962); GARRETT HARDIN, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); HENRY DAVID THOREAU, *WALDEN* (1854); UPTON SINCLAIR, *THE JUNGLE* (1905); MAURICE SENDAK, *WHERE THE WILD THINGS ARE* (Harper & Row 1963).

poses to the environment.³³ While many scholars adopt a “worst-case scenario” approach to that analysis, the law provides flexibility and reasoned responses that would be useful for military planners.³⁴ This again highlights the environmentalist paradigm of risk assessment, cooperative and creative thinking, and thoughtful application of policy solutions. The situations those paradigms address are similar to those in war that have serious implications for public health and the environment.

Landmark environmental cases such as *Massachusetts v. EPA*³⁵ (establishing the Environmental Protection Agency’s (EPA) authority to regulate greenhouse gases) and *Sackett v. EPA*³⁶ (defining “waters of the United States” for the purposes of the CWA) also influence environmentalist paradigms. The political leanings of the members of the Supreme Court who write these opinions, the presidential administrations in power when the decisions are made, and the cultural zeitgeist surrounding environmental politics at the time of these decisions all influence how environmentalists discuss these cases and incorporate them into their work. The judicial treatment of environmental laws and its sensitivity to political change also means that environmentalists are used to dynamic political environments and “playing the long game” in terms of science and policy. This makes their tactics especially useful in a military whose priorities may shift with different ideological changes in political leadership and whose members must remain politically neutral.

Environmental legal theory also focuses on coalition building. For example, enforcement mechanisms in the major environmental statutes usually include a citizen’s suit provision allowing citizen groups to enforce a law or policy when the government is unwilling or unable to do so.³⁷ Consent decrees and cooperative enforcement are other examples of this.³⁸ An environmentalist’s ability to look at problems holistically and shape both the narrative and political impetus behind an issue is a valuable skill for a warfighter who may want to apply soft power solutions to a conflict.

Environmentalists therefore think in terms of economics, politics, ecology, conservation, and preservation. They are more likely to incorporate

³³ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–47 (1969) [hereinafter NEPA]; Clean Water Act of 1972, 33 U.S.C. §§ 1251–1387 (1972).

³⁴ See Todd S. Aagaard, *A Functional Approach to Risks and Uncertainties Under NEPA*, 1 MICH. J. ENV’T & ADMIN. L. 87, 88–91 (2012).

³⁵ 549 U.S. 497 (2007).

³⁶ 598 U.S. 651 (2023).

³⁷ See 33 U.S.C. § 1365 (2018).

³⁸ The EPA website lists examples of various consent decrees and decrees currently in negotiation with the EPA. See U.S. ENV’T PROT. AGENCY, *Enforcement: Civil and Cleanup Enforcement Cases and Settlements*, <https://bit.ly/3zXBZod>.

politically partisan interests into their discourse and have a range of environmental concerns, ranging from climate change affecting global weather patterns, to the impact runoff from a neighbor's home renovation will have on a local stream. As a paradigm, environmentalism has diverse foundations that require advanced insights into various disciplines in order to assess risk, gauge political palatability, and apply constrained resources towards major problems in the most efficient means possible.

C. *Translating the Paradigms of Warfighting and Environmentalists to Increase Interoperability*

In synthesizing environmental and military policymaking environmental lawfare practitioners should focus on the desired end state. The U.S. Constitution, to which all military officers take an oath to support and defend, serves to “provide for the common defence [sic]” and “promote the general welfare” of the American people.³⁹ Likewise, NEPA exists to “stimulate the health and welfare of man.”⁴⁰ Both national security strategists and environmentalists want the same thing: a safe, healthy, and prosperous homeland. Prosperous countries are less likely to go to war than poor ones, so enhancing the relative labor productivity of a population by providing a healthy environment prevents the types of conflicts the NSS seeks to counter.⁴¹

Environmental lawfare tacticians should take a lesson from environmental law in conducting risk analysis. Doing so can improve military activities such as lethal use of force analysis and operational risk management (ORM). When advocating for policies that have national security implications, environmentalists, military planners, and warfighters should look at the ultimate goal of their proposal. They should advocate for why that proposal pursues a defined objective. They should avoid or restrain ulterior political arguments. Despite such restraint, they should be able to provide insight into the political implications of a course of action. Working together, environmentalists and warfighters should also “plan backward” from their desired end state: identifying each step (or tactic) that must be achieved before their end state (strategic objective) can be accomplished. Those tactical decisions are discrete planning elements that will be more familiar to the defense establishment and will be easier for the military planner to integrate into a mission.

³⁹ U.S. CONST. pmbl.; *see also* Ebitz, *supra* note 1 (discussing how the State Department and U.S. military strive to advance U.S. policy and security).

⁴⁰ NEPA, *supra* note 33, § 4321.

⁴¹ *See generally* Jonas Vestby, Halvard Buhaug, & Nina von Uexkull, *Why Do Some Poor Countries See Armed Conflict While Others Do Not?: A Dual Sector Approach*, 138 WORLD DEV. 105272, 105272–73 (2021).

Warfighters, when working with environmentalists, should use the diplomatic element of the DIME model. Interoperability requires an understanding that all parties want the same strategic objective, although the tactics to achieve it may differ. Warfighters should also understand that an environmentalist's position will likely have a political component and that environmentalists may have a personal or community interest in the environmental justice implications of a planned military undertaking.

Warfighters should understand the information element of the DIME model. Environmentalists as a community usually have deep ties to an issue and a thorough understanding of technical intricacies inherent in a given ecological system. They will likely have a better understanding of economics, ecology, etc. They will also have a better understanding of the political reactions that a proposed military action will have on a given community. Warfighters can leverage lessons learned from soft power "hearts and minds" campaigns, regularly used to support civilian populations to enhance cooperation and mutually beneficial objectives.⁴²

In short, even though these groups sometimes may seem to be at an impasse, a common understanding of each other's paradigms can help solve problems. They differ in the tools they use, but many times they have advantages to offer each other in achieving their respective endstates. Cooperating on risk analysis and review processes, similar to the Joint Planning Process and environmental risk assessments, will help both sides reach consensus. Learning from and respecting the vocabularies and paradigms of these positions allows the two groups to speak to each other more easily and thus become more interoperable. For a military seeking to leverage the power of environmentalism in a lawfare context, allies and additional tools are essential. Therefore, a better understanding of environmentalism's context and vocabulary is the first step in leveraging environmental lawfare as a means of national security in the arsenal for democracy.

III. DEFINING ENVIRONMENTAL LAWFARE

Warfighters cannot wield environmental lawfare if it is not defined. This section draws on lawfare scholarship to assess the characteristics of environmental lawfare. It concludes with a recommended formal definition of military environmental lawfare.

⁴² See Christoph Mikulaschek, Saurabh Pant, & Beza Tesfaye, *Winning Hearts and Minds in Civil Wars: Governance, Leadership Change, and Support for Violent Groups in Iraq*, 64 AM. J. POL. SCI. 773, 773 (2020).

Bellicose language like “courtroom battle” and “the war over an issue” is not new in the civilian legal sphere. However, “lawfare” is not a term used for dramatic effect to describe what are, in actuality, usually very boring courtroom proceedings. Civilian lawfare is normally used to describe domestic legal disputes and tactics for achieving civilian political objectives. For example, the 2018 CNR meeting mentioned earlier concerned American groups using domestic institutions.⁴³ While empirical evidence does not support the notion that environmental groups are actually “waging environmental war” on the government, the idea that they could creates political instability.⁴⁴ Civilian environmental lawfare in this sense describes tactics used to advance political or policy goals around environmental issues like climate change.⁴⁵ *Military* environmental lawfare must therefore be distinct and specifically defined so that it is not conflated with civilian lawfare activities.

Maj. Gen. Charles Dunlap, currently a professor at Duke University School of Law, states that lawfare:

is best understood as the use of law as a means of accomplishing what might otherwise require the application of traditional military force. It is something of an example of what Chinese strategist Sun Tzu might say is the “supreme excellence” of war, which aims to subdue “the enemy’s resistance without fighting.”⁴⁶

General Dunlap’s examples of lawfare include, among other things; buying the contract rights to commercial satellite imagery to prevent it from being used by insurgents in Afghanistan; using sanctions to limit the Iraqi Air Force’s ability to maintain combat aircraft; suing banks to gain access to funds kept in America by adversarial entities; and Al Qaeda’s manipulation of the Geneva Convention by using civilians as human shields inside religious buildings.⁴⁷

Lawfare is actively used by the American military today, and environmental lawfare should draw from this status quo to increase its interoperability. One of lawfare’s most common applications is the “Freedom of Navigation” (FON) program. For the United States, the FON program is a two-

⁴³ See CNR Hearing, *supra* note 7, at 1–2.

⁴⁴ See Annika Reynolds, Andrew Ray, & Shelby O’Connor, *Green Lawfare: Does the Evidence Match the Allegations?—An Empirical Evaluation of Public Interest Litigation under the EPBC Act from 2009 to 2019*, 37 ENV’T & PLAN. L.J. 497, 497–510 (2020).

⁴⁵ See, e.g., Siri Gloppen & Asuncion Lera St. Clair, *Climate Change Lawfare*, 79 SOC. RSCH. 899 (2012).

⁴⁶ Dunlap, *supra* note 5, at 9 (quoting SUN TZU, THE ART OF WAR 17 (Lionel Giles trans., Puppet Press 1910) (6th cent. B.C.)).

⁴⁷ *Id.* at 9–11.

pronged challenge to a coastal state's excessive maritime claim. The first prong is diplomatic protest, and the second prong is a military operational challenge, known as a FONOP.⁴⁸ The objective of this program is to demonstrate non-acquiescence to a coastal state's excessive claims and thereby help "preserve for all states the legal balance of interests established in customary international law."⁴⁹

Lawfare is also not a uniquely American concept, as it has been part of Chinese military strategy since the 1960s as a means of "shaping the legal context for Chinese actions using both domestic and international law. Lawfare seeks to gain 'legal principle superiority' . . . and delegitimize an adversary."⁵⁰ Chinese lawfare is exemplified by its excessive maritime claims in the South China Sea. American military legal scholarship has already assessed the viability of using informational lawfare to counter China in this context, specifically highlighting environmental degradation and the use of powerful imagery like dead sea turtles, to delegitimize China's expansion and commensurate military advantages.⁵¹

Military lawyers have also posited several interpretations of law that have environmental aspects and might be deemed environmental lawfare. In one example, the United States conducts military operations within an adversary's Exclusive Economic Zone (EEZ) to prevent a future claim that EEZ's are closed to foreign warships.⁵² In another, the United States engages with foreign partners to legitimize international agreements concerning Arctic boundaries to encourage activity in that space and create a legal framework to resolve future conflict.⁵³ Scholarship has also analyzed the impacts U.S. environmental policies have on foreign relations, the U.S. ability to maintain foreign installations, and the effects foreign military activity has on the interpretation of domestic environmental law.⁵⁴

⁴⁸ DEP'T OF DEF., ANNUAL FREEDOM OF NAVIGATION REPORT FISCAL YEAR 2023, at 2.

⁴⁹ *Id.*; see also Lieutenant Commander Jeanine B. Womble, *Freedom of Navigation, Environmental Protection, and Compulsory Pilotage in Straits Used for International Navigation*, 61 NAVAL L. REV. 134, 134–38 (2012).

⁵⁰ Goldenziel, *supra* note 6, at 1093 (internal quotation marks and citation omitted).

⁵¹ See, e.g., Captain Sean M. Sullivan, *Fighting Destructive Dragons with Sea Turtles: Going on the Legal Offensive using "Info-Lawfare" Against the People's Republic of China*, 68 NAVAL L. REV. 213, 219–20 (2022).

⁵² See Lieutenant Commander Parker S. Carlisle, *Military Activity in the Exclusive Economic Zone: Preventing Creeping Sovereignty*, 67 NAVAL L. REV. 247, 262–64 (2021).

⁵³ See Lieutenant Commander Joan M. Malik, *United States Environmental Law Applied in the Arctic Ocean: Frustrating the Balance of the Law of the Sea, National Sovereignty, and National Collaboration Efforts*, 60 NAVAL L. REV. 41, 55–57 (2010).

⁵⁴ See Adam G. Province, *You Don't Have to Go Home But You Can't Stay Here: Recent Environmental Violations Lead to Wearing Out Our Welcome in Japan*, 59 NAVAL L. REV. 21 (2010); see also Lieutenant Commander Keith S. Gibel, *Defined by the Law of the Sea: "High Seas" in the Marine Mammal Protection Act and the Endangered Species Act*, 54 NAVAL L. REV. 1 (2007).

Using the above scholarship as a foundation, environmental lawfare tactics should (1) legitimize America's interpretation of the international legal order; (2) reinforce the delineation of international borders and sea space to prevent excessive claims; (3) protect and strengthen foreign relations by analyzing domestic environmental legal policy; and (4) build international coalitions around environmental issues with global strategic implications.

While these theories focus on the moral authority gained by international consensus building, environmental lawfare must be effective in kinetic warfare. Therefore, it should also be able to (1) limit a foreign adversary's ability to expand their control over excessive amounts of sea space; (2) protect America's ability to maintain foreign installations and thus result in an increased ability to respond to conflict; and (3) maintain the foreign relations necessary to operate abroad efficiently in a time of conflict.

Some scholars assess that America's failure to participate in international legal regimes like UNCLOS weakens its ability to wage lawfare. Indeed, commentators assess that China is leveraging this vacuum to manipulate American environmental organizations.⁵⁵ These claims even extend to allegations against the Natural Resources Defense Council (NRDC):

[t]he political activism of the Natural Resources Defense Council continues to coincide with China's geopolitical interests, while it regularly files lawsuits against the Pentagon aimed at constraining military exercises vital to national security . . . The organization "collaborates with Chinese government entities deeply involved in Chinese efforts to assert sovereignty over the South China Sea in contravention of international law[.]"⁵⁶

The NRDC denies this claim.⁵⁷ However, foreign adversaries influencing domestic groups and using the legal system to limit military operations falls squarely into a conception of environmental lawfare. The elegance of this tactic is that it does not matter if it is true. Even if a foreign

See generally Lieutenant James E. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies*, 49 NAVAL L. REV. 94 (2002).

⁵⁵ See generally Commander Robert C. "Rock" DeTolve, *At What Cost? America's UNCLOS Allergy in the Time of "Lawfare,"* 61 NAVAL L. REV. 1, 8 (2012).

⁵⁶ Kevin Mooney, *Lawmakers Suggest Lawsuit-Happy Environmentalists Help China, Hurt National Security*, DAILY SIGNAL (Jul. 20, 2018), <https://dailysign.al/3XUAJtX> (citation omitted).

⁵⁷ Press Release, Nat. Res. Def. Council, *The Facts on NRDC's Work in China* (Sep. 13, 2023).

adversary is not directly influencing an environmental group, the mere speculation that it is can sow political dissent and destabilize governments.⁵⁸

From the above, we can attempt a definition of environmental lawfare. Military environmental lawfare is first distinct from domestic civilian lawfare because it does not relate to domestic groups trying to achieve domestic objectives. Second, environmental lawfare is a tactic within the strategic framework of lawfare generally and therefore draws on many of its broader themes. Third, environmental lawfare is expansive and incorporates aspects of political, economic, and informational influence to strengthen its effectiveness. Considering these elements, I propose the following definition:

Environmental Lawfare: The use of environmental legal theories, instruments, and institutions to achieve a strategic advantage over a foreign adversary, usually incorporating informational, economic, and political tactics.

In conclusion, environmental lawfare is not about environmental groups blocking development (unless of course the group is being influenced by a foreign adversary). It is a way to leverage additional tools to engage in asymmetric warfare against a foreign adversary to achieve a strategic objective.

IV. POTENTIAL MILITARY USES OF ENVIRONMENTAL LAWFARE

This section applies the paradigms and definitions discussed above to hypothetical applications of environmental lawfare. Applications are bound to invoke international, military, humanitarian, trade, and other legal issues that will require balancing diverse legal requirements. This section does not advocate for blind application; it seeks to illuminate potential applications that may warrant further consideration and research.

A. *Tactic 1: Supporting Environmentally Sympathetic Groups Abroad*

Military strategists could identify foreign environmental groups whose strategic aims align with America's. Distrust and political discord drain adversarial resources. As Sun Tzu put it, "All warfare is based on deception."⁵⁹ Because environmental groups seek to influence the perception of an issue or a government policy, the United States could fund these groups directly, engage in informational campaigns to support their cause, or encourage domestic civil society to support their efforts.

⁵⁸ Letter from Rep. Rob Bishop, Chairman, H. Comm. On Nat. Res., to Rhea Suh, President, Nat. Res. Def. Council (Jun. 5, 2018).

⁵⁹ Tzu, *supra* note 21, ¶ 18 at 3.

An example might be reinforcing foreign political groups opposed to an adversary's exploitation of critical resources. In democratic states, government opposition to these groups might create political dissent and electoral accountability, potentially with additional benefits in the form of Western-friendly elected officials. Even in a non-democratic country, leveraging these relationships might create a foundation to build future insurgencies against an adversary. Empirically, insurgencies are most effective when legitimizing a friendly government, justifying the use of force, and reforming government policy.⁶⁰ Fomenting insurgency is least effective when "crushing enemies," raising cultural awareness in a population, resettling populations, or building democracy.⁶¹ Therefore, supporting foreign environmental groups that are strategically aligned with the United States, or seeing them as possible allies in an insurrection, could be an effective way to legitimize the use of force against an adversary or change the adversary's government policy.

Aligning American strategic interests with environmental groups also builds support for the people of that country against its government. This sentiment is useful if the United States ever wants to enact international policies against that adversary. It also helps build an international narrative supporting American environmental practices that can eventually coalesce into customary international law.

This policy carries risks; speaking out against dictatorship is a dangerous business. While a warfighter may be experienced in thinking about collateral damage to a civilian population from an explosion, they may be less sensitive to the political consequences for the same population.⁶² Fomenting dissent in adversary nations is not new, but growing sympathy towards environmental causes in the age of information and climate change presents a unique opportunity for the United States to leverage environmental lawfare concepts to acquire a strategic advantage and support environmental causes.

B. Tactic 2: Creating Environmental Protection Buffers in Strategic Areas

Warfighters could use environmental laws to establish environmental protection areas that create buffers between adversaries and their objectives. Environmental protection areas are usually protected by a government's police or military. Leveraging those assets could allow for the forward deployment of

⁶⁰ CHRISTOPHER PAUL ET AL., PATHS TO VICTORY: DETAILED INSURGENCY CASE STUDIES (RAND Nat'l Def. Rsch. Inst. 2013).

⁶¹ *Id.*

⁶² For an examination of the political vulnerabilities of civilian populations during insurgencies, see generally Steven Metz, *New Challenges and Old Concepts: Understanding 21st Century Insurgency*, 37 PARAMETERS 20 (2007).

government forces within those zones in the name of environmental stewardship while providing surveillance and armed defense. The physical space these buffers create can slow an adversary, extend their lines of communication, provide advanced warning to a defending nation, and create a legal justification to engage in preemptory self-defense earlier than may otherwise be feasible.

A current example is China and the South China Sea. While China has disputed the maritime boundaries of its territory since at least the late 19th century, the history of its claims over large portions of the South China Sea began in earnest between 1947 and 1953.⁶³ China's justification for its territorial claims cites over one thousand years of history, including archaeological evidence of Chinese fishermen exploiting natural resources on various islands around the South China Sea.⁶⁴ The PRC's Ministry of Foreign Affairs states it in the following way:

The Chinese people have since ancient times lived and engaged in production activities on Nanhai Zhudao [eds. "South China Sea Islands"] and in relevant waters. China is the first to have discovered, named, and explored and exploited Nanhai Zhudao and relevant waters, and the first to have continuously, peacefully and effectively exercised sovereignty and jurisdiction over them, thus establishing sovereignty over Nanhai Zhudao and the relevant rights and interests in the South China Sea.⁶⁵

China has therefore been able to effectively leverage legal ambiguities using environmental justifications to significantly expand its military capacity.

America already has legal tools that protect specially designated sea space. The National Marine Sanctuaries Act,⁶⁶ Coastal Zone Management Act,⁶⁷ Marine Mammal Protection Act,⁶⁸ and other laws all provide enforcement mechanisms that can bring increased resources into an area.

For example, the National Marine Sanctuaries Act allows for the designation of national sea space as "Marine Sanctuaries" where fishing and

⁶³ 1895–2024: *China's Maritime Disputes*, COUNCIL ON FOREIGN RELS., <https://on.cfr.org/3ZSVlp3>.

⁶⁴ Intan Putri, Dina Sunyowati, & Enny Narwati, *China's Claim on Traditional Fishing Grounds Located in the South China Sea*, 50 ENV'T POL'Y & L. 243, 248 (2020).

⁶⁵ Policy Communique, Ministry of Foreign Affs. of the People's Republic of China, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea* ¶ 8 (Jul. 13, 2016), <https://bit.ly/47V4kbq>.

⁶⁶ 16 U.S.C. § 1431 *et seq.* (2000).

⁶⁷ 16 U.S.C. § 1451 *et seq.* (1990).

⁶⁸ 16 U.S.C. § 1361 *et seq.* (1994).

certain other activities are prohibited.⁶⁹ It is administered by the National Oceanographic and Atmospheric Administration (NOAA), including the NOAA Commissioned Officer Corps, itself a uniformed service of the United States. Its enforcement provisions may be applied against non-Americans per international law and it directs the Secretary of State to coordinate enforcement provisions with international partners.⁷⁰ Section 1437 of the act allows enforcement officials to search and board vessels and arrest individuals suspected of violating the act.⁷¹

Marine sanctuaries could be established along strategically important axes between the United States and an adversary. The extent of the sanctuaries could be expanded through international agreements with other nations. Prohibited activities might include weapons testing and military exercises that make foreign military transit more difficult. The designation would also entail enforcement resources, providing more information and reconnaissance capabilities in strategically important areas. The boarding and seizure provisions of the Act could also potentially be used to monitor foreign intelligence gathering and “gray zone” maritime activities wherein foreign governments utilize civilian vessels for government or military purposes.⁷²

International law already supports this. UNCLOS Article 118, for example, states:

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned.⁷³

Convention and customary international law therefore encourages interstate cooperation in the development of conservation zones.

Designating buffer areas is not going to stop an invasion. It may, however, create legal regimes that enhance international cooperation and surveillance of strategically important sea space and provide resources to monitor them. The environmental legal tools associated with enforcement provisions in these acts can provide additional justifications and opportunities to stop foreign

⁶⁹ See 16 U.S.C. §§ 1433, 1436 (2000).

⁷⁰ 16 U.S.C. § 1435 (1992).

⁷¹ 16 U.S.C. § 1437 (2000).

⁷² See generally Shuxian Lao & Jonathan G. Panter, *China's Maritime Militia and Fishing Fleets, A Primer for Operational Staffs and Tactical Leaders*, MIL. REV., Jan.–Feb. 2021, at 7.

⁷³ U.N. Convention on the Law of the Sea, art. 118, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

intervention and surveillance gathering, all while benefiting environmental protection. Creating enforcement areas and increasing resources within them is a legitimate way to leverage the law for strategically advantageous purposes.

C. *Tactic 3: Subject International Environmental Crime to Universal Jurisdiction*

Warfighters could subject international environmental crimes to universal criminal jurisdiction. International law uses many environmental protection regimes and recognizes the rights of states to enforce certain laws outside their borders. Applying universal jurisdiction to environmental protection violations could expand a state's ability to prevent environmental damage while providing the legal justification necessary to frustrate adversary activity.

The most comprehensive international environmental protection regime in a maritime context is UNCLOS. The United States is not a party to UNCLOS, though it does recognize it as customary international law.⁷⁴ UNCLOS makes the crime of piracy as defined in Article 101 of the convention subject to universal criminal jurisdiction.⁷⁵ On the high seas this powerful tool means that any state may seize a vessel, including a warship, if that vessel is engaged in piracy.

Compare that powerful enforcement regime to the weak environmental enforcement provisions of UNCLOS Part XII. UNCLOS contains obligations for states to protect their natural environment (Article 194), cooperate internationally to coordinate conservation efforts (Article 97), and prevent pollution (Section 5, Articles 207 to 212).⁷⁶ Enforcement is contemplated in Section 6, Articles 213 through 22 and puts the onus for enforcement on the "flag state" where the vessel is registered, a "coastal state," or a "port state."⁷⁷ Typically, the only real obligation is for states to adopt regulations and laws within their own jurisdictions to enforce these environmental provisions.⁷⁸ Perhaps not surprisingly, ships will therefore often register with "flags of convenience" to avoid them.⁷⁹ Ocean dumping, illegal fishing, etc., however, are all severe crimes with significant penalties including imprisonment and fines if committed under domestic law.⁸⁰ For example, in the United States, an oil polluter who fails to notify authorities

⁷⁴ See Ensign Lara Palaver, *It is Time for the U.S. to Ratify UNCLOS*, 147 PROCEEDINGS (June 2021), <https://bit.ly/3zBVAKJ>.

⁷⁵ See UNCLOS, *supra* note 69, arts. 100–105.

⁷⁶ *Id.* arts. 97, 194, 207–12.

⁷⁷ See *id.* arts. 213–22.

⁷⁸ See *id.*

⁷⁹ See Captain Ira Dye, *Flags of Convenience; Maritime Dilemma*, 88 PROCEEDINGS (Feb. 1962), <https://bit.ly/47Sc65K>.

⁸⁰ See 33 U.S.C. § 1321 (2022).

regarding a spill is liable for five years imprisonment for the failure to notify alone.⁸¹

Extending universal criminal jurisdiction to environmental crimes would provide the legal justifications necessary to stop severe environmental violations at any time, avoiding the loopholes created by flags of convenience or lax coastal state enforcement. From a tactical perspective, a search of a ship for an environmental violation might reveal additional illegal activity such as arms smuggling, human trafficking, and nuclear proliferation. China, for example, conducts maritime military operations in the “gray zone,” that is, the “operational space between peace and war, involving coercive actions to change the status quo below a threshold that, in most cases, would prompt a conventional military response, often by blurring the line between military and nonmilitary actions and the attribution for events.”⁸² If in the course of stopping an environmental violation, “gray zone” activities were also revealed, then it could potentially provide intelligence benefits and frustrate adversarial activity. The potential for this justification to be abused is significant and would require case-by-case legal analysis for risks to international and maritime law. While pre-textual searches and seizures are already legal in many jurisdictions under U.S. domestic law, the diplomatic implications of using them in international waters would require additional research and scrutiny.⁸³

This tactic would require the United States to ratify UNCLOS, which has historically proven difficult.⁸⁴ Second, the convention itself would need to amend UNCLOS part XII to change the enforcement provisions of the environmental sections to mirror the universal jurisdiction language found in Article 105.

D. *Tactic 4: Applying Environmental Legal Paradigms to the Law of War*

The final proposed tactic is a way of thinking, versus a direct application of law. As explained above, environmental law focuses on risk mitigation, coalition building, the use of advanced technologies, and the application of policy solutions according to the best available scientific evidence. This manner of considering a problem from a different perspective is useful for warfighters who may only be focused on applying kinetic force to a problem. I propose that warfighters have at least a baseline understanding of environmental law, or have someone with that understanding to advise them, to have a strategically different

⁸¹ *Id.*

⁸² Chongjin Jung, *China’s Gray Zone Operations in the Yellow Sea*, SEC. NEXUS PERSPS., Sep. 2021, at 1 (emphasis removed).

⁸³ See generally Brian J. O’Donnell, *Whren v. United States: An Abrupt End to the Debate Over Pretextual Stops*, 49 MAINE L. REV. 207 (1997).

⁸⁴ See John Kraus, *Unmoored from the UN: The Struggle to Ratify UNCLOS in the U.S.*, SAIA REV. INT’L AFFS. (Jun. 26, 2023), <https://bit.ly/3ByvEQC>.

and potentially advantageous paradigm to apply to conventional problems. Examples may include: considering the environment in addition to the human costs in a collateral damage assessment; assessing the political fallout risk from counterinsurgency operations vis-a-vis a population's relationship to its physical environment; and advancing a global theory of environmental equity and conservation. This last suggestion aligns with America's strategy of retaining the moral authority necessary to affect foreign policy, a prerequisite for relationship building with foreign partners.

Environmental policymakers are adept at analyzing political, economic, biological, and various other factors when confronting complex problems. These analyses are reflected in environmental policies that require best evidence, risk mitigation, alternative courses of action, and others, before an action is taken that could negatively impact the environment. The physical environment is, in essence, a complex interconnected system, much like a social or political system. Influencing those systems is often the ultimate strategic objective in a war. Military doctrine could benefit from the hard lessons learned over decades of environmental policy.

V. CONCLUSIONS AND RECOMMENDATIONS

The brilliance of Sun Tzu's *Art of War* lies in its succinctness. Each lesson is a valuable takeaway for a warfighter. Recommendations to military planners, policymakers, and environmentalists should therefore be short, easy to understand, and achievable. The recommendations below attempt to distill the aspects of environmental lawfare similarly into discrete planning elements and recommendations (mercifully without the poeticism Sun Tzu might have used):

1. Learn the language and way of thinking of environmentalists.
2. Understand that environmental lawfare is a tactical tool. Use it when planning a strategy.
3. Conflicts will always arise when a government seeks to exploit the environment. Mitigate these conflicts at your home and exacerbate them at your enemy's.
4. Environmental law can influence the physical shape of the battlefield. Bring additional resources into strategically important areas and unite allies in mutually agreeable pursuits.
5. Use environmental lawfare to take the fight to the enemy and leverage every justification possible to frustrate his plans both during war and in preparation for it.
6. Establish and enforce a global order that values environmental protection; in the long run, it can provide the legal justification for military intervention while advancing environmentally beneficial causes.

7. View political, economic, and other sociologic systems as environmental ecosystems and apply environmental law principles to mitigate damage, increase combat effectiveness, and achieve the ultimate strategic objective of your operation.

This Article advocated for warfighters and environmentalist interoperability and then proposed this definition of environmental lawfare:

Environmental Lawfare: A term used to describe a government's use of environmental legal theories, instruments, and institutions to achieve a strategic advantage over a foreign adversary, usually incorporating informational, economic, and political tactics.

The Article then analyzed four possible ways that environmental warfare could be used and distilled this analysis into seven actionable recommendations for military planners. The ultimate goal of this Article is to propose a means of developing another weapon for America's arsenal, one that can hopefully complement the other tools it has at its disposal while providing benefits for the physical environment.

ONE CHINA TO RULE THEM ALL: THE P.R.C.'S DISTORTION OF THE ONE CHINA PRINCIPLE

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I. INTRODUCTION

What does the concept of “One China” entail? Does it convey a sense of Chinese pride and national rejuvenation? Is it political gamesmanship for expansionist pursuits? Or both? What does “One China” mean to the People’s Republic of China (P.R.C.)² and what does it mean *now* for the people of Taiwan?³

Since its origination, the term “One China” has held different meanings for different countries and political factions. For the past 75 years, the concept of “One China” has been a fascinating diplomatic tussle between the P.R.C. and Taiwan. The United States is caught in this century-long quagmire under its decades-old, complicated, and ambiguous *One China Policy* designed to ensure peace and stability in the Taiwan Strait. The P.R.C. concept of “One China” is rooted in the *One China Principle*, which is distinctly different from the One China Policy, and is now used as a diplomatic tool to engage in institutional lawfare.

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¹ “Supreme excellence consists in breaking the enemy’s resistance without fighting.” SUN TZŪ ON THE ART OF WAR 8 (Lionel Giles trans., Allandale Online Publishing 2000), <https://bit.ly/3XQVdnD>.

² “China,” “the People’s Republic of China,” and “the P.R.C.” are used interchangeably in this Article depending on the context.

³ “Taiwan,” “the Republic of China,” and “the R.O.C.” are used interchangeably in this Article depending on the context.

For this paper, I define the One China concept as the belief that Taiwan is a part of China and the two should be unified. The One China Principle is the belief that the P.R.C. is the sole legitimate government of China *and* that Taiwan is a part of China. The One China Policy is the United States' policy towards the P.R.C. and Taiwan.

This Article aims to offer key distinctions between the One China Principle and the One China Policy, examine other countries' positions on the One China Principle, and identify significant trends in how countries interpret the concept of "One China." The survey results in the Appendix demonstrate that the P.R.C. government has successfully manipulated the One China Principle to garner international support for its authoritarian vision of a unified China under P.R.C. control.

This paper includes six parts. Part I describes the rich and complicated history of cross-strait relations between Taiwan, China, and the United States. Part II provides an overview of the One China Principle and how the P.R.C. uses the principle to leverage its international power. Part III discusses the diplomatic complexities and nuances of the One China Policy. Parts IV and V outline the One China Principle survey of United Nations (U.N.) member countries' "One China" policies and identify significant trends among the U.N. countries. Part VI offers ideas for future research and further analysis of these trends.

II. THE UNIQUE HISTORY INVOLVING TAIWAN, CHINA, AND THE UNITED STATES

Throughout history, many states have claimed Taiwan, the island approximately 100 miles off the east coast of mainland China, as their territory. The original Austronesian peoples, the Dutch, the Spanish, the Chinese, and the Japanese have each claimed or administered parts of Taiwan.⁴ In 1662, the Kingdom of Tungning drove out the Dutch traders and remained in power until 1683.⁵ Over the next 200 years, Taiwan was loosely administered by China's Qing dynasty.⁶ After more and more Chinese settlers moved to Taiwan, the island received the Qing dynasty's designation as a formal province, but only for about ten years until the Japanese invaded.⁷ Following the Sino-Japanese War in 1895,

⁴ SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF12503, TAIWAN: THE ORIGINS OF THE U.S. ONE-CHINA POLICY (2023), <https://bit.ly/3U1FMTB>.

⁵ Gerrit van der Wees, *Has Taiwan Always Been Part of China?*, DIPLOMAT (Dec. 1, 2020), <https://bit.ly/4dGuBvb>.

⁶ Gerrit van der Wees, *When the CCP Thought Taiwan Should be Independent*, DIPLOMAT (May 3, 2022), <https://bit.ly/47UXu5D> (Taiwan was administered as part of the Fukien province, but the inhabitants there did not see themselves as "part of China.").

⁷ SHIRLEY A. KAN & WAYNE M. MORRISON, CONG. RSCH. SERV., R41952, U.S.-TAIWAN RELATIONSHIP: OVERVIEW OF POLICY (2014), <https://bit.ly/4eUarij>. *But see* Gerrit van der Wees,

and for the next 50 years, Taiwan became a colony of the Japanese empire.⁸ After the Xinhai Revolution on mainland China in 1911, the Republic of China (R.O.C.) formed, led by Sun Yat-sen.⁹ The Chinese civil war, which was paused during World War II, resumed in 1945 despite General George Marshall's attempt to mediate the differences between the nationalist Kuomintang Party (K.M.T.) and the Chinese Communist Party (C.C.P.).¹⁰ In 1949, Mao Zedong's communist forces defeated the Chiang Kai-shek-led nationalist forces, who retreated to Taiwan.¹¹ The victorious C.C.P. established the P.R.C. government and effectively ruled mainland China, whereas the nationalist K.M.T. party ruled Taiwan by martial law.¹²

As part of the Cairo and Potsdam Declarations in 1943 and 1945, respectively, the victorious Allied forces generally agreed to return Taiwan to the R.O.C. at the war's conclusion.¹³ Accordingly, the R.O.C. became a member of the newly formed U.N. representing the entirety of China and holding a permanent seat on the U.N. Security Council (U.N.S.C.).¹⁴ In 1952, the Treaty of San Francisco determined that Taiwan would return to China, but did not clarify whether Taiwan would be part of the R.O.C. or the P.R.C.¹⁵

Originally, President Harry Truman took the position that Taiwan was a part of China. Following the outbreak of the Korean War in 1950, U.S. officials feared communist expansion in greater Asia and further conflict between the P.R.C. and the R.O.C., so President Truman ordered the U.S. Seventh Fleet into the Taiwan Strait to deter both the P.R.C. and the R.O.C. from attacking each other.¹⁶ President Truman then shifted his position on Taiwan, saying that its status was undetermined, in order to recognize the R.O.C. as the government of China while reserving judgment about whether Chinese sovereignty included

supra note 6 (claiming that Taiwan was only a Chinese province under the Qing dynasty for eight years, not ten).

⁸ KAN & MORRISON, *supra* note 7 (describing a Taiwanese resistance, culture, and identity during its time as a Japanese colony).

⁹ *Id.*

¹⁰ RICHARD C. BUSH, A ONE-CHINA POLICY PRIMER, CENTER FOR EAST ASIA POLICY STUDIES AT BROOKINGS 7 (Mar. 2017), <https://bit.ly/3BCeceg>.

¹¹ *The Great Obfuscation of One-China*, THE ECONOMIST (Mar. 11, 2017), <https://econ.st/3BxMm2F>. For the discussion of "mainlanders" as the families that retreated to Taiwan in 1949 and the "Taiwanese" as the ethnic Chinese that were already living on Taiwan, see SUSAN V. LAWRENCE & WAYNE M. MORRISON, CONG. RSCH. SERV., R44996, TAIWAN: ISSUES FOR CONGRESS 2–3 (2017), <https://bit.ly/4gTRHBl>.

¹² KAN & MORRISON, *supra* note 7.

¹³ Ryan M. Fisher, *Defending Taiwan: Collective Self-Defense of a Contested State*, 32 FL. L. REV. 107, 126 (2020).

¹⁴ U.N. Charter art. 23 ¶ 1, <https://bit.ly/3XXilRe> (see page 31 signed, "For China").

¹⁵ Treaty of Peace with Japan, art. 2 ¶ (b), Sept 8, 1951, 136 U.N.T.S. 48 ("Japan renounces all right, title and claim to Formosa [Taiwan] and the Pescadores [islands].").

¹⁶ Bush, *supra* note 10, at 10.

Taiwan.¹⁷ During this period, both the P.R.C. and the R.O.C. claimed to be the sole legitimate government of the entirety of China, further complicating matters of respective sovereignty, autonomy, and international recognition.¹⁸

In 1954, President Dwight Eisenhower explicitly supported Taiwan and established a mutual defense treaty with the R.O.C., later supported by subsequent U.S. administrations encouraging Taiwan to enhance its defense.¹⁹ During the 1960s, pressure intensified to recognize the P.R.C. at the U.N.²⁰ Seeking to take advantage of Sino-Soviet tensions, President Richard Nixon and his National Security Adviser, Henry Kissinger, took steps to normalize diplomatic relations with the P.R.C. government.²¹ In 1971, U.N. General Assembly Resolution (U.N.G.A.R.) 2758 recognized the P.R.C. over the R.O.C. as the official government of China. Later, in 1979, President Jimmy Carter established formal diplomatic relations with the P.R.C., severing official ties with the R.O.C. as detailed in Part III.²²

In the 1990s, Taiwan underwent a political transformation from an authoritarian state to a fully realized democracy, holding its first Presidential election in 1996.²³ Currently, the R.O.C. maintains a sovereign status, with an independent military, vibrant economy, efficient immigration system, and official diplomatic relationships with 11 countries and the Vatican.²⁴ Taiwan also maintains unofficial relationships with almost 60 countries.²⁵ Despite Taiwan's governing system and relative autonomy, the P.R.C. claims Taiwan as a renegade province that is actually a part of China—stating claims from the Cairo Conference, historical ties, diplomatic acquiescence, and the result of U.N.G.A.R.

¹⁷ *Id.*; see also Presidential Statement on Foreign Relations of the United States, 1950, Korea, 7 WEEKLY COMP. PRES. DOC. 119 (Jun. 27, 1950).

¹⁸ Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA INT'L L. & FOREIGN AFF. 354 (1996).

¹⁹ Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, <https://bit.ly/3XSRS7A>; CAITLIN CAMPBELL, CONG. RSCH. SERV., IF12481, TAIWAN: DEFENSE AND MILITARY ISSUES 1 (2024), <https://bit.ly/3Dxl8Kl>.

²⁰ Bush, *supra* note 10, at 11–12.

²¹ *Id.*

²² CAMPBELL, *supra* note 19, at 1.

²³ LAWRENCE, *supra* note 11, at 5.

²⁴ Fisher, *supra* note 13, at 102; for discussions of how Taiwan practically meets the sovereign standards under the Montevideo Convention: (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states, see Jacques deLisle, *Taiwan: Sovereignty and Participation in International Organizations*, FOREIGN POL'Y RSCH. INST. (Jul. 1, 2011), <https://bit.ly/3zYQ3hf>; Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, T.S. No. 881, O.A.S.T.S. NO. 37 (entered into force Dec. 26, 1934).

²⁵ *East Asia and Pacific*, EMBASSIES & MISSIONS, MINISTRY OF FOREIGN AFF. REPUBLIC OF CHINA (TAIWAN) (May 6, 2024), <https://bit.ly/3NgeutS>.

2758.²⁶ The P.R.C. government which came into power in 1949, has never ruled Taiwan.²⁷

Since that time, the P.R.C. has executed a slow, methodical, and meticulous campaign to ensure countries adopt its version of “One China,” further isolating Taiwan and squeezing it of its quasi-sovereignty. Since Chinese President Xi Jinping’s election in 2013, the P.R.C. has formally named unification with Taiwan as crucial to the rejuvenation of the Chinese motherland.²⁸ Understanding the complicated history between China and Taiwan is critical to grasping the aggressive Chinese narrative surrounding the One China Principle.

III. THE ONE CHINA PRINCIPLE

A. Background

Though seemingly contradictory, the broader concept of “One China” appeared in both the nationalist R.O.C. Constitution in 1947 and the preamble to the P.R.C. Constitution in 1949.²⁹ The P.R.C.’s assertion was partially in response to the U.S. containment strategy and the possibility that Taiwan would be independent of China.³⁰ At the time, the concept of “One China” asserted that Taiwan was part of China’s sovereign territory and would eventually be unified with the mainland.³¹ This view was held by both the R.O.C. and P.R.C.

²⁶ TAIWAN AFF. OFFICE OF THE STATE COUNCIL & STATE COUNCIL INFORMATION OFFICE, THE TAIWAN QUESTION AND CHINA’S REUNIFICATION IN THE NEW ERA (2022), <https://bit.ly/4eUrMbg>.

²⁷ van der Wees, *supra* note 6 (van der Wees offers a compelling view that the C.C.P. actually advocated for Taiwan’s independence, similar to Vietnam or Korea, and considered Taiwanese a distinct nationality).

²⁸ Susan M. Gordon et al., *U.S.-Taiwan Relations in a New Era: Responding to a More Assertive China*, COUNCIL ON FOREIGN RELATIONS 21, 30, 37 (2023), <https://bit.ly/4fBH9oU> (identifying 2049 as a target date for (re)unification of Taiwan).

²⁹ Jessica Drun, *One China, Multiple Interpretations*, CENTER FOR ADVANCED CHINA RSCH. (Dec. 28, 2017), <https://bit.ly/4euZzYI>; see Act Governing Relations between the People of the Taiwan Area (Jun. 8, 2022) (codified as amended), <https://bit.ly/4gWeg8u>; see also THE STATE COUNCIL, THE PEOPLE’S REPUBLIC OF CHINA, CONSTITUTION OF THE PEOPLE’S REPUBLIC CHINA (Nov. 20, 2019), <https://bit.ly/4ewjLJx>.

³⁰ Both the P.R.C. and the R.O.C., under the K.M.T., opposed the concept of “two Chinas” where Taiwan would be recognized as a second China, or “one China, one Taiwan.” Adam P. Liff & Dalton Lin, *The “One China” Framework at 50 (1972-2022): The Myth of “Consensus” and Its Evolving Policy Significance*, 252 CHINA Q. 977, 981 (2022).

³¹ The “One China Principle” term was not mentioned until 1992. Both sides of the strait support the One China Principle and seek national unification. However, negotiations on routine matters across the strait do not involve the political meaning of ‘one China.’” See SHIRLEY A. KAN, CONG. RSCH. SERV., RL 30341, CHINA/TAIWAN: EVOLUTION OF THE “ONE CHINA” POLICY – KEY STATEMENTS FROM WASHINGTON, BEIJING, AND TAIPEI 51 (2014); The Constitution of the People’s Republic of China, adopted at the Fifth Session of the Fifth National People’s Congress (N.P.C.) in December 1982, stipulates: “Taiwan is part of the sacred territory of the People’s Republic of China.” EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN THE REPUBLIC OF LATVIA, YE JIANYING’S NINE PRINCIPLES FOR THE PEACEFUL REUNIFICATION WITH TAIWAN (2006), <https://bit.ly/4eMIFVH>.

governments. The P.R.C. claimed that since they won the Chinese civil war, the R.O.C. ceased to exist, and therefore, Taiwan should be a province of China.³²

From 1949 to 1971, Soviet-bloc countries and a few others recognized the P.R.C. as the government of China. In 1971, U.N.G.A.R. 2758 recognized the P.R.C. as the only legitimate representative of China to the U.N.—further delegitimizing the R.O.C. while solidifying international P.R.C. credibility.³³ Soon thereafter, official relations with the P.R.C. rapidly increased, although many countries opted to recognize the P.R.C. government while not accepting that Taiwan was part of China. These countries generally ensured diplomatic communiqués maintained vague or ambiguous language around the Taiwan issue—thereby not explicitly recognizing P.R.C. sovereignty over Taiwan.³⁴

In 1992, at the start of a democratic Taiwan, the C.C.P. and the K.M.T. agreed to the principle that there is “One China,” but both disagreed on its practicality.³⁵ Taiwan’s Democratic Progressive Party (D.P.P.) rejected this debated consensus and currently does not support the One China Principle, whereas Taiwan’s K.M.T. adheres to its conceptual roots. However, neither approach by Taiwan’s major political parties has effectively countered the P.R.C.’s One China Principle.³⁶

In 1993, the P.R.C. issued a white paper titled, *The Taiwan Question and Reunification of China*, that primarily focused on Taiwan’s sovereignty and the P.R.C.’s assertion that those countries with whom it had already established diplomatic relations agree with their version of the One China Principle.³⁷ This concerted effort to “box-in” countries to the One China Principle symbolized a shift in the P.R.C.’s rhetoric around the “One China” concept. The lexicon change elevated the One China Principle to a higher level of policy prioritization and culminated in another P.R.C. white paper in 2000 called *The “One China” Principle and the Taiwan Issue*.³⁸ Here, the P.R.C. Taiwan Affairs Office formally

³² KAN & MORRISON, *supra* note 7.

³³ G.A. Res. 2758 (XXVI), at 2 (Oct. 25, 1971).

³⁴ Lee, *supra* note 18, at 366.

³⁵ *The Great Obfuscation of One-China*, *supra* note 11.

³⁶ IVAN KANAPATHY, THE COLLAPSE OF ONE CHINA, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES 2 (Jun. 2022), <https://bit.ly/3PAW0FD>.

³⁷ *The Taiwan Question and Reunification of China*, TAIWAN AFF. OFFICE & INFORMATION OFFICE OF THE STATE COUNCIL, THE PEOPLE’S REPUBLIC OF CHINA (Aug. 1993), <https://on.china.cn/4exhBJR>. In September 1996, 158 countries recognized the P.R.C. and 30 countries recognized the R.O.C. Lee, *supra* note 18.

³⁸ Taiwan Affairs Office & the Information Office of the State Council, *The One-China Principle and the Taiwan Issue*, N.Y. TIMES (Feb. 21, 2000) [hereinafter *The One-China Principle*], <https://nyti.ms/4dz9j2Q>; see JESSICA DRUN & BONNIE GLASER, GERMAN MARSHALL FUND OF THE U.S., THE DISTORTION OF UN RESOLUTION 2758 TO LIMIT TAIWAN’S ACCESS TO THE UNITED NATIONS 16 (2022), <https://bit.ly/4eREGXh>.

defined the One China Principle as follows: “There is only one China in the world, Taiwan is a part of China and the government of the P.R.C. is the sole legal government representing the whole of China.”³⁹ This white paper sought to shape the narrative around the One China Principle and claim ownership of the terminology that conceptually originated with the R.O.C. government. Additionally, the P.R.C. stated that countries who establish diplomatic relations with the P.R.C. must recognize the P.R.C. as the sole legitimate government representing the whole of China and sever or refrain from establishing diplomatic relations with Taiwan.⁴⁰

As part of Taiwan’s rapid democratization in the 1990s, the Taiwan government formally renounced its claim of authority over mainland China.⁴¹ Nevertheless, the P.R.C. continued to press forward with the One China Principle by passing the 2005 Anti-Secession Law, which stated that there is only one China in the world and that both the mainland of China and Taiwan belong to one China.⁴² The law provides a formal mechanism for the P.R.C. to unify the country through peaceful means and clarifies that, if Taiwan secedes from China, or if other peaceful means are completely exhausted, then China “shall employ non-peaceful means and other necessary measures to protect China’s sovereignty and territorial integrity.”⁴³

On August 2, 2022, the P.R.C. released a statement in strong opposition to a diplomatic visit to Taiwan by the then-Speaker of the U.S. House of Representatives, Nancy Pelosi. The P.R.C. claimed that U.S. actions violated the integrity of the One China Principle and the U.S. One China Policy. The statement again reaffirmed P.R.C. allegiance to the One China Principle: “There is but one China in the world, Taiwan is an inalienable part of China’s territory, and the Government of the People’s Republic of China is the sole legal government representing the whole of China.”⁴⁴

Shortly thereafter, the P.R.C. released another white paper titled, *The Taiwan Question and China’s Reunification in the New Era*.⁴⁵ Like in 2000, the P.R.C. sought to further control the information narrative at the outset, stating in the preamble: “Taiwan is part of China—this is an indisputable fact.”⁴⁶ The white

³⁹ *The One-China Principle*, *supra* note 38 (noting P.R.C.’s ownership and advocacy of the “One China” concept).

⁴⁰ *Id.*

⁴¹ Lee, *supra* note 18, at 374.

⁴² Anti-Secession Law (反分裂国家法), art. 2, Mar. 14, 2005 (China), *translated in* CSIS Interpret: China, <https://bit.ly/3U0KmX8>.

⁴³ *Id.* arts. 5–8.

⁴⁴ STATEMENT BY THE MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE’S REPUBLIC OF CHINA (Aug. 2, 2022), <https://bit.ly/3OMDk54>.

⁴⁵ THE TAIWAN QUESTION AND CHINA’S REUNIFICATION IN THE NEW ERA (2022), *supra* note 26.

⁴⁶ *Id.*

paper sought to reiterate that Taiwan is part of China, explain the P.R.C.'s commitment to unifying Taiwan with mainland China, and attack the current Taiwanese political party in power, the D.P.P.⁴⁷ The key difference with this particular white paper was that the P.R.C. implied that U.N.G.A.R. 2758 forms the basis of the One China Principle.⁴⁸ The P.R.C. explained that national rejuvenation is essential for China to return to its glorious past and restore China to a position of world leadership.⁴⁹

Today, the P.R.C.'s interpretation of the One China Principle includes two parts: (1) that the P.R.C. is the sole legal government of China and (2) that Taiwan is a part of China. The first part is a government's official position on who is the government of China, typically formalized through a joint political communiqué after normalizing diplomatic relations with the P.R.C.⁵⁰ The second part is more complicated. Here, governments have instituted creative flexibility to craft their diplomatic intentions with the P.R.C. government, generally adopting affirmative, ambiguous, or silent positions on whether Taiwan is a part of China.

B. U.N.G.A.R. 2758 Exploitation

Since 1971, the P.R.C. has attempted to shape the international narrative about Taiwan's legitimacy at the U.N. and among international organizations. P.R.C. efforts include eliminating Taiwan from all international bodies, inserting language into international entities that identify Taiwan as a "Province of China," and subtly re-enforcing that the international community has agreed to the One China Principle by reference to U.N.G.A.R. 2758.⁵¹

U.N.G.A.R. 2758 concluded that the P.R.C. government would be represented at the U.N. as "the only lawful representative of China" and "one of the five permanent members of the [U.N. Security Council]."⁵² The resolution did not mention Taiwan, the Republic of China, or whether Taiwan was a province of the P.R.C.⁵³ Nevertheless, the PRC has pushed the view that Taiwan is a province of China and that the One China Principle was "confirmed" or "affirmed" by the resolution.⁵⁴ While many countries do not adhere to the P.R.C. version of the One

⁴⁷ *Id.* ("The historic goal of reuniting our motherland must be realized and will be realized.").

⁴⁸ *Id.* ("[U.N.G.A.R.] 2758 is a political document encapsulating the one-China principle whose legal authority leaves no room for doubt and has been acknowledged worldwide.").

⁴⁹ Mark Metcalf, *The National Humiliation Narrative: Dealing with the Present by Fixating on the Past*, 25 *EDUC. ABOUT ASIA* 44 (2020), <https://bit.ly/4dAhHyT>.

⁵⁰ Liff & Lin, *supra* note 30, at 988.

⁵¹ DRUN & GLASER, *supra* note 38, at 23.

⁵² G.A. Res. 2758, *supra* note 33.

⁵³ DRUN & GLASER, *supra* note 38, at 29.

⁵⁴ THE TAIWAN QUESTION AND CHINA'S REUNIFICATION IN THE NEW ERA, *supra* note 26 (The P.R.C. refers to the official legal opinion from the UN Secretariat Office of Legal Affairs that "the United Nations considers 'Taiwan' as a province of China with no separate status."); see Madoka

China Principle, the P.R.C. artfully mischaracterizes U.N.G.A.R. 2758 as international justification to establish the link that Taiwan is a part of China.

C. *Gross Misrepresentation*

The P.R.C. actively seeks to control the global narrative by influencing domestic and foreign populations and leaders about the One China concept.⁵⁵ The One China Principle is now a coercive, diplomatic tool used to escalate lawfare against Taiwan and its international legitimacy.⁵⁶ The P.R.C. uses information to stress adherence to the One China concept and to ensure the One China Principle becomes a universally accepted international norm.⁵⁷ Many countries have adopted joint communiqués with the P.R.C., but they are often more indicative of Taiwan's status rather than China's.⁵⁸ Despite this, the P.R.C. uses these joint communiqués as a way to bolster support for the One China Principle. While many of the communiqués have certain characteristics of the One China Principle, many do not adopt the P.R.C.'s interpretation.

In 2022, the P.R.C.'s foreign ministry issued the inflated claim that 181 countries established diplomatic relations with China on the basis of the One China Principle, and that the One China Principle was a universal consensus of the international community and a basic norm in international relations.⁵⁹ This rhetoric is an example of the P.R.C.'s strategic, legal warfare in their attempt to reframe international sentiment and suggest implicit adoption of the One China Principle.⁶⁰ Although there is almost universal recognition of the P.R.C. government, there is no international consensus on, or global acceptance of the Taiwan portion of the One China Principle.⁶¹ These tactics are similar to the P.R.C.'s lawfare efforts in the South China Sea, where China has been advancing

Fukuda, *China is Using a UN Resolution to Further Its Claim Over Taiwan*, DIPLOMAT (Aug. 26, 2022) (explaining that the Secretariat language goes beyond the original implication of Resolution 2758), <https://bit.ly/4808KOb>; see also DRUN & GLASER, *supra* note 38, at 14.

⁵⁵ Dean Cheng, *Winning Without Fighting: Chinese Legal Warfare*, HERITAGE FOUND. (May 21, 2012), <https://heritag.org/4ewA3SQ> (describing how the P.R.C. uses political warfare to establish international political norms, raise doubts, and diminish political will).

⁵⁶ Major General Charles J. Dunlap Jr., *Lawfare 101: A Primer*, 97 MIL. REV. 8, 9 (2017) (Lawfare is the use of law as a means of accomplishing what might otherwise require the application of traditional military force.). For a greater discussion on lawfare, see Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare*, 106 CORNELL L. REV. 1100 (2021).

⁵⁷ Chien-Huei Wu, Ching-Fu Lin, & Yun-Sheng Lin, *China's Word Game: A New Narrative of the "One China Principle"*, DIPLOMAT (Aug. 16, 2023), <https://bit.ly/4gTwKGQ>.

⁵⁸ Fisher, *supra* note 13.

⁵⁹ STATEMENT BY THE MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 44.

⁶⁰ Liff & Lin, *supra* note 30, at 997.

⁶¹ Chong Ja Ian, *The Many "One Chinas": Multiple Approaches to Taiwan and China*, CARNEGIE ENDOWMENT INT'L PEACE (Feb. 9, 2023), <https://bit.ly/3zNO13t>.

spurious territorial claims for decades.⁶² By allowing such rhetoric to go unchecked, the international community allows the P.R.C. to ignore established legal norms, gain strategic advantage, and control the narrative about Taiwan.

The P.R.C. has long sought to isolate Taiwan with its long game diplomacy. This brand of institutional lawfare seeks to exploit the international community and coerce states to adopt the P.R.C. version of the One China Principle.⁶³ Coopting international institutions, influencing weak states with economic dependency, and seeking to control the power of information have enabled the P.R.C. to create new international legal norms as a pretext for possible action.⁶⁴ The One China Principle has successfully sowed confusion around the world and used its ambiguous status to China's advantage. Even while the P.R.C. falsely claims the U.S. has accepted the One China Principle, the U.S. One China Policy is, in fact, distinctly different.

IV. THE U.S. ONE CHINA POLICY

The One China Policy is not the One China Principle. The One China Policy is a comprehensive framework of diplomatic agreements and government statements. The simple explanation of the One China Policy is that the United States maintains an official, diplomatic relationship with the P.R.C. government and an unofficial relationship with Taiwan. This does not necessarily mean that the U.S. acquiesces to the P.R.C.'s worldview; it is simply a recognition of the diplomatic reality and necessity of a bilateral relationship with China. However, the policy has come under recent scrutiny. Statements from President Donald Trump and President Joseph Biden, P.R.C. military escalation around Taiwan, and the linguistic similarities with the One China Principle all create uncertainty and confusion.⁶⁵ In a U.S. State Department hearing the topic was nicely summarized by the future Secretary of State Rex Tillerson:

The Three Communiqués, Taiwan Relations Act, and Six Assurances provide the foundation for U.S. policy toward China and Taiwan. The United States should continue to uphold the One China policy and support a peaceful and mutually

⁶² Wu et al., *supra* note 57.

⁶³ Goldenziel, *supra* note 56, at 1100 (identifying institutional lawfare as either using or creating new domestic or international law to achieve strategic, operational, or tactical objectives).

⁶⁴ See *id.*; see also Dean Cheng, Senior Advisor, U.S. Institution for Peace, Speech at Duke University School of Law 29th Annual National Security Law Conference: Update on China: Lawfare Technology and More (Feb. 23, 2024), <https://bit.ly/3Yf0ZRr>.

⁶⁵ See Peter Nicholas, Paul Beckett, & Gerald F. Seib, *Trump Open to Shift on Russia Sanctions, "One China" Policy*, WALL ST. J. (Jan.13, 2017), <https://on.wsj.com/3BJIBYX>; see also *The Great Obfuscation of One-China*, *supra* note 11 (Former President Trump stated: "I don't know why we have to be bound by a one-China policy," only to later walk back his comments.).

agreeable cross Strait outcome. Under this policy, the United States recognizes the People's Republic of China as the sole legal government of China and acknowledges the Chinese position that Taiwan is part of China. As required by the Taiwan Relations Act, the United States continues to provide Taiwan with arms of a defensive character and maintains the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people of Taiwan. The United States also upholds the Six Assurances on U.S. policy toward Taiwan.⁶⁶

A. *The Three Communiqués*

The three communiqués between the United States and P.R.C. are doctrinal statements of U.S. policy signed in 1972, 1978, and 1982 under three different U.S. Presidents.⁶⁷ These statements serve as nonbinding political commitments to express diplomatic intentions and are not legally binding agreements under domestic or international law.⁶⁸ The P.R.C. has sought to manipulate the U.S. communiqués to suit their version of the One China Principle, whereas the United States views them as diplomatic notes and statements of future policy.

The 1972 *Shanghai communiqué* became the first and pivotal step toward normalization between the United States and the P.R.C., and ensured the P.R.C. government would be the primary sovereign entity in international organizations.⁶⁹ In President Nixon's historic trip to China, the communiqué summarized the dialogue between the two countries. The P.R.C. clarified its position that it "is the sole legal government of China [and that] Taiwan is a province of China."⁷⁰ The U.S. position "acknowledge[d] that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan

⁶⁶ *Nomination of Rex Tillerson to be Secretary of State: Hearing on Nomination of Rex Tillerson Before the S. Comm. on Foreign Relations*, 2017 S. Hrg. 115-4, 1st Sess. (Secretary-Designate Tillerson's Answers to Questions from Senator Cardin, S. Comm. on Foreign Relations). <https://bit.ly/4itmc1O>.

⁶⁷ SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF10275, TAIWAN: BACKGROUND AND U.S. RELATIONS 2 (2024), <https://bit.ly/4etpTIO>.

⁶⁸ Julian Ku, *President Trump Can Legally End the One China Policy and Station U.S. Troops in Taiwan*, LAWFARE (Jan. 17, 2017, 2:10 PM), <https://bit.ly/4ex4FDI> (describing how China implies these communiqués are binding international agreements and offers that the United States adheres to their One China Principle).

⁶⁹ See BUSH, *supra* note 10, at 11–12.

⁷⁰ JOINT COMMUNIQUÉ BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA (SHANGHAI COMMUNIQUÉ), China-U.S., Feb. 27, 1972, WILSON CENTER DIGIT. ARCHIVE, <https://bit.ly/3Ya1ig6>.

is part of China [and] the [United States] does not challenge that position,” and that the United States “reaffirm[ed] its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.”⁷¹ In other words, the United States acknowledged and did not challenge the P.R.C.’s position that there is but one China and Taiwan is a part of China.⁷²

The 1978 *normalization communiqué* provided not only an official recognition of diplomatic relations between the United States and the P.R.C., but also confirmation that the U.S. would “maintain cultural, commercial, and other unofficial relations with Taiwan.”⁷³ In this communiqué, the United States “recognize[d] the Government of the [P.R.C.] as the sole legal Government of China,” which formalized their official relations.⁷⁴ Secondly, the United States removed the “does not challenge” language from the 1972 *Shanghai communiqué* and simply “acknowledge[d] the Chinese position that there is but one China and Taiwan is part of China.”⁷⁵ By merely acknowledging the Chinese position, rather than not challenging the position, the United States held no position on the matter.⁷⁶ However, during the negotiations, U.S. diplomats allowed the P.R.C. to use the stronger verb “recognize” in the Chinese text of the communiqué, which caused tensions later.⁷⁷ Shortly thereafter, President Carter announced the termination of the U.S.-R.O.C. mutual defense treaty.⁷⁸

The 1982 *arms communiqué* allowed the United States and the P.R.C. to reaffirm the 1972 and 1978 communiqués under President Ronald Reagan. Additionally, the Taiwan Relations Act put a major strain on initial U.S.-P.R.C. relations, so this communiqué sought to address some of those issues.⁷⁹ President

⁷¹ *Id.*

⁷² See Liff & Lin, *supra* note 30, at 984 (discussing that the United States did not support the “one China, one Taiwan” or “two Chinas” framework).

⁷³ President James Earl Carter, Address to the Nation, in 1 FOREIGN RELATIONS OF THE UNITED STATES, 1977–1980 (Dec. 15, 29178), <https://bit.ly/4dvzqHX> (quoting the final text of the joint communiqué), JOINT COMMUNIQUE BETWEEN THE UNITED STATES AND THE PEOPLE’S REPUBLIC OF CHINA (NORMALIZATION COMMUNIQUE), China-U.S., Dec. 15, 1979, AMERICAN INSTITUTE TAIWAN, <https://bit.ly/4ja9w0v>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Michael J. Green & Bonnie S. Glaser, *What Is the U.S. “One China” Policy, and Why Does it Matter?*, CTR. FOR STRATEGIC & INT’L STUD. (Jan. 13, 2017), <https://bit.ly/3zNgIO0> (Then-Deputy Secretary of State Warren Christopher stating that, “[W]e regard the English text as being the binding text. We regard the word ‘acknowledge’ as being the word that is determinative for the U.S.”); Victor H. Li, *The Law of Non-Recognition: The Case of Taiwan*, 1 NW. J. INT’L L. & BUS. 134, 137 n.12 (1979) (Professor Victor Li testified before the U.S. Senate Committee on Foreign Relations about the linguistic discrepancy of the Chinese versions of the word “acknowledge.” *Ch’eng-jen* carries a strong connotation of acceptance or agreement whereas *jen-shih* is more similar to the English version of acknowledge, or take note of.).

⁷⁷ BUSH, *supra* note 10, at 13.

⁷⁸ LAWRENCE, *supra* note 4, at 1.

⁷⁹ See *id.*; See *infra* Part III.C.

Reagan reiterated the English version of the 1978 *normalization communiqué* (using “acknowledge” rather than “recognize”) and stated to Congress that the United States took no position on Taiwan’s sovereignty.⁸⁰ The United States noted its intention to gradually reduce the sale of arms to Taiwan on the condition that the P.R.C. settle the Taiwan matter via peaceful means.⁸¹ Lastly, the United States declared no intention of pursuing a policy of two Chinas (one China, one Taiwan).⁸²

B. The Six Assurances

President Reagan provided six assurances to Taiwan before the release of the 1982 *arms communiqué*, which sought to clarify communiqué negotiations.⁸³ The assurances were as follows:

1. The United States had not agreed to set a date for ending arms sales to the R.O.C;
2. The United States had not agreed to hold prior consultations with the P.R.C. regarding arms sales to the R.O.C;
3. The United States would not play a mediation role between the P.R.C. and the R.O.C;
4. The United States would not revise the Taiwan Relations Act;
5. The United States had not altered its position regarding sovereignty over Taiwan;
6. The United States would not exert pressure on the R.O.C. to enter negotiations with the P.R.C.⁸⁴

C. The Taiwan Relations Act

On April 10, 1979, Congress passed the Taiwan Relations Act (T.R.A.), intending to respond to P.R.C. recognition with a commitment of an “unofficial relationship” with the “people of Taiwan.”⁸⁵ The T.R.A. allows the United States to continue its relationship with Taiwan via the American Institute of Taiwan,

⁸⁰ See BUSH, *supra* note 10, at 13.

⁸¹ *The August 17, 1982 U.S.-China Communiqué on Arms Sales to Taiwan*, U.S. DEP’T. STATE: OFF. OF THE HISTORIAN, <https://bit.ly/4exRnGT> [hereinafter *The August 17, 1982 U.S.-China Communiqué*]; see also *Declassified Cables: Taiwan Arm Sales & Six Assurances (1982)*, AM. INST. IN TAIWAN (Mar. 30, 2022), <https://bit.ly/3BzkAmk>.

⁸² *The August 17, 1982 U.S.-China Communiqué*, *supra* note 81; see also LAWRENCE, *supra* note 4.

⁸³ See generally SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF11665, PRESIDENT REAGAN’S SIX ASSURANCES TO TAIWAN (2024).

⁸⁴ *Id.* at 1; see also Green & Glaser, *supra* note 76.

⁸⁵ Steven M. Goldstein, *Understanding the One China Policy*, BROOKINGS (Aug. 31, 2023), <https://bit.ly/47SKpdf>; Taiwan Relations Act, H.R.2479, 96th Cong. (1979), <https://bit.ly/3PhXhRu>.

while also providing significant U.S. security and commercial guarantees.⁸⁶ The T.R.A. states that “the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability,” and it is U.S. policy “to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.”⁸⁷ In sum, the T.R.A. outlines that the United States will continue to provide Taiwan with arms of a defensive character and conveys an ambiguous political commitment to come to Taiwan’s defense if the P.R.C. were to attack the island by force.⁸⁸

The T.R.A. created *strategic ambiguity* by not specifying whether the United States would defend Taiwan in the event of a P.R.C. attack. Additionally, the T.R.A. provided a robust defense relationship between the United States and Taiwan, thus making the P.R.C. unsure about what would happen if it were to attack Taiwan militarily.⁸⁹ Since 2021, President Biden has stated on multiple occasions that the United States would defend Taiwan, appearing to abandon strategic ambiguity, although White House officials later said U.S. policy remains unchanged.⁹⁰

D. Additional Factors

In addition to the above, the One China Policy shifts slightly with each presidential administration. Under certain circumstances, U.S. presidents have reiterated portions of the One China Policy depending on the current geopolitical relationship with China and Taiwan. For example, President Bill Clinton reiterated “three Nos” in that the United States did not support: (1) two Chinas (or one China, one Taiwan); (2) Taiwan independence; and (3) Taiwan membership in international organizations when statehood was required.⁹¹

In 2023, the U.S. Deputy Secretary of State, Wendy Sherman, reiterated the U.S. One China Policy at a U.S. Senate Foreign Relations Committee hearing: “We remain committed to our long standing One China Policy and oppose any

⁸⁶ SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF10275, TAIWAN: BACKGROUND AND U.S. RELATIONS 1–2 (2024), <https://bit.ly/4etpTIO>.

⁸⁷ Taiwan Relations Act, *supra* note 85.

⁸⁸ BUSH, *supra* note 10, at 18; *see also* Hearing to Receive Testimony on U.S. Policy on Taiwan Before the S. For. Rel. Comm., Sub. Comm. on East Asia and the Pacific, 104th Cong. (Feb. 7, 1996), <https://bit.ly/3ZZNsy6> (statement of Winston Lord, Assistant Secretary of State for East Asian and Pacific Aff.) (The T.R.A. forms the basis of U.S. policy regarding the security of Taiwan.).

⁸⁹ CAMPBELL, *supra* note 19, at 2.

⁹⁰ LAWRENCE, *supra* note 83, at 2.

⁹¹ BUSH, *supra* note 10, at 12 (allowing the United States to still advocate for Taiwan internationally).

unilateral changes to the cross-strait status quo. Our policy has not changed. What has changed is Beijing's growing coercion. So we will keep assisting Taiwan in maintaining a sufficient self-defense capability."⁹² The United States does not recognize the P.R.C.'s One China Principle nor does it support Taiwan's independence, which is a common misconception about the One China Policy.

U.S. officials regularly state that the United States takes no position on the status of Taiwan, but that is incorrect, as the United States has never deviated from Taiwan's *undetermined* status set forth by President Truman.⁹³ Positing an undetermined status is distinct from taking no position on the matter. So, across the past two U.S. presidential administrations, the policy is on fragile grounds, with officials regularly misstating the policy, Western media misconstruing the policy, and Presidents Trump and Biden publicly displaying a lack of understanding, perhaps unintentionally.⁹⁴

V. THE ONE CHINA PRINCIPLE SURVEY FACTORS (SEE APPENDIX)

Since 1949, the P.R.C. has aggressively demanded adoption of the One China Principle. From 1970 to 1996, 123 countries established diplomatic ties with the P.R.C., but those countries have varied in their approach to whether China was recognized as the sole legitimate government of China and whether Taiwan was a part of China.⁹⁵ In 1996, Tzu-wen Lee categorized these diplomatic relationships into nine categories, and more recently, Chong Ja Ian of the Carnegie Endowment for International Peace, did the same but added another category for states that recognized the R.O.C.⁹⁶ The survey in the Appendix seeks to expand their efforts, identify any significant trends among various geopolitical factors, and offer ideas for further analysis.

In 2017, the former Taiwanese president Ma Ying-jeou identified three categories of countries regarding the One China Principle in his attempt to

⁹² Evaluating U.S.-China Policy in the Era of Strategic Competition Hearing Before the S. Foreign Relations Comm., 108th Cong. 118 (Feb. 9, 2023), <https://bit.ly/4gWnqlq> (reiterating the One China Policy, guided by the Taiwan Relations Act, the Three Joint Communiqués, and the Six Assurances).

⁹³ James Lee, *The One-China Policy in Transition*, SFS: GEO. J. INT'L AFF. (Nov. 7, 2022), <https://bit.ly/3Ngyi0a>.

⁹⁴ One idea is to change the name of the U.S. One China Policy as the term "One China" feeds into the P.R.C.'s narrative of tacit support of the One China Principle. The U.S. Policy on Cross-Strait Relations, U.S. Policy in the Taiwan Strait, or U.S. Cross-Strait Policy are possible examples. See, e.g., Michael E. O'Hanlon et al., *Should the United States Change Its Policies Toward Taiwan?*, BROOKINGS (Apr. 16, 2024), <https://bit.ly/3YdAV9k> (Kanapathy supports this idea); DRUN & GLASER, *supra* note 38, at 31; *The U.S.'s One-China Policy Explained*, ABC NEWS (Feb. 10, 2017, 5:26 AM), <https://bit.ly/3ZTbIC5> (describing how the U.S. media mischaracterizes the U.S. One China Policy as "recognizing" China's claims over Taiwan).

⁹⁵ Lee, *supra* note 18, at 357.

⁹⁶ *Id.* at 357–59; Chong, *supra* note 61.

overcome P.R.C. rhetoric that all states adhere to the stricter P.R.C. version of the One China Principle.⁹⁷ According to Ying-jeou, the categories of countries are classified as follows: (1) Countries that recognize P.R.C. claims that Taiwan is a province or part of China; (2) Countries that provide vague or ambiguous language about recognizing P.R.C. claims that Taiwan is a province or part of China; and (3) Countries that neglect to mention Taiwan whatsoever.⁹⁸ This classification of states is simpler than the Lee and Chong versions, but should be expanded to include countries that recognize the R.O.C.⁹⁹

A. Country

In his study, Lee reviewed 123 countries. This article expands the survey to include all 181 U.N. member states plus the Vatican, which officially recognizes Taiwan but only holds U.N. observer status.¹⁰⁰

B. One China Principle Scale

The One China Principle has two parts: (1) the position as to whether the P.R.C. is the sole legitimate government of China; and (2) the position as to whether Taiwan is a part of China. The scale here represents four Categories across a continuum of diplomatic preference between the P.R.C. and Taiwan. Lee addresses part (2), but I expanded his efforts here by including part (1), increasing the number of countries, and identifying other survey factors for consideration. Across the continuum, Category 1 countries are pro-P.R.C. and Category 4 countries are pro-R.O.C.

- Category 1 countries (light red color):
 - Recognize the P.R.C. as the sole legitimate government of China; and
 - Recognize Taiwan as part of China.
- Category 2 countries (light orange color):
 - Recognize the P.R.C. as the sole legitimate government of China; and
 - Express some type of vagueness (acknowledge, take note of, understand and respect) or remain silent as to whether Taiwan is a part of China.

⁹⁷ Ma Ying-jeou, Former President of Taiwan, Speech to Brookings Institution: Views from a Former President: Taiwan's Past, Present and Future (Mar. 7, 2017), <https://bit.ly/3ZTbUkN>.

⁹⁸ Drun, *supra* note 29.

⁹⁹ Lee, *supra* note 18, at 357–59.

¹⁰⁰ *Member States*, UNITED NATIONS, <https://bit.ly/3BCgPNa>. The Vatican, also known as the Holy See, is the government of the Roman Catholic Church led by the Pope. Along with Palestine, The Vatican is a non-member state of the U.N. and can observe the sessions and work of the United Nations. See *Non-Member-States*, UNITED NATIONS, <https://bit.ly/3TWfw1E>.

- Category 3 countries (light yellow color):
 - Remain silent as to whether the P.R.C. is the sole legitimate government of China; and
 - Remain silent as to whether Taiwan is a part of China.
- Category 4 countries (light green color):
 - Recognize Taiwan; and
 - Do not adhere to the One China Principle.

C. *One China Principle Position on China*

This column identifies part (1) of the One China Principle as to whether the P.R.C. is the sole legitimate government of China. Here, I used Chong's language: "Recognize PRC as sole legitimate government of China (or representing all Chinese people)."¹⁰¹ Those countries that recognize the P.R.C. government are listed as Category 1 and Category 2 countries as explained above. Category 3 countries contain no mention of the P.R.C. as the sole legitimate government of China, but often those countries established official relations before 1970 or are simply indifferent. Category 4 countries explicitly recognize Taiwan and maintain no official relations with the P.R.C. government.

D. *One China Principle Position on Taiwan*

This column identifies part (2) of the One China Principle as to whether Taiwan is a part of China. Again, I modified the language from Chong among the four categories.¹⁰² Category 1 countries recognize Taiwan as part of China, an explicit, pro-P.R.C. position. Category 2 countries are broad in their approach to part (2) of the One China Principle but offer a level of ambiguity as to whether Taiwan is a part of China. These Category 2 countries express varying levels of diplomatic parlance: acknowledge, take note of, understand and respect, or remain silent with no explicit mention of Taiwan's status. I combined this vague language into one category to explain that this large cohort of countries has been able to maintain official relations with the P.R.C. while still holding unofficial relations with Taiwan. Category 3 countries do not include any mention of Taiwan's status and Category 4 countries do not adhere to the One China Principle.

E. *Type of Government*

Each country's type of government listed is identified by the Central Intelligence Agency World Factbook.¹⁰³

¹⁰¹ Chong, *supra* note 61.

¹⁰² *See id.*

¹⁰³ *The World Factbook – Explore All Countries*, CENTRAL INTEL. AGENCY, <https://bit.ly/4gXyrmP>.

F. *Region*

Each country listed is identified as part of one of the six geographical regions from the U.S. Department of State.¹⁰⁴ Of particular note, 75 percent of Category 1 countries (pro-P.R.C.) are located in South and Central Asia.

G. *Gross Domestic Product (G.D.P.)*

A nation's G.D.P. at purchasing power parity exchange rates is the sum value of all goods and services produced in the country valued at prices prevailing in the United States dependent on the year. This is the measure most economists prefer when looking at per-capita welfare and when comparing use of resources across countries. The estimates here range from 2014 to 2023 based on current and available data.¹⁰⁵

H. *G.D.P. Per Capita*

This measurement, meant to identify a citizen's purchasing power, is calculated by dividing the G.D.P. of a country by its population. The dates of the estimates here range from 2015 to 2023 with a mean of \$17,500 in 2017 U.S. Dollars.¹⁰⁶

I. *China Foreign Investment*

This column identifies P.R.C. global investments through two databases: (1) the American Enterprise Institute (A.E.I.) China Global Investment Tracker and (2) the College of William & Mary's Global Chinese Development Finance dataset (AidData). In the event that a country's data was not captured from the A.E.I. China Global Investment Tracker which collected data from 2005 to 2023, I alternatively used AidData which spanned from 2000 to 2021. The data shows that the P.R.C. is the largest official source of international development financing.¹⁰⁷

J. *Belt and Road Initiative (B.R.I.)*

In 2013, Chinese president Xi Jinping proposed the B.R.I. in a speech at Nazarbayev University in Kazakhstan. Invoking Chinese ties to Central Asia, he sought to build economic development ties, regional cooperation, and strategic

¹⁰⁴ *Countries and Areas*, U.S. DEP'T STATE, <https://bit.ly/4eIYhce>.

¹⁰⁵ *The World Factbook – Real GDP (purchasing power parity)*, CENTRAL INTEL. AGENCY, <https://bit.ly/4gMk70a>.

¹⁰⁶ *The World Factbook – Real GDP per capita*, CENTRAL INTEL. AGENCY, <https://bit.ly/4gQROxN>.

¹⁰⁷ *China Global Investment Tracker*, AM. ENTER. INST., <https://bit.ly/3XTCwj5>; *Global Chinese Development Finance*, AIDDATA, <https://bit.ly/4gTUxpZ>.

partnerships.¹⁰⁸ Now, over a decade later the B.R.I. has expanded the P.R.C.'s international influence across the developing world by supporting an international network of infrastructure projects that have boosted trade and connectivity, transformed geopolitical environments, and increased China's political reach.¹⁰⁹ In 2023, China had more than 200 B.R.I. cooperation agreements with approximately 150 countries across five continents, yielding large infrastructure projects, small initiatives, and green B.R.I. ventures.¹¹⁰ Of the 181 countries listed in the Appendix, almost 90 percent of Category 1 countries are B.R.I. members, while 75 percent of Category 2 countries, 87 percent of Category 3 countries, and none of Category 4 countries are B.R.I. members.¹¹¹

K. Power Index

This column identifies a country's power status via numerical ranking. The power index includes the top 89 countries and was developed by the BAV Group and The Wharton School at the University of Pennsylvania and published by U.S. News & World Report.¹¹² A country's power calculation is based on leadership, economic influence, political influence, diplomatic alliances, and a strong military. Of the 11 Category 4 countries (plus the Vatican), only Guatemala is listed in the Power Index at number 64.¹¹³

L. Human Development Index (H.D.I.)

This column identifies a country's human development status from the U.N. Development Program. H.D.I. is a composite index measuring average achievement in three basic areas of human development: (1) a long and healthy life, (2) knowledge, and (3) a decent standard of living.¹¹⁴ H.D.I. is a more comprehensive approach than the power index model because the U.N. provides identification criteria and methodology of determining "developed" nations.¹¹⁵

¹⁰⁸ *President Xi Proposes Silk Road Economic Belt*, CHINADAILY.COM (Sep. 7, 2013), <https://bit.ly/3NffsGt>.

¹⁰⁹ Joseph Leahy, James Kygne, & Benjaming Parkin, *Ten Years of China's Belt and Road: What Has \$1tn Achieved?*, FIN. TIMES (Oct. 22, 2023), <https://on.ft.com/3XS8rjP>.

¹¹⁰ *Key Takeaways from BRI White Paper*, XINHUANET (Oct. 11, 2023), <https://bit.ly/4eyqgeS> (noting major B.R.I. projects such as the China-Pakistan Economic Corridor and the China-Mongolia-Russia Corridor); see also Spencer Feingold, *China's Belt and Road Initiative Turns 10*, WORLD ECON. F. (Nov. 20, 2023), <https://bit.ly/4exRUZp> (cleaner forms of infrastructure investment align with China's climate goals).

¹¹¹ *See Countries of the Belt and Road Initiative (BRI)*, GREEN BELT AND ROAD INITIATIVE CENTER, <https://bit.ly/3BD4Zml>.

¹¹² *Power*, U.S. NEWS & WORLD REPORT, <https://bit.ly/4eSg2pk>.

¹¹³ *See id.*

¹¹⁴ *Human Development Index (H.D.I.)*, UNITED NATIONS DEV. PROGRAMME (last visited Aug. 24, 2024), <https://bit.ly/4eyzOXj>.

¹¹⁵ *LDC Identification Criteria & Indication*, UNITED NATIONS DEP. OF ECON. AND SOCIAL AFF. (last visited Nov. 26, 2024), <https://bit.ly/3BXifC7>.

VI. THE ONE CHINA PRINCIPLE SURVEY RESULTS (SEE APPENDIX)

A. *World Powers Maintain Ties to Taiwan*

The most powerful countries fall in Category 2 (P.R.C. recognition and Taiwan ambiguity) and generally have strong, unofficial ties with Taiwan.¹¹⁶ These countries have higher G.D.P., G.D.P. per capita, power rankings, and H.D.I. scores than any of the other three categories. Most of these world powers maintain official relations with the P.R.C. and unofficial relations with Taiwan, and have not changed their positions on whether Taiwan is a part of China.¹¹⁷ While these countries recognize the P.R.C. as the sole legitimate government of China, many world powers do not accept the P.R.C.'s claim that Taiwan is a part of China and are able to maintain an ambiguous position on the Taiwan issue.¹¹⁸

B. *Countries That Recently Switched Official Relations to the P.R.C. Affirm That Taiwan is a Part of China*

For the past two decades, when a country switches official relations from the R.O.C. to the P.R.C., it immediately adopts the P.R.C. version of the One China Principle and affirms that Taiwan is an inalienable part of China.¹¹⁹ For example, in 2021 Nicaragua switched official relations from the R.O.C. to the P.R.C. government.¹²⁰ The joint communiqué stated that Nicaragua: “recognize[d] that there is only one China in the world, the Government of the People’s Republic of China is the only legitimate Government representing all of China, and Taiwan is an inalienable part of Chinese territory.”¹²¹ Therefore, it is likely that any countries that switch relations from the R.O.C. to the P.R.C. going forward will resemble a Category 1 (pro-P.R.C.) country and affirm that Taiwan is a part of China.

¹¹⁶ Fisher, *supra* note 13, at 126.

¹¹⁷ For example, Australia, Brazil, Canada, Iran, Italy, Japan, Saudi Arabia, South Korea, United Kingdom, United States, India, among others.

¹¹⁸ Liff & Lin, *supra* note 30, at 987–88.

¹¹⁹ This includes Nauru, Honduras, Nicaragua, Kiribati, Solomon Islands, Burkina Faso, Dominican Republic, El Salvador.

¹²⁰ MINISTRY OF FOREIGN AFFS. OF CHINA, COMUNICADO CONJUNTO ENTRE LA REPUBLICA POPULAR CHINA Y LA REPUBLICA DE NICARAGUA SOBRE EL RESTABLECIMIENTO DE RELACIONES DIPLOMATICAS [JOINT COMMUNIQUÉ BETWEEN THE PEOPLE’S REPUBLIC OF CHINA AND THE REPUBLIC OF NICARAGUA ON THE REESTABLISHMENT OF DIPLOMATIC RELATIONS], ONE CHINA POLICIES DATABASE (Dec. 10, 2021, 12:46 PM) (Esp.), <https://bit.ly/4gV8qEp> (translated to English).

¹²¹ *Id.*

C. *Countries That Recently Switched Official Relations to the P.R.C. Receive Economic Benefits*

Since 2016, eight of the ten countries to switch official relations from the R.O.C. to the P.R.C. have immediately entered into a B.R.I. agreement with the P.R.C. government.¹²² Most recently, Honduras switched relations in 2023 and secured a B.R.I. agreement later that year.¹²³ The same is true for Panama in 2017, El Salvador in 2018, the Solomon Islands in 2019, and so on.¹²⁴ Nauru is the latest country to switch diplomatic relations and has not yet established membership in the B.R.I., but one would expect that to occur very soon.¹²⁵

D. *Countries with Official Relations with the P.R.C. are Now Confirming That Taiwan is a Part of China*

Countries with long-standing, official relations with the P.R.C. are now confirming that Taiwan is an inalienable part of China. For example, Tanzania recognized the P.R.C. in 1961, but only recently reaffirmed its relationship, stating in the joint communiqué: “The Tanzanian side reaffirmed its firm commitment to the one-China principle [and] regards Taiwan as an inalienable part of China.”¹²⁶ The same language that “Taiwan is an inalienable part of China” holds true for Sri Lanka, Pakistan, Nepal, and Laos, among others. Accordingly, the P.R.C. is now focusing solely on a country’s position on whether Taiwan is a part of China because most countries in the world already recognize the P.R.C. as the government of China. Therefore, many countries that already have official relations with the P.R.C. may reaffirm their relationship by endorsing that Taiwan is a part of China.

E. *Category 1 Countries are Firmly Pro-P.R.C.*

Clearly, countries that adhere to both parts of the One China Principle are strong diplomatic partners of the P.R.C. government. The survey identified almost all Category 1 countries as official members of the B.R.I., receiving over \$300 billion in Chinese foreign investment since 2000. Additionally, Category 1

¹²² This includes Nauru, Honduras, Nicaragua, Kiribati, Solomon Islands, Dominican Republic, El Salvador, Burkina Faso, Republic of Panama, and Gambia. See *infra* Appendix. Of the 10 countries, Nauru and the Burkina Faso are the only two nations that have not joined the B.R.I. See *Countries of the Belt and Road Initiative (BRI)*, GREEN BELT AND ROAD INITIATIVE CENTER, <https://bit.ly/3BD4Zml>.

¹²³ See *infra* Appendix.

¹²⁴ *Id.*

¹²⁵ Ryan Woo, *Former Taiwan Ally Nauru Re-established Diplomatic Ties with China*, REUTERS (Jan. 24, 2024: 11:09 PM), <https://reut.rs/3TWW5WH>.

¹²⁶ See *infra* Appendix; see MINISTRY FOREIGN AFFS. CHINA, JOINT STATEMENT ON ESTABLISHING A COMPREHENSIVE STRATEGIC COOPERATIVE PARTNERSHIP BETWEEN THE PEOPLE’S REPUBLIC OF CHINA AND THE UNITED REPUBLIC OF TANZANIA (Nov. 3, 2022, 9:49 PM), <https://bit.ly/4eo0z0B>.

countries coalesce around common issues in international organizations and have demonstrated significant international political influence.¹²⁷

F. *Category 4 Countries are Geopolitically Weak and Concentrated in Latin America*

Countries that recognize Taiwan and do not adhere to the One China Principle have lower G.D.P., below average G.D.P. per capita, lower power rankings, and lower H.D.I. scores. Seven out of eleven Category 4 countries are located in Latin America, which may explain China's recent push to expand the B.R.I. there and foster new economic agreements in the Americas region.¹²⁸ Two of the eleven Category 4 countries (Marshall Islands and Palau) maintain a special defense relationship with the United States called the Compact of Free Association.

VII. FUTURE ANALYSIS

The diplomatic relationships of Taiwan and China are complex, economically interdependent, and ever-changing. Given the associated trends with the One China Principle, it is likely that all countries that currently recognize the R.O.C. will eventually switch their official relations to the P.R.C. government. Those countries will likely become B.R.I. members, which will provide access to large amounts of Chinese foreign investment, economic, financial, and digital infrastructure, and even political power.

This One China Principle survey focuses on the language of the One China Principle in two parts, type of government, region, G.D.P., G.D.P. per capita, foreign investment, B.R.I. membership, power, and H.D.I. factors. Additional factors worth considering include defense spending, population trends, corruption propensity, or other diplomatic and socioeconomic characteristics. A more focused review into the complexities and financing of the B.R.I. would be helpful, especially given the impacts of the COVID-19 pandemic. Given that China has strengthened its diplomatic ties significantly with the Global South, including Latin America, extensive examination into the specific economic and financial relationships there could be analyzed further.

¹²⁷ See John Feng, *China Backed by 65 Nations on Human Rights Despite Xinjiang Concerns*, NEWSWEEK (Jun. 23, 2021, 08:25 AM), <https://bit.ly/4eVsdSB>.

¹²⁸ See *What does China want from Latin America and the Caribbean?* ECONOMIST (Jun. 17, 2023), <https://econ.st/3TWgdYO> (describing how the P.R.C. became Latin America's top trading partners from \$12 billion to \$445 billion over two decades); see Didi Kirsten Tatlow, *China Building New Outpost on U.S. Doorstep, Leaked Documents Reveal*, NEWSWEEK (Apr. 19, 2024), <https://bit.ly/3XXvMAy>.

VIII. CONCLUSION

The history and meaning of “One China” can be difficult to grasp. Today, the P.R.C. uses the concept of “One China” via its One China Principle to advance its authoritarian and expansionist vision. Even though the R.O.C. has generally abandoned the term, “One China” remains embedded linguistically in the U.S. One China Policy and is a critical link to maintaining peace, stability, and economic prosperity in the Taiwan Strait.

While many foreign policy observers disagree on the current practicality of the One China Policy, it remains clear that other countries’ One China policies show significant trends in favor of the P.R.C. government.¹²⁹ The remaining eleven countries that recognize the R.O.C. are likely to switch to the P.R.C. in the near future, secure economic benefits, and reinforce the P.R.C. rhetoric of the One China Principle that Taiwan is a part of China. Other countries are expected to reinforce their diplomatic relationship with Beijing and adhere more strongly to the One China Principle – further isolating Taiwan. Despite these trends, some of the most powerful countries still hold strong ties to Taiwan, while maintaining a politically ambiguous status.

The P.R.C. is notorious for playing long game diplomacy to reclaim its former dynastic glory. The One China Principle is a form of institutional lawfare designed to convince states to ultimately accept that Taiwan is a part of China. The United States, in particular, given its outsized role in Taiwan-China relations, cannot allow the P.R.C. to dictate how the world views Taiwan. A whole-of-government effort could coalesce neatly under a counter-lawfare concept to confront and challenge the P.R.C.’s manipulation of the One China Principle.¹³⁰ Disciplined and diplomatic resiliency, supported by continued ambiguity with other like-minded countries, will serve to counter the P.R.C.’s incremental encroachment in the Indo-Pacific region and sustain a peaceful status quo.

¹²⁹ See Richard Haass and David Sacks, *American Support for Taiwan Must be Unambiguous*, FOREIGN AFFS. (Sep. 2, 2020), <https://fam.ag/3XT3pne>; see also Thomas J. Christensen et al., *How to Avoid a War Over Taiwan*, FOREIGN AFFS. (Oct. 13, 2022), <https://fam.ag/4gQjldd>; *Why the Absurd One-China Policy Must be Upheld*, ECONOMIST (Mar. 9, 2017), <https://econ.st/4gV8Med>; Gordon, *supra* note 28, at 71.

¹³⁰ Bill Gertz, *Pacific Command Legal Office Prepares Military Forces For Future Fight With China*, WASHINGTON TIMES (Feb. 6, 2024), <https://bit.ly/4gVsG9e> (identifies military lawyers conducting counter legal warfare and information operations designed to prevent China from achieving its military objectives); see *J06 Office of the Staff Judge Advocate*, U.S. INDO-PACIFIC COMMAND, <https://bit.ly/4gT1qIa> (Counter-lawfare is a cross-functional concept that encompasses a range of functions centered on the law and enhancing legitimacy of the U.S. Indo-Pacific Command’s activities while exposing flawed legal narratives and illuminating activities of those who challenge the rules-based international order and a free and open Indo-Pacific.).

APPENDIX THE ONE CHINA PRINCIPLE SURVEY

Country	One China Principle Scale	Date of Official Relations with P.R.C. ¹	One China Principle Position on China's Govt. ¹	One China Principle Position on Taiwan [#]	Type of Govt.	Region	GDP	GDP per capita	P.R.C. Foreign Investment	BRI	Power Index	HDI	Comments
Albania	1	1949	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$43 Billion	\$15,500	\$7.8 million	Yes		74	
Andorra	1	1994	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Democracy	Europe and Eurasia	\$3 Billion	\$49,900	No data	No		35	
Angola	1	1983	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$210 Billion	\$5,900	\$3.79 billion	Yes		150	
Antigua and Barbuda	1	1983	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$2 Billion	\$22,300	\$23.97 million	Yes		54	
Armenia	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Democracy	Europe and Eurasia	\$45 Billion	\$16,100	\$44.7 million	Yes		76	
Azerbaijan	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Europe and Eurasia	\$153 Billion	\$15,100	\$312.2 million	Yes	57	89	
Bahamas	1	1997	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$14 Billion	\$34,700	\$2.4 million	No		57	
Belarus	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic In Fact A Dictatorship	Europe and Eurasia	\$176 Billion	\$19,100	\$400 million	Yes	30	69	
Bolivia	1	1985	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Western Hemisphere	\$101 Billion	\$8,200	\$2 billion	Yes		120	
Bosnia and Herzegovina	1	1995	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$54 Billion	\$16,700	\$1 billion	Yes		80	

Botswana	1	1975	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Sub-Saharan Africa	\$41 Billion	\$15,500	\$2 billion	Yes	114	
Costa Rica	1	2007	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Western Hemisphere	\$114 Billion	\$22,100	\$1.1 billion	Yes	74	64
Croatia	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$132 Billion	\$34,300	\$<1 billion or \$220 million	Yes	79	39
Czechia (also known as the Czech Republic)	1	1949	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$438 Billion	\$41,100	\$1 billion	Yes	66	32
Dominica	1	2004	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Western Hemisphere	\$1 Billion	\$11,500	\$310 million	Yes	97	
Dominican Republic	1	2018	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Western Hemisphere	\$217 Billion	\$19,300	\$194 million	Yes	75	82
												Switched to P.R.C. in 2018 ¹ BR1 in 2019
El Salvador	1	2018	Recognize P.R.C. as sole legitimate government of China (or representing all Chinese people) [hereinafter "Recognize P.R.C. government"]	Recognize Taiwan as part of China (province or inalienable part) [hereinafter "Recognize Taiwan as part of China"]	Presidential Republic	Western Hemisphere	\$60 Billion	\$9,400	\$310 million	Yes	60	127
												Switched to P.R.C. in 2018 ² BR1 in 2018
Eritrea	1	1993	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$10 Billion	\$1,600	\$950 million	Yes	175	

Estonia	1	1991	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$51 Billion	\$37,700	No data	Yes	87	31	
France	1	1964	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	Europe and Eurasia	\$3,120 Billion	\$45,900	\$35 billion	No	7	28	
Gambia	1	1974	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$6 Billion	\$2,100	\$214 million	Yes		174	Switched back to P.R.C. in 2016
Georgia	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	Europe and Eurasia	\$63 Billion	\$17,100	\$370 million	Yes		60	Switched back to P.R.C. in 2016
Guinea Bissau	1	1974	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	Sub-Saharan Africa	\$4 Billion	\$1,900	\$170 million	Yes		179	
Honduras	1	2023	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Western Hemisphere	\$60 Billion	\$5,700	\$450 million	Yes	72	138	Switched to P.R.C. in 2023
Israel	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Democracy	Near East (Middle East and Northern Africa)	\$424 Billion	\$44,400	\$5.7 billion	No	11	25	
Jordan	1	1977	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Constitutional Monarchy	Near East (Middle East and Northern Africa)	\$107 Billion	\$9,500	\$2 billion	Yes	61	99	

Kazakhstan	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	South and Central Asia	\$512 Billion	\$26,100	\$20 billion	Yes	50	67	
Kyrgyzstan	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	South and Central Asia	\$35 Billion	\$5,100	\$860 million	Yes		117	
Latvia	1	1991	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$62 Billion	\$33,000	No data	Yes	86	37	
Lesotho	1	1983	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Constitutional Monarchy	Sub-Saharan Africa	\$5 Billion	\$2,200	\$513 million	Yes		168	
Lithuania	1	1991 ¹⁸	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	Europe and Eurasia	\$113 Billion	\$40,000	No data	Yes	84	37	
Malawi	1	2007 ¹⁹	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$30 Billion	\$1,500	\$100 million	Yes		172	
Maldives	1	1972	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	South and Central Asia	\$11 Billion	\$21,300	\$100 million	Yes		87	
Madova (Republic of)	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$34 Billion	\$13,300	\$82 million	Yes		86	
Montenegro	1	2006	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$14 Billion	\$22,100	\$100 million	Yes		50	

Namibia	1	1990	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$25 Billion	\$9,800	\$4 billion	Yes	142	
Nauru	1	2024	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	East Asia and the Pacific	<\$1 Billion	\$11,000	\$5 million	No	122	Switched to P.R.C. in 2024 ⁴
Nicaragua	1	1985	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Western Hemisphere	\$40 Billion	\$5,800	\$300 million	Yes	130	Switched back to P.R.C. in 2021 ⁵ BRI in 2022
Niger	1	1974	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	Sub-Saharan Africa	\$33 Billion	\$1,300	\$6 billion	Yes	189	
North Macedonia	1	2001	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$35 Billion	\$17,100	\$1.4 billion	Yes	83	Switched to P.R.C. in 2002 ⁶ BRI in 2013
Panama	1	2017	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Western Hemisphere	\$147 Billion	\$33,300	\$310 million	Yes	65	Switched to P.R.C. in 2017 ⁷ BRI in 2017
Poland	1	1949	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$1,888 Billion	\$37,700	\$1 billion	Yes	37	36
Portugal	1	1979	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	Europe and Eurasia	\$372 Billion	\$35,800	\$9 billion	Yes	39	42

Romania	1	1949	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	Europe and Eurasia	\$619 Billion	\$32,500	\$888 million	Yes	78	53	
Serbia	1	1949	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$139 Billion	\$20,900	\$5 billion	Yes	71	65	
Slovakia (also known as the Slovak Republic)	1	1949 ^a	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$180 Billion	\$33,200	\$130 million	Yes	85	45	
Slovenia	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Europe and Eurasia	\$87 Billion	\$41,000	\$1 billion	Yes	83	22	
Solomon Islands	1	2019	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Democracy Under A Constitutional Monarchy: A Commonwealth Realm	East Asia and the Pacific	\$2 Billion	\$2,200	\$200 million	Yes		156	Switched to P.R.C. in 2019 ^a
South Africa	1	1998	Recognize P.R.C. government	Recognize Taiwan as part of China	Parliamentary Republic	Sub-Saharan Africa	\$807 Billion	\$13,500	\$11 billion	Yes	29	110	
South Sudan	1	2011	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$20 Billion	\$1,600	\$6 billion	Yes		192	
Sudan	1	1959	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$167 Billion	\$3,600	\$260 million	Yes		170	
Switzerland	1	1950	Recognize P.R.C. government	Recognize Taiwan as part of China	Federal Republic (Formerly A Confederation)	Europe and Eurasia	\$634 Billion	\$72,200	\$62 billion	No	21	1	

Tajikistan	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	South and Central Asia	\$41 Billion	\$4,100	\$1 billion	Yes		126	
Timor-Leste	1	2002	Recognize P.R.C. government	Recognize Taiwan as part of China	Semi-Presidential Republic	East Asia and the Pacific	\$5 Billion	\$3,900	\$113 million	Yes		155	
Tonga	1	1998	Recognize P.R.C. government	Recognize Taiwan as part of China	Constitutional Monarchy	East Asia and the Pacific	\$1 Billion	\$6,100	\$427 million	Yes		98	
Turkmenistan	1	1992	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	South and Central Asia	\$95 Billion	\$14,700	\$2 billion	Yes		94	
Uganda	1	1962	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$108 Billion	\$2,300	\$3 billion	Yes		159	
Viet Nam	1	1950	Recognize P.R.C. government	Recognize Taiwan as part of China	Communist State	East Asia and the Pacific	\$1,119 billion	\$11,400	\$10 billion	Yes	27	107	
Burkina Faso	1	2018	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	Sub-Saharan Africa	\$49 Billion	\$2,200	\$447 million	No		185	Switched to P.R.C. in 2018 ⁹ BRI TBD
Kiribati	1	1980	Recognize P.R.C. government	Recognize Taiwan as part of China	Presidential Republic	East Asia and the Pacific	<\$1 Billion	\$2,000	\$161 million	Yes		137	Switched back to P.R.C. in 2019 ⁹ BRI in 2020

Russian Federation	1	1949	Respects and supports the position of the P.R.C. over Taiwan	Respects and supports the position of the P.R.C. over Taiwan	Semi-Presidential Federation	Europe and Eurasia	\$4,027 Billion	\$27,500	\$34 billion	Yes	3	56	While "respects and supports" are similar to "understands and respects" Russia has made clear that it is a support of the One China Principle
Bulgaria	1	1949 ¹	Recognizes the P.R.C.	Recognize Taiwan as part of China ²	Parliamentary Republic	Europe and Eurasia	\$174 Billion	\$27,000	\$120 million	Yes	82	70	
Cambodia	1	1958	Recognizes the P.R.C.	Recognize Taiwan as part of China ³	Parliamentary Constitutional Monarchy	East Asia and the Pacific	\$76 Billion	\$4,500	\$13 Billion	Yes	62	148	
Laos People's Democratic Republic (Laos)	1	1961 ⁴	Recognizes the P.R.C.	Recognize Taiwan as part of China ⁵	Communist State	East Asia and the Pacific	\$60 Billion	\$7,900	\$16 Billion	Yes		139	Countries who recognized the P.R.C. decades ago are now coming out with statements that Taiwan is an inalienable part of China
Nepal	1	1955 ⁶	Recognizes the P.R.C.	Recognize Taiwan as part of China ⁷	Federal Parliamentary Republic	South and Central Asia	\$122 Billion	\$4,000	\$1 billion	Yes		146	Countries who recognized the P.R.C. decades ago are now coming out with statements that Taiwan is an inalienable part of China

North Korea (Democratic People's Republic of Korea)	1	1949	Recognizes the P.R.C.	Unknown	Dictatorship, Single-party State	East Asia and the Pacific	\$40 Billion	\$1,700	\$2 billion	No			China is North Korea's closest ally, so they are listed here in Category 1
Pakistan	1	1951 ¹⁹	Recognizes the P.R.C.	Recognize Taiwan as part of China ²⁰	Federal Parliamentary Republic	South and Central Asia	\$1,268 Billion	\$5,400	\$16 billion	Yes		164	Countries who recognized the P.R.C. decades ago are now coming out with statements that Taiwan is an inalienable part of China
Sri Lanka	1	1957	Recognizes the P.R.C.	Recognize Taiwan as part of China ²¹	Presidential Republic	South and Central Asia	\$271 Billion	\$12,200	\$4 billion	Yes	53	78	Countries who recognized the P.R.C. decades ago are now coming out with statements that Taiwan is an inalienable part of China
Tanzania, United Republic of	1	1961 ²²	Recognizes the P.R.C.	Recognize Taiwan as part of China ²³	Presidential Republic	Sub-Saharan Africa	\$167 Billion	\$2,600	\$1 billion	Yes		167	Countries who recognized the P.R.C. decades ago are now coming out with statements that Taiwan is an inalienable part of China
Zambia	1	1964 ²⁴	Recognizes the P.R.C.	Recognize Taiwan as part of China ²⁵	Presidential Republic	Sub-Saharan Africa	\$67 billion	\$3,400	\$4 billion	Yes		153	Countries who recognized the P.R.C. decades ago are now coming out with statements that Taiwan is an inalienable part of China

Argentina	2	1972	Recognize P.R.C. government	"Take note of" P.R.C. claim over Taiwan	Presidential Republic	Western Hemisphere	\$1,039 Billion	\$22,500	\$1.7 billion	Yes	47	48	
Australia	2	1972	Recognize P.R.C.'s government	"Acknowledge" P.R.C.'s claim over Taiwan	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth	East Asia and the Pacific	\$1,329 Billion	\$51,100	\$106 Billion	No	17	10	
Austria	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Federal Parliamentary Republic	Europe and Eurasia	\$565 Billion	\$55,900	\$1 Billion	Yes	38	22	
Barbados	2	1977	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Parliamentary Republic; A Commonwealth	Western Hemisphere	\$4 Billion	\$15,400	\$243 million	Yes		62	
Belgium	2	1971	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Federal Parliamentary Democracy Under A Constitutional Monarchy	Europe and Eurasia	\$623 Billion	\$53,300	\$5 billion	No	28	12	
Benin	2	1964	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$46 Billion	\$3,400	\$3 billion	Yes		173	
Brazil	2	1974	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Federal Presidential Republic	Western Hemisphere	\$3,250 Billion	\$15,100	\$71 billion	No	19	89	
Cameroun	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$104 Billion	\$3,700	\$9 billion	Yes		151	
Canada	2	1970	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth	Western Hemisphere	\$1,907 Billion	\$49,000	\$58 billion	No	13	18	
Chad	2	1972	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$25 Billion	\$1,400	\$2 billion	Yes		189	

Chile	2	1970	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Presidential Republic	Western Hemisphere	\$507 Billion	\$25,500	\$18 billion	Yes	55	44	
Colombia	2	1980	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Presidential Republic	Western Hemisphere	\$810 Billion	\$15,600	\$7 billion	No	44	91	
Comoros	2	1975	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Federal Presidential Republic	Sub-Saharan Africa	\$3 Billion	\$3,200	\$302 million	Yes		152	
Cote d'Ivoire	2	1983	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Presidential Republic	Sub-Saharan Africa	\$156 Billion	\$5,500	\$7 billion	Yes		166	
Cyprus	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Europe and Eurasia	\$41 Billion	\$45,000	No data	Yes	81	29	
Denmark	2	1950	Recognize P.R.C. government	"Understands and respects" P.R.C.'s claim over Taiwan	Parliamentary Constitutional Monarchy	Europe and Eurasia	\$354 Billion	\$59,500	\$730 million	No	32	5	
Djibouti	2	1979	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$6 Billion	\$5,000	\$700 million	Yes		171	
Ecuador	2	1980	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Presidential Republic	Western Hemisphere	\$195 Billion	\$10,500	\$6 billion	Yes	68	83	
Equatorial Guinea	2	1970	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$25 Billion	\$14,900	\$9 billion	Yes		133	

Ethiopia	2	1970	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Federal Parliamentary Republic	Sub-Saharan Africa	\$294 Billion	\$2,400	\$2 billion	Yes		176	
Fiji	2	1975	Recognize P.R.C. government	"Acknowledge" P.R.C.'s claim over Taiwan	Parliamentary Republic	East Asia and the Pacific	\$12 Billion	\$12,400	No data	Yes		104	
Gabon	2	1974	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$33 Billion	\$13,900	\$400 million	Yes		123	
Greece	2	1972	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Parliamentary Republic	Europe and Eurasia	\$331 Billion	\$31,700	\$9 billion	Yes	43	33	
Grenada	2	1985	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$2 Billion	\$14,500	\$490 million	Yes		73	
Guyana	2	1972	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Parliamentary Republic	Western Hemisphere	\$29 Billion	\$35,600	\$5 billion	Yes		95	
Hungary	2	1949	Recognize P.R.C. government	"Understands and respects" P.R.C.'s claim over Taiwan	Parliamentary Republic	Europe and Eurasia	\$341 Billion	\$35,400	\$8 billion	Yes	67	47	
Iceland	2	1971	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Unitary Parliamentary Republic	Europe and Eurasia	\$21 Billion	\$55,600	No data	No		3	
Indonesia	2	1950	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	East Asia and the Pacific	\$3,419 Billion	\$12,400	\$44 billion	Yes	36	112	

Iran	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Theocratic Republic	Near East (Middle East and Northern Africa)	\$1,369 Billion	\$15,500	\$5 billion	Yes	18	78	
Ireland	2	1979	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Parliamentary Republic	Europe and Eurasia (Africa)	\$577 Billion	\$112,400	\$8 billion	No	48	7	
Italy	2	1970	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Parliamentary Republic	Europe and Eurasia	\$2,611 Billion	\$44,300	\$24 billion	No	16	30	
Jamaica	2	1972	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Parliamentary Democracy (Parliament) Under Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$29 Billion	\$10,100	\$1 billion	Yes		115	
Japan	2	1972	Recognize P.R.C. government	"Understands and respects" P.R.C.'s claim over Taiwan	Parliamentary Constitutional Monarchy	East Asia and the Pacific	\$5,210 Billion	\$41,600	\$13 billion	No	8	24	
Kuwait	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Constitutional Monarchy (Emirate)	Near East (Middle East and Northern Africa)	\$211 Billion	\$49,400	\$650 million	Yes		49	
Lebanon	2	1971	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Parliamentary Republic	Near East (Middle East and Northern Africa)	\$73 Billion	\$13,000	\$490 million	Yes	49	109	
Liberia	2	1977	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$8 Billion	\$1,500	\$520 million	Yes		177	
Luxembourg	2	1972	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Constitutional Monarchy	Europe and Eurasia	\$77 Billion	\$117,700	\$5 billion	Yes	45	20	

Madagascar	2	1972	Recognize P.R.C. government	No mention of Taiwan's sovereignty	explicit of	Semi-Presidential Republic	Sub-Saharan Africa	\$44 Billion	\$1,500	\$140 million	Yes		178	
Malaysia	2	1974	Recognize P.R.C. government	"Acknowledge" P.R.C.'s claim over Taiwan		Federal Parliamentary Constitutional Monarchy	East Asia and the Pacific	\$963 Billion	\$28,400	\$24 billion	Yes	42	63	
Malta	2	1972	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan		Parliamentary Republic	Europe and Eurasia	\$26 Billion	\$48,600	\$440 million	Yes		25	
Mauritius	2	1972	Recognize P.R.C. government	No mention of Taiwan's sovereignty	explicit of	Parliamentary Republic	Sub-Saharan Africa	\$29 Billion	\$22,800	\$740 million	Yes		72	
Micronesia (Federated States of)	2	1989	Recognize P.R.C. government	No mention of Taiwan's sovereignty	explicit of	Federal Republic In Association With The US	East Asia and the Pacific	<\$1 Billion	\$3,200	\$204 million	Yes		135	
Netherlands (Kingdom of the)	2	1972	Recognize P.R.C. government	"Respects" P.R.C.'s claim that <i>Taiwan is a province of the P.R.C.</i>		Parliamentary Constitutional Monarchy: Part Of The Kingdom Of The Netherlands	Europe and Eurasia	\$1,049 Billion	\$59,200	\$22 billion	No	25	10	
New Zealand	2	1972	Recognize P.R.C. government	"Acknowledge" P.R.C.'s claim over Taiwan		Parliamentary Democracy Under A Constitutional Monarchy: A Realm	East Asia and the Pacific	\$232 Billion	\$45,200	\$4 billion	Yes	31	16	
Nigeria	2	1971	Recognize P.R.C. government	No mention of Taiwan's sovereignty	explicit of	Federal Presidential Republic	Sub-Saharan Africa	\$1,085 Billion	\$5,000	\$7 billion	Yes		160	
Norway	2	1954	Recognize P.R.C. government	No mention of Taiwan's sovereignty	explicit of	Parliamentary Constitutional Monarchy	Europe and Eurasia	\$368 Billion	\$67,500	\$8 billion	No	35	2	

Oman	2	1978	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Absolute Monarchy	Near East (Middle East and Northern Africa)	\$162 Billion	\$35,300	\$2 billion	Yes	56	59	
Peru	2	1971	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Presidential Republic	Western Hemisphere	\$434 Billion	\$12,700	\$28 billion	Yes	70	87	
Philippines	2	1975	Recognize P.R.C. government	"Understands and respects" P.R.C.'s claim over Taiwan	Presidential Republic	East Asia and the Pacific	\$992 Billion	\$6,600	\$7 billion	Yes	46	113	
Rwanda	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$33 Billion	\$2,400	\$120 million	Yes		161	
Samoa	2	1975	Recognize P.R.C. government	"Acknowledge" P.R.C.'s claim over Taiwan	Parliamentary Republic	East Asia and the Pacific	\$1 Billion	\$5,200	\$110 million	Yes		116	
San Marino	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Parliamentary Republic	Europe and Eurasia	\$2 Billion	\$61,600	No data	No		43	
Sao Tome and Principe	2	2016	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Semi-Presidential Republic	Sub-Saharan Africa	\$1 Billion	\$3,400	\$270 million	No		141	Switched to P.R.C. in 2016
Saudi Arabia	2	1990	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Absolute Monarchy	Near East (Middle East and Northern Africa)	\$1,827 Billion	\$50,200	\$14 billion	Yes	9	40	BRI TBD
Senegal	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$62 Billion	\$3,600	\$4 billion	Yes		169	

Seychelles	2	1976	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$3 Billion	\$25,200	\$163 million	Yes		67	
Sierra Leone	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$14 Billion	\$1,600	\$5 billion	Yes		184	
South Korea (Republic of Korea)	2	1992	Recognize P.R.C. government	"Respect" P.R.C.'s claim that Taiwan is a province of the P.R.C.	Presidential Republic	East Asia and the Pacific	\$2,352 Billion	\$45,600	\$13 billion	Yes	6		
Spain	2	1973	Recognize P.R.C. government	"Acknowledge" P.R.C.'s claim over Taiwan	Parliamentary Constitutional Monarchy	Europe and Eurasia	\$1,922 Billion	\$40,200	\$11 billion	No	20	27	
Suriname	2	1976	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Western Hemisphere	\$9 Billion	\$15,000	\$360 million	Yes		124	
Thailand	2	1975	Recognize P.R.C. government	"Acknowledge" P.R.C.'s claim over Taiwan	Constitutional Monarchy	East Asia and the Pacific	\$1,255 Billion	\$17,500	\$7 billion	Yes	33	66	
Togo	2	1972	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$19 Billion	\$2,200	\$190 million	Yes		163	
Turkiye (Turkey)	2	1971	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic	Europe and Eurasia	\$2,017 Billion	\$33,100	\$6 billion	Yes	15	45	
Ukraine	2	1949	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Semi-Presidential Republic	Europe and Eurasia	\$380 Billion	\$10,700	\$180 million	Yes	14	100	
United Kingdom of Great Britain and Northern Ireland	2	1972	Recognize P.R.C. government	"Acknowledge" P.R.C.'s claim over Taiwan	Parliamentary Constitutional Monarchy; A Commonwealth Realm	Europe and Eurasia	\$3,187 Billion	\$47,600	\$101 billion	No	5	15	

United States of America	2	1979	Recognize P.R.C. government	"Acknowledges" P.R.C. position that Taiwan is part of China	Constitutional Federal Republic	Western Hemisphere	\$21,538 Billion	\$64,600	\$195 billion	No	1	20	The United States "acknowledges" the P.R.C. position, not the P.R.C. claim.
Uruguay	2	1968	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Presidential Republic	Western Hemisphere	\$84 Billion	\$24,400	\$323 million	Yes	80	52	
Uzbekistan	2	1992	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Presidential Republic; Highly Authoritarian	South and Central Asia	\$288 Billion	\$8,100	\$3 billion	Yes	51	106	
Vanuatu	2	1982	Recognize P.R.C. government	No explicit mention of Taiwan's sovereignty	Parliamentary Republic	East Asia and the Pacific	\$1 Billion	\$2,800	\$594 million	Yes		140	
Venezuela, Bolivarian Republic of	2	1974	Recognize P.R.C. government	"Take note of" P.R.C.'s claim over Taiwan	Federal Presidential Republic	Western Hemisphere	\$369 billion	\$7,704	\$5 billion	Yes		119	
Algeria	2	1958 ¹	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ²	Presidential Republic	Near East (Middle East and Northern Africa)	\$503 Billion	\$11,200	\$28 Billion	Yes	52	93	
Egypt	2	1956 ³	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁴	Presidential Republic	Near East (Middle East and Northern Africa)	\$1,419 Billion	\$12,800	\$25 billion	Yes	34	105	
Finland	2	1950 ⁵	Recognizes the P.R.C.	Does not take a position on Taiwan's international status ⁶	Parliamentary Republic	Europe and Eurasia	\$275 Billion	\$49,400	\$17 billion	No	41	12	
Guinea	2	1969 ⁷	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁸	Presidential Republic	Sub-Saharan Africa	\$37 billion	\$2,700	\$8 billion	Yes		181	

India	2	1950	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Federal Parliamentary Republic	South and Central Asia	\$10.079 Billion	\$7,100	\$17 billion	No	12	134	
Iraq	2	1958 ¹⁰	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Federal Parliamentary Republic	Near East (Middle East and Northern Africa)	\$409 Billion	\$9,200	\$14 billion	Yes		128	
Kenya	2	1963 ¹¹	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Presidential Republic	Sub-Saharan Africa	\$264 Billion	\$4,900	\$1 billion	Yes	73	146	
Liechtenstein	2	1950 ¹²	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Constitutional Monarchy	Europe and Eurasia	\$5 Billion	\$139,100	No data	No		12	
Mauritania	2	1965 ¹³	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Presidential Republic	Sub-Saharan Africa	\$25 Billion	\$5,300	\$2 billion	Yes		164	
Monaco	2	1995 ¹⁴	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Constitutional Monarchy	Europe and Eurasia	\$8 Billion	\$115,700	No Data	No			
Mongolia	2	1949 ¹⁵	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Semi-Presidential Republic	East Asia and the Pacific	\$41 Billion	\$12,100	\$5 billion	Yes		96	
Myanmar (formerly known as Burma)	2	1950 ¹⁶	Recognizes the P.R.C.	"Understands and supports" China's stance on the Taiwan issue ¹⁶	Military Regime	East Asia and the Pacific	\$230 Billion	\$4,200	\$7 billion	Yes	58	144	
Samalia	2	1960 ¹⁷	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty ⁹	Federal Parliamentary Republic	Sub-Saharan Africa	\$25 Billion	\$1,400	\$77 million	Yes		193	

Syrian Arab Republic	2	1966	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty	Presidential Republic; Highly Authoritarian Regime	Near East (Middle East and Northern Africa)	\$50 Billion	\$2,900	\$4 billion	Yes		157	
Tunisia	2	1964*	Recognizes the P.R.C.	No explicit mention of Taiwan's sovereignty	Parliamentary Republic	Near East (Middle East and Northern Africa)	\$131 Billion	\$10,600	\$549 million	Yes	77	101	
Afghanistan	3	1955	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Theocratic / Provisional Government	South and Central Asia	\$61 Billion	\$1,500	\$3.28 Billion	Yes	N/A	182	
Bahrain	3	1989	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Constitutional Monarchy	Near East (Middle East and Northern Africa)	\$76 Billion	\$51,900	No data	Yes	59	34	
Bangladesh	3	1975	No mention of P.R.C. as sole legitimate government of China	No mention of Taiwan's sovereignty	Parliamentary Republic	South and Central Asia	\$1,072 Billion	\$6,200	\$7 billion	Yes	40	129	
Brunei Darussalam	3	1991	No mention of P.R.C. as sole legitimate government of China	No mention of Taiwan's sovereignty	Absolute Monarchy Or Sultanate	East Asia and the Pacific	\$26 Billion	\$58,700	\$3 billion	Yes		55	
Burundi	3	1963	No mention of P.R.C. as sole legitimate government of China	No mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$9 Billion	\$700	\$507 million	Yes		187	
Cabo Verde	3	1976	No mention of P.R.C. as sole legitimate government of China	No mention of Taiwan's sovereignty	Parliamentary Republic	Sub-Saharan Africa	\$4 Billion	\$7,400	\$498 million	Yes		131	

Central African Republic	3	1964	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$5 Billion	\$800 million	Yes		191	
Congo, Republic of the	3	1964	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$2.2 Billion	\$3,700 million	Yes		149	
Cuba	3	1960	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Communist State	Western Hemisphere	\$137 Billion	\$12,300 million	Yes		85	
Democratic Republic of the Congo (formerly known as Zaïre)	3	1972	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Semi-Presidential Republic	Sub-Saharan Africa	\$112 Billion	\$1,100 million	Yes		180	
Germany	3	1972 ¹	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Federal Parliamentary Republic	Europe and Eurasia	\$4,523 Billion	\$54,000 million	No	4	7	
China	3	1960	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$183 Billion	\$5,500 million	Yes	63	145	
Libya	3	1978	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	In Transition	Near East (Middle East and Northern Africa)	\$135 Billion	\$19,800 million	Yes		92	
Mali	3	1960	No mention of P.R.C. as legitimate	No mention of Taiwan's sovereignty	Semi-Presidential Republic	Sub-Saharan Africa	\$48 Billion	\$2,100 million	Yes		188	

Mexico	3	1972	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Federal Presidential Republic	Western Hemisphere	\$2,583 Billion	\$20,300	\$5 billion	No	26	77	
Morocco	3	1958	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Parliamentary Constitutional Monarchy	Near East (Middle East and Northern Africa)	\$307 Billion	\$8,100	\$970 million	Yes	54	120	
Mozambique	3	1975	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$41 Billion	\$1,300	\$5 billion	Yes		183	
Papua New Guinea	3	1976	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Parliamentary Democracy Under A Constitutional Monarchy, A Realm	East Asia and the Pacific	\$38 Billion	\$3,800	\$2 billion	Yes		154	
Qatar	3	1988	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Absolute Monarchy	Near East (Middle East and Northern Africa)	\$260 Billion	\$96,600	\$1 billion	Yes	22	40	
Singapore	3	1990	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Parliamentary Republic	East Asia and the Pacific	\$609 Billion	\$108,000	\$44 billion	Yes		9	
Sweden	3	1950	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Parliamentary Constitutional Monarchy	Europe and Eurasia	\$580 Billion	\$55,300	\$17 billion	No	23	5	
Trinidad and Tobago	3	1974	No mention of P.R.C. as legitimate government of China	No mention of Taiwan's sovereignty	Parliamentary Republic	Western Hemisphere	\$36 Billion	\$23,300	\$1 billion	Yes		60	

United Arab Emirates	3	1984	No mention of P.R.C. as sole legitimate government of China	No mention of Taiwan's sovereignty	Federation Of Monarchies	Near East (Middle East and Northern Africa)	\$707 Billion	\$74,900	\$8 billion	Yes	10	17	
Yemen	3	1956	No mention of P.R.C. as sole legitimate government of China	No mention of Taiwan's sovereignty	In Transition	Near East (Middle East and Northern Africa)	\$74 billion	\$2,500	\$470 million	Yes		186	
Zimbabwe	3	1980	No mention of P.R.C. as sole legitimate government of China	No mention of Taiwan's sovereignty	Presidential Republic	Sub-Saharan Africa	\$36 billion	\$2,200	\$4 billion	Yes	69	159	
Belize	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$4 Billion	\$9,500	No data	No		118	
Eswatini	4	None	Recognize Taiwan	Does not adhere to the One China Principle	Absolute Monarchy	Sub-Saharan Africa	\$11 Billion	\$9,100	No data	No		142	
Guatemala	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Presidential Republic	Western Hemisphere	\$159 Billion	\$9,200	No data	No	64	136	
Haiti	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Semi-Presidential Republic	Western Hemisphere	\$32 Billion	\$2,800	No data	No		158	
Marshall Islands	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Mixed Presidential-Parliamentary System In Free Association With The US	East Asia and the Pacific	-\$1 Billion	\$6,000	\$5 billion	No		102	Compact of Free Association with the United States since 1986;

Palau	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Presidential Republic In Free Association With The US	East Asia and the Pacific	<\$1 Billion	\$14,100	No data	No		71	Compact of Free Association with the United States since 1994. ¹ Recognized the ROC since 1957 ²⁸
Paraguay	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Presidential Republic	Western Hemisphere	\$92 Billion	\$13,200	\$76 million	No		102	Recognized the ROC since 1957 ²⁸
Saint Kitts and Nevis	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Federal Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$1 Billion	\$28,800	No data	No		51	Recognized the ROC since 1983 (established independence in 1983) ²⁹
Saint Lucia	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$3 Billion	\$15,100	\$56 million	No		108	Recognized the ROC since 2007 ²⁸
Saint Vincent and the Grenadines	4	N/A	Recognize Taiwan	Does not adhere to the One China Principle	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	Western Hemisphere	\$2 Billion	\$14,600	No data	No		81	Recognized the ROC since 1981 ¹
Tuvalu	4	N/A	Recognizes Taiwan	Does not adhere to the One China Principle	Parliamentary Democracy Under A Constitutional Monarchy; A Commonwealth Realm	East Asia and the Pacific	<\$1 Billion	\$4,600	No data	No		132	Recognized the ROC since 1979 ²⁸
Vatican (also known as Holy See) ²⁸	4	N/A	Recognizes Taiwan	Does not adhere to the One China Principle	Ecclesiastical Elective Monarchy; Self-Described As An "Absolute Monarchy"	Europe and Eurasia	N/A	N/A	No data	No			Recognized the ROC since 1942 ²⁸
Bhutan	N/A	None	No relations	No relations	Constitutional Monarchy	South and Central Asia	\$9 Billion	\$11,600	No data	No		125	Bhutan shares a southwest border with the P.R.C. but maintains no official

¹ Compiled via miscellaneous news reports and government websites. If the date was questionable, I included a citation for clarification.

² Chong, *supra* note 59. Some countries have additional citations for clarification.

³ *Id.*

⁴ MINISTRY OF FOREIGN AFFS., THE PEOPLE'S REPUBLIC OF CHINA, JOINT COMMUNIQUÉ ON THE ESTABLISHMENT OF DIPLOMATIC RELATIONS BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE DOMINICAN REPUBLIC (May 1, 2018, 08:24 AM), <https://bit.ly/3ZSMgwB>.

⁵ ONE CHINA POLICIES DATABASE, *supra* note 118; see Chris Horton, *El Salvador Recognizes China in Blow to Taiwan*, N.Y. TIMES (Aug. 18, 2018), <https://nyti.ms/4etrb08>.

⁶ *New Gambia Government Says Committed To "One-China" Policy*, REUTERS (Feb. 27, 2017, 03:03 AM), <https://reut.rs/40bX4Gv>.

⁷ Amy Chang Chien & Emiliano Rodríguez Mega, *In Blow to Taiwan, Honduras Switches Relations to China*, N.Y. TIMES (Mar. 25, 2023), <https://nyti.ms/4dzi5Oe>.

⁸ Some countries recognized then severed official ties with the P.R.C., only to re-establish them later. See *Lesotho, China Celebrate 30 Years of Friendship*, THE REPORTER (Jan. 15, 2024), <https://bit.ly/4gMVsc5>.

⁹ Augustas Stankevičius, *Vilnius and Beijing are in talks on normalizing relations – Lithuanian FM*, LITH. NAT'L RADIO & TELEVISION (Nov. 10, 2023, 12:33 PM), <https://bit.ly/3ByBH9G> (P.R.C.-Lithuania relations are in transition).

¹⁰ *Malawi Confirms Establishment of Diplomatic Relations With China*, CHINADAILY.COM (Jan. 14, 2008, 10:53 PM), <https://bit.ly/3Bsy5UM>.

¹¹ Woo, *supra* note 117.

¹² JOINT COMMUNIQUÉ BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF NICARAGUA ON THE REESTABLISHMENT OF DIPLOMATIC RELATIONS, *supra* note 116.

¹³ MINISTRY OF FOREIGN AFFS. OF CHINA, JOINT COMMUNIQUÉ ON THE ESTABLISHMENT OF DIPLOMATIC RELATIONS BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF MACEDONIA (Apr. 18, 2002, 00:00 AM), <https://bit.ly/4eV9ejd>.

¹⁴ *Panama Cuts Ties With Taiwan In Favor Of China*, BBC (Jun. 13, 2017), <https://bbc.in/3XXCdnz>.

¹⁵ Under the Social Federal Republic of Yugoslavia, which later became Serbia.

¹⁶ Under the Czechoslovak Republic, which later became Slovakia.

¹⁷ *Solomon Islands forms ties with China after Taiwan break*, THE ASSOCIATED PRESS (Sep. 21, 2019), <https://yhoo.it/3zNQhHZ>.

¹⁸ EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF BOTSWANA, THE PEOPLE'S REPUBLIC OF CHINA AND BURKINA FASO RESUME DIPLOMATIC RELATIONS (May 26, 2018, 09:20 AM), <https://bit.ly/3YaDdpz>.

¹⁹ MINISTRY OF FOREIGN AFFS. OF CHINA, JOINT COMMUNIQUÉ ON THE RESUMPTION OF DIPLOMATIC RELATIONS BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF KIRIBATI (Sep. 28, 2019, 02:40 AM), <https://bit.ly/3NedFBz>.

²⁰ Under the Soviet Socialist Republics until December 25, 1991.

²¹ Vladimir Shopov, *Thousands Of Contacts To Flourish: How China Competes For Influence In Bulgaria – A Comprehensive Analysis Of The Chinese Presence In Bulgaria*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Sep. 2021), <https://bit.ly/3YcKwN>.

²² ONE CHINA POLICIES DATABASE, *supra* note 117; see also Ambassador Yu, Speech *The Relationship Between China and Bulgaria: Present and Future* (Apr. 25, 2017), <https://bit.ly/47XCUBH>.

(confirming adherence to the PRC version of the One China Principle).

²³ ONE CHINA POLICIES DATABASE, *supra* note 117; see also MINISTRY OF FOREIGN AFFS. OF CHINA, JOINT COMMUNIQUÉ BETWEEN THE ROYAL GOVERNMENT OF CAMBODIA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA (Sep. 16, 2023), <https://bit.ly/47WZJHF>. In the Communique, it states:

The Cambodian side reaffirms resolute adherence to the One-China Policy, that the Government of the People's Republic of China is the sole lawful government representing the whole of China, and that Taiwan is an inalienable part of China's territory and China's internal affairs, brooking no foreign interference. Cambodia opposes any attempt to interfere in China's internal affairs or to block or contain China under the subterfuge of Taiwan, or any form of separatist activities seeking "Taiwan independence." Cambodia resolutely supports China's every effort to achieve national reunification and will not develop any form of official relations with Taiwan."

Id.

²⁴ *List of States which LAO PDR has Established Diplomatic Relations Since 1950*, MINISTRY OF FOREIGN AFFS. OF LAOS, <https://bit.ly/3BCiCln>.

²⁵ ONE CHINA POLICIES DATABASE, *supra* note 117; see also *Statement of the Spokesperson of the Ministry of Foreign Affairs of the Lao PDR*, LAO NEWS AGENCY (Mar. 8, 2022), <https://bit.ly/3TVvkaKA> (Lao PDR "reaffirms its consistent policy of supporting "One China Policy" and that Taiwan is an inalienable part of China, and opposes any intention aiming at creating a situation for "two Chinas" or "one China, one Taiwan."").

²⁶ *Nepal-China Relations*, GOV'T OF NEPAL MINISTRY OF FOREIGN AFFS. (Feb. 2019), <https://bit.ly/47TU43e>.

²⁷ ONE CHINA POLICIES DATABASE, *supra* note 117; see also MINISTRY OF FOREIGN AFFS. OF CHINA, JOINT STATEMENT BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND NEPAL (Oct. 13, 2019, 6:56 PM), <https://bit.ly/4eQewUX> ("The Nepali side reiterated its firm commitment to One China policy, acknowledging that Taiwan is an inalienable part of the Chinese territory and Tibet Affairs are China's internal affairs, and the determination on not allowing any anti-China activities on its soil.").

²⁸ Daniel Wertz, JJ Oh & Kim Insung, *DPRK Diplomatic Relations, Issue Brief*, NAT'L COMMITTEE ON NORTH KOREA (Aug. 2016), <https://bit.ly/3XXL9Jk>.

²⁹ Jamal Afridi & Jaysree Bajoria, *China-Pakistan Relations*, COUNCIL ON FOREIGN REL. (Jul. 6, 2010, 08:00 AM), <https://on.cfr.org/3Nfntak>.

³⁰ ONE CHINA POLICIES DATABASE, *supra* note 117; see also USC US-CHINA INSTITUTE, CHINA-PAKISTAN JOINT DECLARATION, NOVEMBER 11, 2003 (Nov. 4, 2003), <https://bit.ly/3XXLIAG>. In That Joint Declaration it states:

The Pakistani side reaffirms that it will continue to consistently adhere to the one-China policy, and recognize the Government of the People's Republic of China as the sole legal government representing the whole of China and Taiwan an inalienable and indivisible part of Chinese territory, and fully support China's cause of peaceful reunification.

Id.

³¹ ONE CHINA POLICIES DATABASE, *supra* note 117; see also MINISTRY OF FOREIGN AFFS. OF CHINA, JOINT PRESS COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA AND THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA (Mar. 4, 2007, 12:00 AM), <https://bit.ly/3NcQKqg>. In that Joint Communique, it states:

The Sri Lankan side reiterated its consistent position that there is only one China in the world, that the Government of the People's Republic of China is the sole legal government representing the whole China and that Taiwan is an inalienable part of the Chinese territory. Sri Lanka remains firmly committed to the one China policy, opposes any form of "Taiwan independence" including "de jure independence" and opposes participation of Taiwan in any international and regional organizations which are composed of sovereign states. Respecting each other's major concerns, Sri Lanka will not develop any official link with Taiwan and supports all efforts by the Chinese Government to achieve national reunification. The Chinese side highly appreciates the above position of Sri Lanka.

Id.

^{xxxxi} Tanzania, CHINA.ORG (Oct. 10, 2006), <https://on.china.cn/3NbOwaR>.

^{xxxxii} ONE CHINA POLICIES DATABASE, *supra* note 117; see also MINISTRY OF FOREIGN AFFS. OF CHINA, JOINT STATEMENT ON ESTABLISHING A COMPREHENSIVE STRATEGIC COOPERATIVE PARTNERSHIP BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE UNITED REPUBLIC OF TANZANIA (Nov. 3, 2022, 9:49 PM), <https://bit.ly/3Ya8mJN> ("The Tanzanian side reaffirmed its firm commitment to the one-China principle, regards Taiwan as an inalienable part of China, and opposes any actions or remarks that undermine China's sovereignty and territorial integrity.").

^{xxxxiii} China and Zambia Celebrated the 55th Anniversary of the Establishment of Diplomatic Relations, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF ZAMBIA (Nov. 1, 2019, 9:00 PM), <https://bit.ly/3zDhRIS>.

^{xxxxiv} ONE CHINA POLICIES DATABASE, *supra* note 117; see also MINISTRY OF FOREIGN AFFS. OF CHINA, JOINT COMMUNIQUÉ BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND THE REPUBLIC OF ZAMBIA (Feb. 4, 2007, 12:00 AM), <https://bit.ly/3ZSS18s>. In that Joint Communiqué, it states:

The Zambian side reaffirmed its commitment to the one China policy and its opposition to "Taiwan independence" in any form, including "de jure Taiwan independence," and Taiwan's attempt to join any international or regional organisation consisting only of sovereign states. The Zambian side will not enter into any official relations or have any official contacts with Taiwan and supports the efforts made by the Chinese side to realize national reunification. The Chinese side highly appreciated this principled position of the Zambian side.

Id.

^{xxxxv} Italy official pulled out of the B.R.I. on December 6, 2023. Mazzocco & Palazzi, *Italy Withdraws from China's Belt and Road Initiative*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Dec. 14, 2023), <https://bit.ly/3zPXTIE>.

^{xxxxvi} J.R. Wu & Ben Blanchard, *Taiwan Loses Another Ally, Says Won't Help China Ties*, REUTERS (Dec. 21, 2016, 12:40 AM), <https://reut.rs/3ZOB4RJ>.

^{xxxxvii} Algeria, China: Exceptional Achievements in 60 Years of Diplomatic Relations, ALGERIE PRESSE SERV. (Dec. 20, 2018, 12:22 AM), <https://bit.ly/3XOUQd8>.

^{xxxxviii} See Xi Jinping Meets with Algerian Prime Minister Ayman Benabderrahmane, MINISTRY OF FOREIGN AFFS. OF CHINA (Dec. 10, 2022, 9:39 PM), <https://bit.ly/4ewGDsw>.

^{ix} China-Egypt Relations, CHINA.ORG (Jan. 18, 2004), <https://on.china.cn/47TWG0O>.

^x ONE CHINA POLICIES DATABASE, *supra* note 117; see also President Abdel Fattah El-Sisi of Egypt Meets with Qin Gang, MINISTRY OF FOREIGN AFFS. OF CHINA (Jan. 16, 2023), <https://bit.ly/3zNmrt6> (the leaders of the three countries reaffirmed that they will adhere to the One China principle position).

^{xi} Andreas B. Forstby, *The Precarious State of the Nordic Countries' One China Policy*, DIPLOMAT (Feb. 27, 2024), <https://bit.ly/3YbyJir>.

^{xii} MINISTRY OF FOREIGN AFFS. OF FINLAND, FINLAND'S CHINA ACTION PLAN 12 (Jun. 2010), <https://bit.ly/3NgDT6G> ("Finland considers stability in the Taiwan Strait important. Finland welcomes the improvement in cross strait relations; this may open up new perspectives for both Finland and the EU.").

^{xiii} Guinea, CHINA.ORG (Oct. 10, 2006), <https://bit.ly/3YdSp5t>.

^{xiv} ONE CHINA POLICIES DATABASE, *supra* note 117; see also China, Guinea Vow To Further Parliamentary Exchange, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF LIBERIA (Jul. 14, 2008, 12:00 AM), <https://bit.ly/3ZO9rYY> (reaffirming Guinea would adhere to the one-China policy).

^{xv} Joint Communiqué On The Establishment of Diplomatic Relations Between The People's Republic Of China and The Republic Of India EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF INDIA (Jan. 16, 2002, 10:18 AM), <https://bit.ly/4ezAsUw>.

^{xvi} ONE CHINA POLICIES DATABASE, *supra* note 117; see also *A Shared Vision for the 21st Century of the People's Republic of China and the Republic of India*, MINISTRY OF EXTERNAL AFFS. GOV'T INDIA (Jan. 14, 2008), <https://bit.ly/47XZYjD>. The statement reads:

The Indian side recalls that India was among the first countries to recognize that there is one China and that its one China policy has remained unaltered. The Indian side states that it would continue to abide by its one China policy, and oppose any activity that is against the one China principle. The Chinese side expresses its appreciation for the Indian position.

Id.

^{xvii} Bilateral Relations between China and Iraq, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF IRAQ (Apr. 11, 2013, 8:57 PM), <https://bit.ly/4eONOfI>.

^{xviii} ONE CHINA POLICIES DATABASE, *supra* note 117; see also Xi Says China to Expand Cooperation with Iraq, XINHUANET (Aug. 18, 2021, 10:55 PM), <https://bit.ly/3BCn7MM> ("[Iraq] firmly adheres to the one-China policy.").

^{xix} Adekunle Agbeteilo, *Kenya Reaffirms Support For One-China Policy Amidst Diplomatic Engagement*, BUSINESS INSIDER AFRICA (Jan. 26, 2024), <https://bit.ly/3YCH5GF>; see also Chinese Foreign Ministry, Kenya, CHINA.ORG (Oct. 10, 2006), <https://on.china.cn/3TYWzvc>.

^{xx} Chen Junxia and Martina Fuchs, *Interview: Liechtenstein aims to strengthen ties with China – PM*, XINHUANET (Jun. 6, 2021, 2:59 PM), <https://bit.ly/3ZSR9pe>.

Id.

^{xxi} Mauritania, CHINA.ORG (Oct. 10, 2006), <https://on.china.cn/3YdEXLW>.

^{xxii} China and Monaco, PRINCIPALITY OF MONACO (2024), <https://bit.ly/3YfQdrl>.

^{xxiii} MINISTRY OF FOREIGN AFFS. OF MONGOLIA, MONGOLIA-CHINA RELATIONS (Jan. 17, 2021), <https://bit.ly/47Y14xR>.

^{xxiv} See Zhao Jia, *Mongolia Says It Firmly Supports the One-China Principle*, CHINADAILY.COM (Aug. 8, 2022, 3:17 PM), <https://bit.ly/3zZcCQK>.

^{xxv} List of Countries Having Diplomatic Relations with the Republic of the Union of Myanmar, EMBASSY OF THE REPUBLIC OF THE UNION OF MYAN. IN BRAZ., <https://bit.ly/3ZZVdMn>.

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- ¹³⁰⁸ Sebastian Strangio, *Myanmar's Shadow Government Issues 10-Point China Policy*, DIPLOMAT (Jan. 3, 2024), <https://bit.ly/3Ydfxsq> ("Myanmar reiterated that it sticks to the One-China policy, understands and supports China's stance on the Taiwan issue, Tibet-related issues and Xinjiang-related issues.").
- ¹³⁰⁹ *Our [Somalia] Diplomatic Relations*, SOMALI MINISTRY OF FOREIGN AFFS. (Jul 24, 2011), <https://bit.ly/3YcU4fi>.
- ¹³¹⁰ *67 Years Passed And The Syrian Chinese Ties Towards Greater Hardness And Strength*, SYRIAN ARAB NEWS AGENCY (Sep. 22, 2023), <https://bit.ly/4eSn9Oy>.
- ¹³¹¹ *Tunisia*, CHINA.ORG (Oct. 10, 2006), <https://on.china.cn/3zNo0Bm>.
- ¹³¹² Bernd Schafer, Senior Research Scholar, Woodrow Wilson Int'l Ctr., Speech to the Konrad-Adenauer-Stiftung Shanghai Foundation: Relations between the People's Republic of China and the two German States, 1949–1990 (Jun. 2, 2011), <https://bit.ly/47VSMek>.
- ¹³¹³ THOMAS LUM, CONG. RSCH. SERV., IF12194, THE COMPACTS OF FREE ASSOCIATION 2 (2024), <https://bit.ly/3TTEEWX>.
- ¹³¹⁴ *Id.*
- ¹³¹⁵ *Paraguay President-Elect Invited to Visit Taiwan*, TAIPEI TIMES (May 19, 2023), <https://bit.ly/3TYCjdr>.
- ¹³¹⁶ *Saint Kitts and Nevis Celebrates 40 Years of Friendship with Taiwan*, ST KITTS NEVIS OBSERVER (Oct. 12, 2023), <https://bit.ly/4gWicna>.
- ¹³¹⁷ *St. Lucia Dumps PRC for Taiwan*, TAIPEI TIMES (Apr. 26, 2007), <https://bit.ly/3zZsqVM>.
- ¹³¹⁸ *Bilateral Relations*, EMBASSY OF THE REPUBLIC OF CHINA (TAIWAN) IN ST. VINCENT AND THE GRENADINES (June 26, 2018), <https://bit.ly/3XSgNYJ>.
- ¹³¹⁹ Helen Davidson, *'Not About The Highest Bidder': The Countries Defying China to Stick with Taiwan*, GUARDIAN (Apr. 3, 2023, 7:01 PM), <https://bit.ly/3NeJ86J>.
- ¹³²⁰ Holy See (Vatican) is a permanent observer. *Non-Member-States*, *supra* note 97.
- ¹³²¹ Channing Lee, *What the Holy Don't See: A Catholic Defense of Vatican-Taiwan Relations*, GEO. U. BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFS. (Apr. 28, 2022), <https://bit.ly/4ex8fgW>.
- ¹³²² Shi Jiangtao, *Why Bhutan's Tilt Towards China May 'Significantly Change' Regional Dynamics*, SOUTH CHINA MORNING POST (Oct 29, 2023), <https://bit.ly/3BzESMF>.