



# BENGOSHI 弁護士

Volume IV Issue I



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### A Note on our Name

On July 15, 2019, Region Legal Service Office (RLSO) Japan was renamed RLSO Western Pacific (RLSO WESTPAC). This name better reflects the broad geographic range of commands for whom we provide legal services. In addition to our headquarters office in Yokosuka, we maintain offices in Misawa, Atsugi, Sasebo, Okinawa, Guam, Singapore, and Diego Garcia.

The Bengoshi, which means “lawyer” in Japanese, is designed as a means to educate and inform fleet leaders, legal officers, and others in the Indo-Pacific area of responsibility who might have an interest in the complex legal issues that uniquely impact those who serve here.

- USINDOPACOM’s 32nd Annual International Military Operations and Law Conference.
- Cybersecurity challenges in Southeast Asia.
- Trade disputes between Japan and South Korea.
- The challenging strategic environment in Antarctica.

These topics are thoroughly explored by our exceptional team of legal professionals in this edition of the Bengoshi!

CAPT Florencio “Flo” Yuzon,  
JAGC, USN  
Commanding Officer  
RLSO WESTPAC

## MILITARY OPERATIONS AND LAW (MILOPS) CONFERENCE 2019 DIGEST

CDR Sylvaine Wong

U.S. Indo-Pacific Command (USINDOPACOM) hosted the 32<sup>nd</sup> Annual International Military Operations and Law Conference June 23-27, 2019 in Bangkok, Thailand. According to USINDOPACOM, the strategic engagement “has been and remains an integral part of [USINDOPACOM’s] engagement plan, offering a unique opportunity for strategic-level leaders in the Pacific region to share and exchange views with key players in the legal, policy, and operational arenas whose mission is to support their respective military and national security establishment.”<sup>1</sup>

This year’s approximately 140 participants included representatives from the armed forces of over 18 nations, including the United States, Australia, Bangladesh, Fiji, Japan, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Singapore, and Taiwan – as well as numerous academic institutions, government agencies, and non-governmental organizations. The robust dialogue focused on topics ranging from challenges in fisheries management to ethical debates in the cyber domain. From the Indian Ocean Region (IOR), through the South China Sea, and up to the Taiwan Strait, the common theme among presenters was an appeal to greater information sharing and multilateral cooperation in the face of Great Power Competition. Three major topic areas were addressed by panels spread across the four-day agenda: enforcement actions, maritime security, and ethics and leadership.

### Enforcement Actions

#### *Indian Ocean Region (IOR)*

*“The Greater Indian Ocean Region...will be the centre of global conflicts, because most international business supply will be conducted through this route...[I]t is in this region the interests and influence of India, China and the United States are beginning to overlap and intersect.”<sup>2</sup>*

Beginning with the above Robert Kaplan quote, the

representative from the Indian Navy<sup>3</sup> highlighted the main challenges in the IOR – including an increase in terrorism, illegal/unreported/unregulated (IUU) fishing, piracy, and land/maritime border demarcation disputes – and the dynamic between littoral nations and extra-regional powers such as France, the United Kingdom, Russia, Japan, the United States, and China. Focusing on China’s “One Belt One Road” (OBOR) Initiative – which aims to create the world’s largest trade route (akin to a maritime “silk road”) linking East, South, Southeast and Southwest Asia – the



*Image: Public Domain*

presenter discussed the obligations littoral countries are incurring by accepting massive loans from China with unsustainable terms of repayment. For example, he cited to the Sri Lankan government’s sale of a majority stake in the strategically located Hambantota Port for exclusive lease to China to compensate for one such unsustainable loan repayment. Citing other projects in Myanmar, the Maldives and Bangladesh, the presenter concluded by urging India and the extra-regional powers to offer alternatives to Chinese OBOR investments so littoral and island nations in the IOR can maintain financial and environmental responsibility, while maintaining their territorial integrity and sovereignty.

An academic presentation from Jawaharlal Nehru University, India, expanded on the IUU crisis, which accounts for \$10-23 billion (USD) in losses annually. At the heart of the dispute are sovereignty issues, with violators ignoring maritime boundaries and often depleting the exclusive economic zone resources of other nations while using destructive fishing methods such as dynamite and bottom trawling. Although the top three flag-states cited for violating Exclusive Economic Zone-fishing boundaries were reportedly China, South Korea and Taiwan, the top three flag-states for vessels impacted by enforcement efforts (by Indonesia in this case study) were Vietnam, Philippines and Malaysia.

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### *South China Sea*

In a panel discussion titled, “Combating Maritime Threats in the Indo-Pacific Region,” presenters from the Royal Thai Navy and the Philippine Navy shared their perspectives on priorities and challenges for their respective national approaches to maritime security. The more established Thai Maritime Enforcement Command Center (established in 1998) includes robust law enforcement action as part of their interagency approach to combat IUU fishing, piracy, human trafficking, trade violations, and disaster relief efforts, but still struggles with budgeting, resources, and implementing regulations. The Philippine National Coast Watch Council (established in 2005) appealed to greater regional information sharing to promote a common awareness of the maritime domain. Both presenters keyed-in on the importance of monitoring legal and illegal maritime trade in the region as fundamental aspects of their maritime security.

### *North Korea*

A presenter from the Royal Thai Navy presented a lecture on the economic context for historic and current efforts to enforce United Nations sanctions against the Democratic People’s Republic of Korea (DPRK). Approximately 85% of the DPRK’s import and export trade is with the People’s Republic of China, followed far behind by South Korea and India, then Russia and several Southeast Asian countries. However, following the DPRK’s nuclear testing in 2006, Thailand decreased its trade activity with the DPRK by almost 94%, curtailed visas, and severed exports to the country. The presenter stated that upholding the U.N. Charter and international law was of paramount concern to the nation’s leaders and Maritime Enforcement Command Center, as was upholding the Association of Southeast Asian Nations’ (ASEAN) charter of preserving Southeast Asia as a nuclear weapon/weapon of mass destruction-free zone.

The Australian perspective also focused on establish-

ing a stable and prosperous Indo-Pacific region, citing advancements in national law as a means of enforcing U.N. sanctions in addition to the U.N. Security Council Resolutions. The Australian Autonomous Sanctions Act of 2011 provides a wide array of sanctions and jurisdiction, including criminal penalties, against “grave repression of human rights or democratic freedoms of a population by a government, or proliferation of weapons of mass destruction or means of delivery, in internal or international armed conflict.”

Finally, the Japanese perspective had three priorities: (1) promoting the rule of law, freedom of navigation, and free trade, (2) pursuit of economic prosperity, and (3) commitment for peace and stability in the region. The presenter characterized the most frequent occurrence of the DPRK threat as a massive increase in illegal ship-to-ship transfers (of illicit goods), illegal fishing rights, and false maritime identity data, and called for multinational maritime domain awareness as a means of maximizing enforcement actions.

### Maritime Security

Panelists from the RAND Corporation, Japanese Maritime Self Defense Force, and the Diplomatic Academy of Vietnam provided significant background and context for the current “gray zone” challenges in the South China Sea (SCS). As described by one panelist, “‘gray zone’ operations (1) physically change the status quo by coercion and gradualism, (2) lie somewhere between war and peace, and (3) are coercive, expansive and quasi-aggressive.”

RAND presented an assessment of the People’s Republic of China (PRC) Defense Policy, highlighting “one of the most significant changes in Chinese defense policy since . . . [the] 1970s,” shifting focus from “homeland defense” to one of “expansion of strategic space.” Reflecting many of the same issues in the IOR discussions, RAND assessed the three main focus areas to be sovereignty/maritime rights, fisheries, and natural resources.

**MILITARY OPERATIONS AND LAW (MILOPS) CONFERENCE 2019 DIGEST**

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With national interest in establishing sovereignty in disputed territory and expanding its global economy, the PRC's increased militarization and use of its Coast Guard (PRCCG) as a coercive arm of the state was seen as an unprecedented expansion in the region. Examples included the military armament of PRCCG vessels, physical ramming by PRCCG and maritime militia vessels against foreign-flagged fishing vessels and PRCCG and maritime militia intrusions into disputed or foreign territorial waters. Highlighting legal complexities, one panelist compared the law enforcement regime otherwise appropriate for private fisherman engaging in the above criminal behavior to the national self-defense regime appropriate to the same behavior conducted by maritime militia or other government proxies.

Panelists also highlighted the PRC's extensive land reclamation efforts since the late 1990s as demonstrative of the "expansion of strategic space," which accounts for 95% of all the reclamation efforts in the SCS. According to one presentation, based on numbers from the Council for Foreign Relations, the PRC reclaimed over 3,200 acres as of 2015. This is significant because it is more land than all other SCS claimants reclaimed in the past 40 years. Militarization of these reclamation sites has not only expanded the physical reach of PRC armaments and force posture, but has expanded the sovereign territorial and maritime claims of the PRC to increasingly pressurize its regional neighbors.

The discussion regarding the SCS Code of Conduct being negotiated between ASEAN and the PRC perhaps best highlights the regional pressures and multilateral concerns raised by the PRC's activities. One presenter offered the PRC perspective – that there is no absolute universal right to "freedom of navigation," and that coastal states can and should regulate military exercises in their exclusive economic zone. The offered U.S. perspective was that the Code of Conduct is designed to exclude foreign oil firms from development in the region, and restrict military activities with extra-regional nations, which would benefit PRC the most. The offered ASEAN perspective was that freedom of

navigation should focus on safe and free international navigation and antipiracy, linked to enforcement of the U.N. Convention on the Law of the Sea (UNCLOS) and the 2016 decision against the PRC by the Permanent Court of Arbitration in the Hague (which rejected PRC's expansive claims to maritime territory in the SCS under UNCLOS) with the goal of fair and reciprocal trade and an open investment environment.

**Ethics and Leadership**

Leadership, character and ethics presentations by the Honorable James Baker (Professor of Law and Director, Institute for National Security and Counterterrorism), RADM Darse "Del" Crandall, JAGC, USN (Deputy Judge Advocate General), and RDML (ret.) Kirk Foster, JAGC, USN, challenged all participants to approach the legal and policy issues being discussed at the conference with more than a legalistic lens. They also identified common themes in a number of more specific ethical and leadership challenges discussed by other presenters during the conference, including the 2018 rescue of a Thai soccer team which made headlines around the world, presented by Commander, Royal Thai Navy Special Warfare Command, and computer hacker El Kentaro's introduction to the computer hacking subculture.

The panel with the most considerable debate revolved around ethical issues associated with unmanned systems, and specifically lethal autonomous weapons systems (AWS). The panel moderator from the Australian Defense Force used as background the 2016 United Nations Group of Government Experts findings, as established by the 5<sup>th</sup> Review Conference of the Parties to the Convention on Certain Conventional Weapons. The findings included a call for retaining human accountability for decisions across the life cycle of an AWS, from development to employment, mitigation against proliferation, and balancing humanitarian considerations with military necessity. On one side, the presenter from the Public Law department of Europa-

## CYBERSECURITY IN SOUTHEAST ASIA: DETERRING CHINA'S APT10

LT Jason Bentley & LTJG Brandon Maitlen

In December 2018, the U.S. Department of Justice stated the Advanced Persistent Threat Group (APT10), a Chinese cyber group,

acted in association with the Chinese Ministry of State Security... [and] engaged in an intrusion campaign to obtain unauthorized access to the computers and computer networks of commercial and defense technology companies and U.S. Government agencies in order to steal information and data concerning a number of technologies.<sup>1</sup>

These activities resulted in the indictment of two APT10 members<sup>2</sup> in the Southern District of New York for Conspiracy to Commit Computer Intrusions, Identity Theft, and Wire Fraud.<sup>3</sup> This article summarizes expert opinions regarding whether (1) indicting (but not arresting) members of APT10 and other groups can deter them from future action, and (2) whether state action against APT10 would violate Article 2(4) of the U.N. Charter.

### **Indictments: Are they enough?**

Professor Jack Goldsmith<sup>4</sup> and Mr. Robert Williams<sup>5</sup> contend that the indictment strategy failed because it cannot adequately deter Chinese cyber activity.<sup>6</sup> Professor Goldsmith and Mr. Williams assert that although indictments impose costs—such as negative publicity for the named individuals and the nations associated with them—those costs are vastly outweighed by the access to billions of dollars' worth of trade secrets China gains from these cyber activities. Professor Goldsmith and Mr. Williams also posit that when these indictments do not lead to punishment,

such as jail time, the United States appears to international adversaries as being unable to effectively enforce U.S. law against cyber activities.

Responding to Professor Goldsmith and Mr. Williams' positions, Mr. Tim Maurer<sup>7</sup> and Mr. Garrett Hink,<sup>8</sup> suggest indictments should be considered more than just a tool for deterrence, but also could serve as a "tool for operational disruption."<sup>9</sup> Mr. Maurer and Mr. Garrett contend when a bad actor is indicted by name, nation states and other organizations—such as corporations and other NGOs—may decide to look for other individuals to work with to avoid negative publicity through associating with the bad actor.

However, Mr. Maurer and Mr. Garrett admit that evaluating whether operational disruption has occurred is quite difficult, since there is no public information regarding whether individuals who have been indicted, but not arrested, have discontinued their activities, or have been "blacklisted" by nation states and other organizations.

A third approach is advocated by Mr. John Carlin,<sup>10</sup> which he terms the "whole of government" approach.<sup>11</sup> Mr. Carlin notes the "whole of government" approach "may encompass economic sanctions from the Treasury Department, proceedings initiated by the Office of the U.S. Trade Representative, and cyber defense operations from the Defense Department. At other times, it might mean information sharing coordinated by the Department of Homeland Security, diplomatic pressure from the State Department, intelligence operations from the U.S. Intelligence Community, and prosecution or other legal action from the Justice Department."<sup>12</sup> Mr. Carlin's approach recognizes the limits of indicting without arresting and augments with other state actions, such as those listed above.



Image: Pixnio.com

## CYBERSECURITY IN SOUTHEAST ASIA: DETERRING CHINA'S APT10

LT Jason Bentley & LTJG Brandon Maitlen

### State Action

If an indictment is insufficient to stop APT10's activities, could the U.S. consider offensive cyber operations (OCO) against APT10 without violating the U.N. Charter? According to the U.S. Department of Defense Law of War Manual, "operations described as 'cyber attacks' or 'computer network attacks' are not necessarily 'armed attacks' for the purpose of triggering a State's inherent right of self-defense."<sup>13</sup> A cyberattack constitutes a use of force "if cyber operations cause effects that, if caused by traditional physical means, would be regarded as a use of force."<sup>14</sup> Examples include: (1) the triggering of a nuclear meltdown resulting in mass casualties; (2) the opening of a dam above a populated area; and (3) disabling air traffic control services, resulting in airplane crashes.<sup>15</sup> By that definition, APT10's actions described in this article would not likely constitute an armed attack against the United States, nor would U.S. OCO that do not cause physical effects.

Looking to past state action, the U.S. has taken countermeasures when an international wrong, not rising to the Law of War Manual definition of a cyber-attack, was committed against the U.S. On February 27, 2017, the Washington Post reported that U.S. Cyber Command had successfully conducted a "strike on [Russia's] Internet Research Agency . . . a company underwritten by an oligarch close to President Vladimir Putin."<sup>16</sup> While the article was careful not to call the action an "attack," one author has characterized the effort as "offensive cyber operations."<sup>17</sup>

While efficacy of indictments without arrests is disputed and the current relationship between cyber operations and international law continues to develop, Congress has recently taken meaningful action. Section 1631(b) of the FY2020 National Defense Authorization Act contains provisions that allow the Department of Defense to "conduct military operations, including clandestine operations, in the information environment to defend the United States, allies of the United States, and interests of the United States, including in response to malicious influence activities carried out against the United States or a United States person by a foreign power."

[1] Indictment, United States Southern District of New York, *United States of America v. Zhu Hua and Zhang Shilong*. Available online here: <https://www.justice.gov/opa/press-release/file/1121706/download>.

[2] Members were indicted, but not arrested. *Id.*

[3] *Id.*

[4] Jack Goldsmith is the Henry L. Shattuck Professor at Harvard Law School, cofounder of *Lawfare*, and a Senior Fellow at the Hoover Institution.

[5] Executive Director of the Tsai China Center at Yale

[6] The Failure of the United States' Chinese-Hacking Indictment Strategy, *Lawfare Blog*, by Jack Goldsmith and Robert D. Williams. Available online here: <https://www.lawfareblog.com/failure-united-states-chinese-hacking-indictment-strategy>.

[7] Member of the Cyber Policy Initiative at the Carnegie Endowment for International Peace.

[8] Georgetown University School of Foreign Service graduate.

[9] What's the Point Charging Foreign State Linked Hackers, *Lawfare Blog*, by Garrett Hinck and Tim Maurer. Available online here: <https://www.lawfareblog.com/whats-point-charging-foreign-state-linked-hackers>.

[10] Former Assistant Attorney General for National Security.

[11] Direct, Disrupt, Deter: A whole-of-Government Approach to National Security Cyber Threats. *Harvard National Security Journal*, Volume 7. By John P. Carlin.

[12] *Id.*

[13] *Id.* at 16.1.3.2.

[14] *Id.* at 16.3.1.

[15] *Id.*

[16] U.S. Cyber Command operation disrupted Internet access of Russian troll factory on day of 2018 midterms. *Washington Post*, by Ellen Nakashima. Available online here: [https://www.washingtonpost.com/world/national-security/us-cyber-command-operation-disrupted-internet-access-of-russian-troll-factory-on-day-of-2018-midterms/2019/02/26/1827fc9e-36d6-11e9-af5b-b51b7f322e9\\_story.html](https://www.washingtonpost.com/world/national-security/us-cyber-command-operation-disrupted-internet-access-of-russian-troll-factory-on-day-of-2018-midterms/2019/02/26/1827fc9e-36d6-11e9-af5b-b51b7f322e9_story.html).

[17] The New Contours of Cyber Conflict, *Lawfare Blog*, by Paul Rosenzweig, available online here: <https://www.lawfareblog.com/new-contours-cyber-conflict>.

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## SOUTHEAST ASIA TRADE: JAPAN & SOUTH KOREA

LT Clint Barker

The recent trade dispute between Japan and South Korea has inflamed passions in both nations.<sup>1</sup> The trade restrictions which started in response to demands to compensate victims of forced labor and to alleged national security concerns have now spilled over into boycotts, counter-restrictions, and the cancellation of an intelligence-sharing agreement. With the disagreements quickly multiplying, it is easy to lose sight of what trade restrictions have actually been put into place.<sup>2</sup>

Three high-tech materials were restricted by Japan's actions on July 4, 2019: fluorinated polyimides, photoresists, and hydrogen fluoride.<sup>3</sup> Fluorinated polyimides are used to make smartphone displays; photoresists are used to make semiconductors, and hydrogen fluoride is a type of etching gas also used to make semiconductors.<sup>4</sup> The impact on the South Korean economy could be significant—South Korea relies on Japanese suppliers for more than 70 percent of its photoresist and etching gas for chipmakers in its semiconductor industry.<sup>5</sup> Semiconductors account for more than 20 percent of South Korea's exports, making imports of photoresists and hydrogen fluoride important for the South Korean economy.<sup>6</sup> Finding alternative suppliers is difficult for South Korean semiconductor manufacturers because of Japan's large market share in these materials. Japan produces 90 percent of the world's supply of photoresists and fluorinated polyimides, along with about 70 percent of its etching gas.<sup>7</sup>

The new trade restrictions do not ban shipments to South Korea, but they do impose delays. Under the new trade restrictions exporters have to seek permission to ship any of the three materials, a process which could take as long as 90 days to complete.<sup>8</sup> The new process was implemented almost immediately after it was announced, but has not eliminated trade between the two countries entirely – two shipments of photoresists and

one shipment of hydrogen fluoride arrived in South Korea this past August.<sup>9</sup> Concern over disruptions to the supply chain have led South Korean chipmakers to seek alternative means to produce their products. Particularly, some South Korean chipmakers have begun testing the feasibility of domestically produced etching gas to reduce reliance on the global supply chain.<sup>10</sup> Additionally, South Korea has increased the portion of the country's annual budget allotted to research and development into hydrogen fluoride and domestically produced etching gas, specifically to improve its competitiveness in producing these materials.<sup>11</sup> At least some South Korean chipmakers plan to increase stockpiles of these materials to reduce the shock of further restrictions.<sup>12</sup>

Japan imposed further trade restrictions on August 28, 2019. The latest trade restrictions are less targeted than the July 4, 2019 restrictions. In its August 28 action, Japan removed South Korea from its "white list" of trusted trading partners subject to fewer restrictions, thus making exports to South Korea subject to arms control measures.<sup>13</sup> The "white list," which South Korea was removed from, covers 1,194 items, many of which are items that could be used for military purposes. Presently, no additional restrictions have been placed on Japanese exports to Korea.<sup>14</sup>



Source: Pixnio.com

## SOUTHEAST ASIA TRADE: JAPAN &amp; SOUTH KOREA

LT Clint Barker

Like the July 4 restrictions, these “white list” items can still be exported to South Korea, but the screening process includes an additional verification that the items will not be used in the military or weapons industry, especially for items that will later be exported from South Korea to a third country.<sup>15</sup> While the July 4 restrictions applied to shipments, these new restrictions exist on a per-contract basis.<sup>16</sup> They largely ensure that South Korean firms can verify the purpose the material will be used for and where it will ultimately be shipped.<sup>17</sup> These restrictions are also estimated to take as long as 90 days to process, although Japanese exporters can acquire pre-approval to expedite the process.<sup>18</sup>

While the trade dispute continues to have impacts on national security and intelligence sharing, its most direct impact continues to be on the companies trading in the restricted materials. Whether the restrictions continue, and in what form, will determine the lasting impact to the Japanese and South Korean economies.

[1] South Korea accuses Japan of treating it like a “hostile nation” after it was officially downgraded as a trading partner amid escalating tensions, Business Insider, August 8, 2019, <https://www.businessinsider.com/japan-south-korea-official-downgrade-preferred-trading-partner-hostile-nation-2019-8?r=US&IR=T>.

[2] *Id.*; see Korea and Japan Clash Over History and Law, Lawfare, August 16, 2019, <https://www.lawfareblog.com/korea-and-japan-clash-over-history-and-law>.

[3] Japan to tighten export rules for high-tech materials to South Korea: media, Reuters, June 30, 2019, <https://www.reuters.com/article/us-southkorea-japan-laborers/japan-to-tighten-export-rules-for-high-tech-materials-to-south-korea-media-idUSKCN1TV089>.

[4] *Id.*

[5] Factbox: The high-tech materials at the heart of a Japan-South Korea row, Reuters, July 2, 2019, <https://www.reuters.com/article/us-southkorea-japan-laborers-factbox/factbox-the-high-tech-materials-at-the-heart-of-a-japan-south-korea-row-idUSKCN1TX12I>.

[6] Samsung uses domestic chip chemical to bypass Tokyo export ban, Financial Times, September 5, 2019, <https://www.ft.com/content/389745a6-cf89-11e9-99a4-b5ded7a7fe3f> (subscription required).

[7] Japan to tighten export rules for high-tech materials to South Korea: media, Reuters, June 30, 2019, <https://www.reuters.com/article/us-southkorea-japan-laborers/japan-to-tighten-export-rules-for-high-tech-materials-to-south-korea-media-idUSKCN1TV089>.

[8] Factbox: The high-tech materials at the heart of a Japan-South Korea row, Reuters, July 2, 2019, <https://www.reuters.com/article/us-southkorea-japan-laborers-factbox/factbox-the-high-tech-materials-at-the-heart-of-a-japan-south-korea-row-idUSKCN1TX12I>.

[9] Japan approves first export of hydrogen fluoride to South Korea since controls tightened, Japan Times, August 30, 2019, <https://www.japantimes.co.jp/news/2019/08/30/business/japan-exports-hydrogen-fluoride-south-korea/#.XZLaN7A7Z7h>.

[10] Samsung uses domestic chip chemical to bypass Tokyo export ban, Financial Times, September 5, 2019, <https://www.ft.com/content/389745a6-cf89-11e9-99a4-b5ded7a7fe3f> (subscription required).

[11] *Id.*

[12] Factbox: The high-tech materials at the heart of a Japan-South Korea row, Reuters, July 2, 2019, <https://www.reuters.com/article/us-southkorea-japan-laborers-factbox/factbox-the-high-tech-materials-at-the-heart-of-a-japan-south-korea-row-idUSKCN1TX12I>.

**MILITARY OPERATIONS AND LAW (MILOPS)  
CONFERENCE 2019 DIGEST (CONT)**

CDR Sylvaine Wong

**SOUTHEAST ASIA TRADE: JAPAN & SOUTH  
KOREA**

LT Clint Barker

Universitat Viadrina (Oder), Germany argued that existing norms under international humanitarian law are sufficient to address the emerging ethical and legal issues presented by AWS. Healthy debate ensued, although no resolution was reached.

On the other hand, a presenter from Human Rights Watch argued that the possibility of self-learning artificial intelligence presented fundamental challenges to one of the foundations of the 2016 findings, specifically with the ability to retain human accountability throughout the life cycle of an AWS.

The conference as a whole presented the myriad of perspectives on critical issues affecting the Indo-Pacific and the world maritime domain. In his final remarks, INDO-PACOM's Staff Judge Advocate encouraged continued learning and dialogue from that sparked during the 4-day conference, between nations and organizations as well as individual participants.

For more information about any of the presentations, please contact the author.

[1] MSG ID HQ USPACOM J06 DTG 292031Z Jan 19, SUBJ/2019 MILITARY LAW AND OPERATIONS (MILOPS) STRATEGIC ENGAGEMENT.

[2] Robert Kaplan, "Monsoon: The Indian Ocean and the Future of American Power", 2010.

[3] To preserve non-attribution, no presenters' names or titles will be cited in this article. For more information, please contact the author.

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[13] Japan's new whitelist rules exclude additional 'strictly controlled' export items for now, Korea Herald, August 7, 2019, <http://www.koreaherald.com/view.php?ud=20190807000666>.

[14] *Id.*

[15] South Korea accuses Japan of treating it like a "hostile nation" after it was officially downgraded as a trading partner amid escalating tensions, Business Insider, August 8, 2019, <https://www.businessinsider.com/japan-south-korea-official-downgrade-preferred-trading-partner-hostile-nation-2019-8?r=US&IR=T>; Japan's new whitelist rules exclude additional 'strictly controlled' export items for now, Korea Herald, August 7, 2019, <http://www.koreaherald.com/view.php?ud=20190807000666>.

[16] *Id.*

[17] *Id.*

[18] Japan's new whitelist rules exclude additional 'strictly controlled' export items for now, Korea Herald, August 7, 2019, <http://www.koreaherald.com/view.php?ud=20190807000666>.

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## ANTARCTICA: AVOIDING AN ARMS RACE, OR RUNNING STRAIGHT INTO ONE?

LT AMY ZAJAC

January 20, 2020, marks the bicentennial of the official discovery of Antarctica, when a team of Russian explorers, led by Fabian Gottlieb von Bellingshausen, became the first to set eyes and land on territory within the Antarctic Circle.<sup>1</sup> Once a vast, unknown, uninhabited tundra, Antarctica has transformed into a continent at the center of novel legal issues surrounding territorial claims, international cooperation, and militarization.

The Antarctic Treaty of 1959 (“Treaty”) is an agreement meant to minimize these potential legal issues and regulate relations on the continent to further international collaboration on scientific and exploratory pursuits.

The Treaty suspends individual territorial claims<sup>2</sup> and bans militarization and weapons use on the continent, “[r]ecognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.”<sup>3</sup> While the primary objective of the Treaty--preventing international discord--may not withstand the test of time, the Treaty has been relatively effective in ensuring that the international priority remains freedom of scientific investigation, all while staying true to its intent of limiting any kind of militarization. The only military presence currently allowed on Antarctica under the Treaty is “the use of military personnel or equipment for scientific research or for any other peaceful purpose[s],” otherwise referred to as “dual use.”<sup>4</sup>

Among partner nations, there are a number of na-

tional military programs that organize essential missions to ensure the safety of and provisions for personnel stationed at Antarctic research facilities.<sup>5</sup> For the United States in particular, the Joint Task Force – Support Forces Antarctica (JTF-SFA) recently commenced its 64<sup>th</sup> year providing logistics and support for the U.S. Antarctic Program.<sup>6</sup> JTF-SFA’s principal support mission is Operation Deep Freeze (ODF), a joint service, interagency Defense Support to Civilian Authorities (DSCA) activity in



*Image: Public Domain<sup>14</sup>*

support of the National Science Foundation (NSF), the lead agency for the U.S. Antarctic Program.<sup>7</sup> ODF engages in ongoing collaboration with parallel programs originating out of countries such as New Zealand, Italy, and Australia<sup>8</sup> to carry out “strategic inter-theater airlift, tactical deep field support, aeromedical evacuation support, search and rescue response, sealift, seaport access, bulk fuel supply logistics, port cargo handling and transportation requirements.”<sup>9</sup>

A number of countries have been collaborating on Antarctic exploration for nearly sixty years,<sup>10</sup> but with the advent of new technological capabilities and globalization, more and more state actors are working to develop a presence and increase involvement on the continent. Today, fifty-four nations are party to the Antarctic Treaty of 1959, twenty-nine of which are currently conducting substantial scientific research recognized by the Treaty’s Secretariat.<sup>11</sup>

In 2048, the Antarctic Treaty will be up for review, at which time any Consultative Party<sup>12</sup> will be able to request a conference for proposed revisions to the Treaty protocol.<sup>13</sup> As we approach that date, international agendas may be shifting as more parties become in-

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volved and geopolitics evolve.

The United States, for one, has indicated a priority shift towards increasing military presence and capabilities on the continent. During a talk this past July at the Mitchell Institute for Aerospace Studies, General Charles Brown, U.S. Air Force Commander, Pacific Air Forces, stated, “the capabilities that we have in the Arctic are the same capabilities we probably want to have in the Antarctic,” citing Russia and China’s growing presence in Antarctica as the 2048 Treaty review nears.<sup>14</sup>

Australia has also recently voiced an openness to enhancing military capabilities on the continent through the introduction of dual-use technology, or technology that serves both military and civilian functions. Examples of dual-use technology include satellites and ground-based receiving stations used for GPS, which can be utilized both for peaceful and military purposes. These types of projects are already underway in Antarctica, such as China’s “Beidou”, the European Union’s “Galileo”, and Russia’s “GLONASS” systems.<sup>15</sup> The United States also utilizes a system of relay stations within the Antarctic, and highlights their value to the “transfer of South Pole science, operational, and weather data, as well as Internet, telephone, and email services.”<sup>16</sup> While dual-use technology does facilitate a wide array of peaceful and scientific functions, Australia for years has been mindful of the potential for this technology to be used for “high-precision military tracking, targeting and coordinating [of] capacities.”<sup>17</sup> According to speaking notes from a senior official in Australia’s Defence Force, there is need to balance preserving the strength and authority of the Antarctic Treaty System with maintaining Australia’s foothold and competitiveness with other presences on the continent. Continuing to prioritize legitimate scientific utility, according to the senior official, “does not mean that we cannot, or should not, utilize the

opportunity for implementing dual-use capabilities where we can...”<sup>18</sup>

The kind of strategic advantage made possible from Antarctica could instigate a potential arms race or militarization race among the nations present, especially as dual-use technology is not prohibited if used for scientific research purposes. The Antarctic Treaty attempted to preempt this type of conflict through provisions aimed at transparency between nations and the open sharing of plans, equipment, personnel, results, and observations. Under the Treaty, any party can designate observers to carry out inspections of any station, installation, equipment, ships, and aircraft on the continent. However, as 2048 approaches, it is unknown whether the international community will continue to favor open access, free-flow of information, and a continued ban on militarization, or if pressing issues of territorial claims, resource extraction and exploitation, and a potential arms race will finally have to be addressed.

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[2] The Antarctic Treaty, <https://www.ats.aq/e/antarctic treaty.html> (last visited Oct. 6, 2019).

[3] The Antarctic Treaty pmb. para. 2, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

[4] *Id.* at art. 1, para 2.

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- [6] Staff Sgt. Mikaley Kline, *Joint task force kicks off 64<sup>th</sup> year of DoD Antarctic mission support*, PACIFIC AIR FORCES, Sep. 10, 2019, <https://www.pacaf.af.mil/News/Article-Display/Article/1956772/joint-task-force-kicks-off-64th-year-of-dod-antarctic-mission-support/>.
- [7] Vaughan, *supra* note 5.
- [8] *Id.*
- [9] Kline, *supra* note 6.
- [10] Science and Operations, <https://www.ats.aq/e/science.html> (last visited Oct. 6, 2019).
- [11] Parties, <https://www.ats.aq/devAS/Parties?lang=en> (last visited Oct. 6, 2019).
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- [13] Protocol on Environmental Protection to the Antarctic Treaty (The Madrid Protocol), <http://www.antarctica.gov.au/law-and-treaty/the-madrid-protocol> (last visited Oct. 6, 2019).
- [14] Mike Lucibella, National Science Foundation, Dec 5 2018, in front of Amundsen-Scott South Pole Station, flags of the 12 nations that first signed the Antarctic Treaty in 1959. USAP Photo Library, [https://photolibrary.usap.gov/PhotoDetails.aspx?filename=South\\_Pole\\_Ceremonial\\_Pole\\_Flags.jpg](https://photolibrary.usap.gov/PhotoDetails.aspx?filename=South_Pole_Ceremonial_Pole_Flags.jpg) (last visited Dec. 12, 2019).
- [15] Gen. Charles Brown, Commander, Pacific Air Forces, How the Indo-Pacific and PACAF Strategies Are Shaping the Global Future, Address Before the Mitchell Institute for Aerospace Studies (Jul. 30, 2019) (video recording available at [https://www.youtube.com/watch?v=u\\_pIKw8BN\\_M](https://www.youtube.com/watch?v=u_pIKw8BN_M)).
- [16] Geoff Wade, *Beidou: China’s new satellite navigation system*, PARLIAMENT OF AUSTRALIA, Feb. 26, 2015, [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2015/February/Beidou\\_China\\_new\\_satellite\\_navigation\\_system](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2015/February/Beidou_China_new_satellite_navigation_system).
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- [19] Jackson Gothe-Snape, *Defence wants to roll out military tech in Antarctica despite Treaty ban on military activity*, AUSTRALIAN BROADCASTING CORPORATION, Aug. 20 2019, <https://www.abc.net.au/news/2019-08-19/australia-antarctica-military-dual-use-technology/11427226>.

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## RESULTS OF TRIAL



### **April 2019:**

At a Special Court-Martial in Guam, GM3 Michael Tajan, USN, pled guilty pursuant to a pretrial agreement to violation of a lawful written order, indecent recording and indecent viewing. On April 3, 2019, the military judge sentenced him to reduction in rate to E-1 and confinement for 90 days. Pursuant to the pretrial agreement, all confinement greater than time already served was suspended. The pretrial agreement contained a waiver of the Servicemember's administrative separation board.

### **May 2019:**

At a Special Court-Martial in Guam, HTC Jesse Clayton, USN, was tried for absence without leave and disobeying a noncommissioned officer. On May 1, 2019, a panel of members returned a verdict of guilty to all charges. The panel sentenced him to a reprimand.

At a Special Court-Martial in Yokosuka, Japan, DC3 Lucas Day, USN, pled guilty pursuant to a pretrial agreement to assault consummated by a battery and drunk and disorderly conduct. On May 13, 2019, the military judge sentenced him to 10 months confinement, reduction in rate to E-1 and forfeitures of \$1120 per month for 12 months. The pretrial agreement had no effect on his sentence.

At a Special Court-Martial in Yokosuka, Japan, HM1 David Coffin, USN, pled guilty pursuant to a pretrial agreement to fraternization. On May 14, 2019, the military judge sentenced him to a reprimand. The pretrial agreement had no effect on his sentence.

### **July 2019:**

At a General Court-Martial in Yokosuka, Japan, MA2 Adam Pyron, USN, was tried for two specifications of attempted rape of a child, one specification of rape of a child, one specification of sexual abuse of a child – sexual contact, two specifications of sexual abuse of a child – indecent exposure, and one specification of sexual abuse of a child – indecent communication. On July 19, 2019, a panel of members returned a verdict of guilty to all charges and specifications. The panel sentenced him to a Dishonorable Discharge, reduction in rank to E-1, and confinement for 39 years.

## RESULTS OF TRIAL



### **August 2019:**

At a General Court-Martial in Yokosuka, Japan, an E-4 was tried for sexual assault. On August 14, 2019, a panel of members returned a verdict of not guilty.

### **September 2019:**

At General Court-Martial in San Diego, California, AA Matthew Mosteller, USN pled guilty pursuant to a pretrial agreement to one specification of sexual assault of a person incapable of consenting due to impairment by an intoxicant. On September 26, 2019, the military judge sentenced him to be discharged with a Dishonorable Discharge, reduction in rate to E-1, and confinement for 42 months. Pursuant to a pretrial agreement, all confinement greater than 12 months will be suspended.

At General Court-Martial in Yokosuka, Japan, BM1 Sean McLaughlin, USN pled guilty pursuant to a pretrial agreement to possessing child pornography. On September 30, 2019, the military judge sentenced him to a Dishonorable Discharge and six months confinement. Pursuant to the pretrial agreement, the Dishonorable Discharge will be reduced to a Bad Conduct Discharge.

At a Special Court-Martial in Guam, an E-4 was tried for disrespect towards a sentinel, aggravated assault with a loaded firearm, and assault upon a sentinel or lookout. On September 5, 2019, a panel of members returned a verdict of not guilty.

### **October 2019:**

At General Court-Martial in Yokosuka, Japan, ETN3 Trenton Wallace, USN pled guilty pursuant to a pretrial agreement to one specification of providing a false official statement and two specifications of assault consummated by a battery. On October 2, 2019, the military judge sentenced him to a Bad Conduct Discharge and six months confinement. Pursuant to the pretrial agreement, confinement greater than 30 days was be suspended.

## RESULTS OF TRIAL



### **November 2019:**

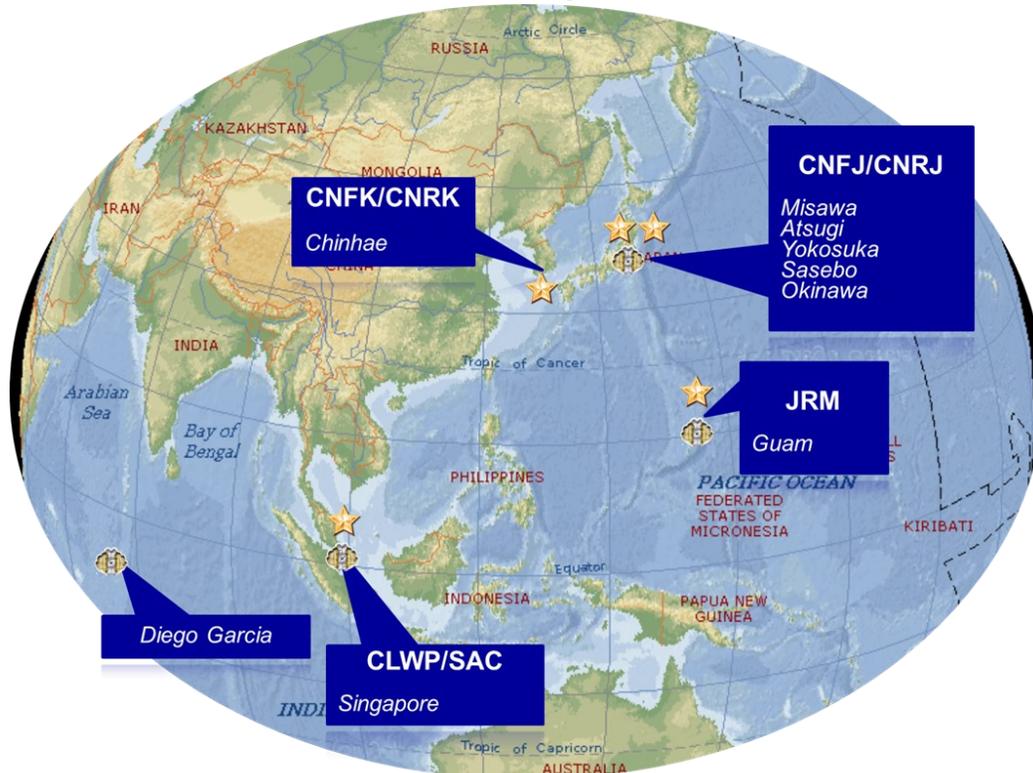
At Special Court-Martial in Yokosuka, Japan, LSSN Liam Nikkel, USN, pled guilty pursuant to a pretrial agreement to absence from place of duty, missing movement, and false official statement. On November 21, 2019, consistent with the pretrial agreement, the military judge sentenced LSSN Nikkel to 81 days confinement, forfeitures of \$1,120.00 for one month, and reduction to E-1. The pretrial agreement contained a waiver of the Servicemember's administrative separation board.

### **December 2019:**

At Special Court-Martial in Yokosuka, Japan, MMNFA Sean Rickard, USN, pled guilty pursuant to a pretrial agreement to three specifications of wrongfully distributing and introducing controlled substances onboard a ship. On December 10, 2019, the military judge sentenced MMNFA Rickard to 10 months confinement, reduction to E-1, and a Bad Conduct Discharge. The pretrial agreement had no effect on his sentence.

## CONTACT INFORMATION

### Your Nearest Legal Advisors



Yokosuka Command Services: 315-243-9541

Yokosuka Legal Assistance: 315-243-8901

CFAY Legal: 315-243-7335

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Atsugi: 315-264-4585

Sasebo SJA: 315-252-3387

Sasebo Legal Assistance: 315-252-2119

Misawa: 315-226-4022

Diego Garcia: 315-370-2922

Okinawa: 315-632-3974

Guam Legal Assistance: 315-333-2061

Joint Region Marianas: 315-349-4134

Singapore: 315-421-2305

CNFK: 315-763-8010

C7F: 315-241-9104

CTF70: 315-243-7113

CTF72: 315-264-2860

CTF76: 315-622-1620

USS RONALD REAGAN: 315-243-6656