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

Lieutenant Commander Erin T. Janofski, JAGC, USN*

"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

---

* Judge Advocate, United States Navy. Presently assigned as the Chief of Operational Law for U.S. Naval Forces Central Command / U.S. Fifth Fleet. LLM, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia. J.D., 2010, The Wake Forest University School of Law; B.A., 2007, DePaul University. Previous assignments include Deputy Executive Assistant to the Judge Advocate General of the Navy, Pentagon, 2022–2023; Command Judge Advocate, USS NIMITZ (CVN 68), Bremerton, Washington, 2020–2022; Instructor, Naval Justice School, Newport, Rhode Island, 2017–2020; Assistant Staff Judge Advocate, Navy Personnel Command, Millington, Tennessee, 2014–2017; Trial Counsel, Region Legal Service Office Japan, Yokosuka, Japan, 2012–2014; Legal Assistance and Defense Attorney, Naval Legal Service Office Pacific, Yokosuka, Japan, 2011–2012. Member of the Bars of North Carolina, the United States Court of Appeals for the Armed Forces, and the Supreme Court of the United States. The positions and opinions expressed in this paper are those of the author and do not necessarily represent the views of the U.S. Government, the U.S. Department of Defense, or the U.S. Navy.

[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/3YIIIC8.
[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] Weiyi 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 Reevell & 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/4fJFbEj.

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/3WNgyyV.
[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/4d8qqsC.
[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/46wI4E0.
[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] Reevell & 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/3SCOHz3 (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 descried 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/3YygS5Q (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/4fpwIpC (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 muddied, 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 ensure 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; s*ee also* Missy Ryan & William Branigin, *U.S. Dispatches Destroyer After Iran Boards Commercial Ship*, WASH. POST. (Apr. 28, 2015), https://bit.ly/4h2DIbN.
[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/4fdsQIb ("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*, MSCI 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).