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Contents

Managing Editor's Comments

Dear *JTMS* Readers,

We are pleased to present this Summer/Fall issue of *JTMS*. As always, this issue of *JTMS* brings a focus on maritime and territorial issues of the day.

First, Sandrine De Herdt provides an overview of the courses of action available to States facing unilateral activities conducted in a maritime area claimed by another State by providing a brief analysis of the content of Articles 74(3) and 83(3) UNCLOS. She then examines protesting, recourse to Part XV UNCLOS, maritime law enforcement, and countermeasures as courses of action. This research is important and has a significant practical dimension since only half of the potential maritime boundaries have been delimited around the world and there are many examples of States acting without notable restraint in disputed areas.

Second, Michael J. Strauss examines the role climate change law can play in determining the future of baselines. This perspective is fresh given that rises in the global mean sea level have been considered from the perspective of the law of the sea, but not from the perspective of climate change law. Strauss summarizes the literature to date and assesses the arguments for and against keeping current baselines. He then describes the primary climate change conventions and their relevance to the issue. This research introduces the relevance of climate change law into the scholarly and diplomatic debate on the future legal treatment of baselines.

Third, Fru Norbert Suh I aims to fill the gap in literature on counterterrorism in gulf zones by identifying and explaining the European Union's counterterrorism framework in the Gulf of Guinea (GoG). Using data obtained from terrorism/counterterrorism literature, including documented reports and other written sources, Suh conducts a comparative analysis using a theory dubbed objective reality-induced counterterrorism to identify and understand the EU's counterterrorism approach in the GoG. He concludes that unless the EU redoubles its efforts in the GoG, international terrorism will further gain grounds there and it will be difficult for the EU to gain control and legitimacy as a partner in the worldwide anti-terrorism struggle.

Fourth, Sindhura Natesha Polepalli discusses the trouble balancing navigational freedom against coastal State security concerns in the context of privately contracted armed security personnel (PCASP) on board ships and floating armories (FA) at sea. In her comparative analysis, the character of the territorial sea (TS) and the exclusive economic zone (EEZ) are examined in light of relevant maritime incidents

and provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). She finds that current regulations do not satisfy coastal State security concerns and argues that the role of International Maritime Organizations (IMOs) is indispensable.

Finally, David Scott delineates, explains and evaluates China's Indo-Pacific strategy through balance of threat theory and security dilemma theory. In terms of geo-economics and geopolitics, he examines energy security and the Maritime Silk Road initiative and also China's presence in its surrounding seas. He finds that China has been quite successful in seeking to establish control of the South China Sea and of the East China Sea, and from there penetrating into the Western Pacific and Indian Oceans. On the other hand, Scott also finds that this very success is creating grounds for failure as a range of states across the region increasingly cooperate ("constrainment") to curb China.

We would like to thank editorial board, our authors, our peer reviewers and you, our readers, for continued support. We look forward to bringing you even more great research and the ongoing improvement of *JTMS*.

Lonnie Edge
Co-Managing Editor

Meaningful Responses to Unilateralism in Undelimited Maritime Areas

Sandrine De Herdt

Structured Abstract

Article Type: Research Paper[1]

Purpose—A number of undelimited maritime areas continues to burden relations between coastal States with opposite or adjacent coasts. Notwithstanding the obligations of States Parties to UNCLOS to make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of a final agreement, various examples of States acting without sufficient restraint are observed in undelimited areas. The purpose of this article is to provide an overview of courses of action available to States facing unilateral activities conducted in a maritime area claimed by another State.

Design/Methodology/Approach—This article first provides a brief analysis of the content of Articles 74(3) and 83(3) UNCLOS. It then examines the following courses of action: protesting, adjudication, provisional measures, maritime law enforcement, and countermeasures.

Findings—This paper shows that unilateral acts could be countered by recourse to diplomatic actions, or Part XV UNCLOS. It further finds that the obligation not to jeopardize or hamper the reaching of a final agreement cuts back the ways in which a State can meaningfully respond to a unilateral activity undertaken in an undelimited area. It is especially true for maritime law enforcement activities and the implementation of lawful countermeasures.

Practical Implications—This article studies the permissible and meaningful

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responses under international law to put a halt to unilateral acts conducted in undelimited areas. The question is important especially since only half of the potential maritime boundaries have been delimited around the world. It has furthermore a significant practical dimension, considering the fact that there are many examples of States acting without notable restraint in disputed areas. The findings may also have important implications for non–State users of the area in question.

Originality, Value—This article presents an analysis of the courses of action available to States facing unilateral activities conducted in disputed maritime areas from the protest through diplomatic channels to the implementation of lawful countermeasures.

Keywords: countermeasures, maritime law enforcement, Part XV UNCLOS, protesting, provisional arrangements, undelimited maritime areas

I. Introduction

A number of undelimited maritime areas continues to burden relations between coastal States with opposite or adjacent coasts. Notwithstanding the obligations of States Parties to UNCLOS[2] under Articles 74(3) and 83(3) to make every effort to enter into provisional arrangements of a practical nature and not to jeopardize or hamper the reaching of a final agreement, various examples of States acting without sufficient restraint are observed in undelimited areas.[3]

On February 16, 2019, Kenya summoned its ambassador to Somalia and asked his Somalia counterpart to leave. The summons was a consequence "of a most regretful and egregious decision by the government of Somalia to auction off oil and gas blocks in Kenya's maritime territorial area that borders Somalia," the Foreign Ministry said.[4] The *Somalia v. Kenya* dispute is currently pending before the International Court of Justice ("ICJ" or "Court"). Somalia accused Kenya of acting unilaterally to exploit both the living and non-living resources on Somalia's side of an equidistance line.[5] It further accused Kenya of having encouraged fisheries within the disputed area.[6] On June 17, 2019, Japan has protested what is says was an "unauthorized Chinese maritime survey within its economic waters near disputed East China Sea islands." The Ministry said it was "extremely regrettable" that the Chinese survey ship was seen conducting research in the area without obtaining Japan's permission. It is recalled that the two countries concluded a framework for mutual prior notification of marine scientific research in 2001.[7] On February 7, 2019, Japan has lodged another protest with China over its continued "deployment of a drilling ship at a gas field" in a contested area of the East China Sea. "It's extremely regrettable that China has continued its unilateral development activity,"[8] Chief Cabinet Secretary said. According to China, it was operating in areas "indisputably" under its jurisdiction.[9] On December 22, 2018, a Venezuelan navy vessel intercepted a ship exploring for oil on behalf of Exxon Mobil in Guyanese waters. Guyana's Foreign Ministry said: "Guyana rejects this illegal, aggressive and hostile act," adding that the move "violates

the sovereignty and territorial integrity of our country."[10] According to Venezuela, the incident occurred in an area under "undoubtedly Venezuelan sovereignty."[11]

Considering these examples, the question boils down to how a State may respond to the other State's unilateral conduct undertaken in an undelimited area. The purpose of this article is to study the permissible and meaningful responses under international law to put a halt to unilateral acts conducted in disputed areas. This paper first provides a brief analysis of the content of the two-pronged obligations contained in Articles 74(3) and 83(3) UNCLOS. It then examines the following courses of action: protesting, adjudication, provisional measures, maritime law enforcement, and countermeasures.

II. The Obligations to Make Every Effort to Enter into Provisional Arrangements of a Practical Nature and not to Jeopardize or Hamper the Reaching of a Final Agreement

Pending the reaching of a final delimitation agreement of the EEZ and continental shelf, respectively, Articles 74(3) and 83(3) UNCLOS impose on the coastal States concerned two interlinked obligations of conduct.[12] These States concerned are under a positive obligation to make every effort to enter into provisional arrangements of a practical nature, and a negative obligation to make every effort not to jeopardize or hamper the reaching of a final agreement. The two obligations simultaneously attempt to promote but also limit activities in disputed areas during the transitional period.[13] As the Arbitral Tribunal in *Guyana/Suriname* held, they constitute "an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime areas, as long as such activities do not affect the reaching of a final agreement."[14] Besides, States are bound by the two obligations during the entire transitional period, i.e., the "period after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved."[15] The two obligations arise when States made it clear that there are overlapping entitlements through a diplomatic protest, legislative act, concrete proposal of a boundary, invitation of negotiation, or *notes verbales* to the Commission on the Limits of the Continental Shelf.

The first obligation aims to invite States to conclude provisional arrangements dealing with the management of resources, or other aspects related to the maritime area subjected to overlapping claims. It was interpreted as an obligation to meaningfully negotiate in good faith.[16] It requires the States concerned to "enter into negotiations with a view to arriving at an agreement and not merely go through a formal process of negotiation."[17] It does not amount to an obligation to reach effectively such agreements.[18] Furthermore, a State facing unilateral activities should request negotiations (and not merely request the offending State to refrain from continuing its activities) to be able to claim a breach of such obligation.[19] Neither merely a non-

binding recommendation nor encouragement, the obligation to negotiate is a mandatory rule and its breach would represent a violation of international law.[20]

The second obligation aims to prevent only activities that will jeopardize or hamper the reaching of a final agreement. This obligation to exercise restraint is thus not intended to preclude *all* activities in undelimited areas.[21] Where provisional arrangements have been reached, these agreements regulate the conduct of the parties in the undelimited area. However, in the situation where no such arrangements have been reached or where they cover only a limited category of activities, the States' obligations concerning an undelimited area are described by the words "not to jeopardize or hamper the reaching of the final agreement."[22] The permissible activities should thus be assessed on a case-by-case basis. In the *Guyana/Suriname* award, the Arbitral Tribunal pronounced itself on the substantive legal difference between oil exploration activities and exploratory drilling. It considered that unilateral activities that might lead to a permanent physical change to the marine environment would generally be regarded as activities jeopardizing or hampering the reaching of a final agreement. Hence, unilateral seismic testing seems to amount to unilateral activities permissible in disputed areas, while exploratory drilling does not.[23] But the *Ghana/Côte d'Ivoire* case seemingly suggests otherwise. The Special Chamber of the International Tribunal for the Law of the Sea ("Tribunal" or "ITLOS") found that it may be permissible for a State to undertake unilateral drilling activities in a disputed area.[24] The distinction between seismic exploration and drilling activities is therefore debatable.

III. Protesting

First of all, faced with an activity unilaterally undertaken that jeopardizes or hampers the reaching of a final agreement, a State can protest against it. A protest is a formal objection by "a State, against a conduct or a claim purported to be contrary to or unfounded in international law."[25] This protest may preserve the rights of the State since the obligations provided for in Articles 74(3) and 83(3) UNCLOS arise when the States make clear that there are overlapping claims. In doing so, the State also makes known that it does not acquiesce.[26] An example may be found in *Ghana/Côte d'Ivoire* where Ghana argued that a tacit agreement has emerged between the parties on a common maritime boundary as a result of their mutual acceptance of such a boundary over many decades. It relied, *inter alia*, on the fact that Côte d'Ivoire never once protested or objected to any of Ghana's extensive activities on its side of the agreed line.[27] On another note, protest invokes state responsibility of another State[28] as well as implies the existence of dispute.[29]

The diplomatic protest could be notably coupled with complaints to the UN Security Council and/or the UN General Assembly. By way of example, in 1976, the unilateral exploration carried out by Turkey without Greece's consent in areas of the continental shelf in the Aegean Sea claimed by the latter triggered a simultaneous and parallel Greek action to the ICJ and to the UN Security Council. On August 25,

1976, the Security Council adopted Resolution 395 by which, *inter alia*, it urged "the Governments of Greece and Turkey to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated," and called upon the parties "to resume direct negotiations over their differences and appealed to them to do everything within their power to ensure that these negotiations will result in mutually acceptable solutions."[30] It also recalled the need for them "to respect each other's international rights and obligations and to avoid any incident which might lead to the aggravation of the situation and which, consequently, might compromise their efforts towards a peaceful solution."[31] Accordingly, the ICJ found it was not necessary "to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of a dispute."[32]

Depending upon the particular circumstances of a case, a mere protest may not suffice and further responses may be required.

IV. Compulsory Dispute Resolution Under UNCLOS

Facing unilateral acts conducted by another State in an undelimited area, a claimant State could resort to the compulsory procedures provided for in Part XV UNCLOS for the peaceful resolution of disputes.

4.1 Requirements Under Article 283 UNCLOS

Recourse to Part XV brings into play the requirements of Article 283 UNCLOS. It requires parties in dispute to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."[33] It also requires a further exchange of views upon the failure of a dispute settlement procedure.[34] The purpose of this article is "to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings."[35] The parties must exchange views on the means to settle the dispute, but they are not under an obligation to engage in substantive negotiations.[36] A State is furthermore "not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement had been exhausted."[37]

Interpreting the articulation between Articles 283 and 74 and 83 UNCLOS, the Arbitral Tribunal in *Arbitration between Barbados and the Republic of Trinidad and Tobago* reached the conclusion that such requirements overlap with the obligation to agree upon delimitation. Since the Parties have already spent a "reasonable period of time" seeking to negotiate a solution to their delimitation problems, it considered that to require a further separate exchange of views on its settlement by negotiation or other peaceful means or procedure for settlement was "unrealistic."[38] Similarly, the Arbitral Tribunal in *Chagos Marine Protected Area Arbitration* emphasized: "an overly formalistic application of Article 283 does not accord with how diplomatic negotiations are actually carried out. […] In practice, substantive negotiations con-

cerning the parties' dispute are not neatly separated from exchanges of views on the preferred means of settling a dispute."[39] Therefore, by seeking to negotiate a solution to delimitation problems during a "reasonable period of time" under Articles 74 and 83 UNCLOS, States seem to have already exhausted the requirements of Article 283. States having exhausted the requirements under Article 283 have not, however, exhausted the obligation to enter into provisional arrangements.

4.2 Declaration Under Article 298 UNCLOS

Upon the failure of the Parties to settle their dispute by recourse to Section 1, i.e., to settle it by negotiations, Part XV, Section 2, UNCLOS gives a Party to a dispute concerning the interpretation or application of UNCLOS a unilateral right to submit it to compulsory settlement by a court or tribunal.[40] However, when signing, ratifying or acceding to UNCLOS or at any time thereafter, Article 298 UNCLOS explicitly permits States Parties to exclude certain categories of disputes from compulsory procedures. As envisaged in Article 298(1)(a)(i) UNCLOS, a State could make a declaration so as to opt out of the compulsory settlement of "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles." Such a dispute may still be subject to the compulsory conciliation procedures in Annex V UNCLOS if it meets certain conditions.[41] The question arises of whether the two obligations enshrined in the common paragraph 3 of Articles 74 and 83 UNCLOS were intended to be covered by Article 298(1)(a)(i) UNCLOS. According to some, the exceptions must be strictly construed. Furthermore, the explicit reference to the disputes "relating to *sea boundary delimitations*" indicates that disputes arising out of an alleged breach of the two obligations does not fall within the scope of declarations under Article 298(1)(a)(i) UNCLOS.[42] Others, instead, argued that such a declaration also excludes the disputes concerning these two obligations.[43] It is open to discussion since the question has not yet been tested by any court or tribunal.[44]

Considering the interpretation whereby the two obligations might be captured by such a declaration raises some interesting questions. The *Ghana/Côte d'Ivoire* case may serve as a good example for further discussions. Ghana closed off the possibility of a judicial solution by filing a declaration under Article 298 UNCLOS, "so shielding its activities from the scrutiny of a judicial body and preventing any possibility of the dispute's being settled by a third party."[45] Following the discovery of a significant oil deposit in the TEN zone,[46] it lodged a declaration on December 15, 2009, in accordance with Article 298(1)(a) UNCLOS excluding disputes concerning sea boundary delimitations from compulsory dispute settlement as provided for in section 2 of Part XV UNCLOS.[47] At that time, it seemed that Ghana used the opportunity to exponentially step up its drilling activities, increase the number of oil contracts and grant permission for seismic surveys to be conducted in the disputed area in spite of Côte d'Ivoire's repeated objections.[48] Ghana kept its declaration in force until after having instituted proceedings and it eventually withdrew it on September 22, 2014.[49] The Special Chamber decided that the fact that Ghana initially closed off the possibil-

ity of a judicial solution by filing the declaration under Article 298 was not contrary to the obligation to negotiate in good faith since the UNCLOS explicitly permits it.[50]

Against this background, a first question arises: can a State lodge a declaration after a dispute has arisen concerning the interpretation or application of Articles 74(3) and 83(3) between the parties to prevent proceedings being instituted against it in respect of this dispute? The limitation of the declaration under Article 298 UNCLOS can have "an impact upon an existing dispute which has yet to reach the stage of proceedings before a Section 2 court of tribunal."[51] A declaration under Article 298 may indeed be withdrawn or amended *at any time* by a State party.[52] A new declaration or a withdrawal of a declaration does not, however, affect a proceeding that is underway.[53]

The ICJ jurisprudence might be of interest for this issue.[54] In the *Right of Passage Over Indian Territory* case, the Court found that a declaration of acceptance to its compulsory jurisdiction applies to disputes brought before it after the date of notification and that no retroactive effect can properly be imputed to notifications made.[55] In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the Court considered the question of the precise period of notice appropriate to terminate a declaration. It should be observed that in the *Right of Passage over Indian Territory* case, it did make a pronouncement on the opposite situation, where Portugal had made a declaration regarding the Optional Clause only a few days before it filed an application against India based on this declaration.[56] In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, while the United States was bound by self-imposed clause of six months' notice, the ICJ held that:

> the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a *reasonable time* for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.[57]

On the question of what reasonable period of notice would legally be required, the Court observed that three days would not amount to a reasonable time.[58] In the *Fisheries Jurisdiction (Spain v. Canada)*, the Court upheld the declaration of reservation made 10 months prior to an application to it by Spain to the jurisdiction of the Court in relation to disputes concerning conservation measures applicable to vessels fishing in the NAFO Regulatory area.[59] By comparison, a State making a declaration under Article 298(i)(a) UNCLOS may be subject to the tests of good faith and reasonable period of notice.[60] The precise period of notice must necessarily be fixed *in concreto* according to the circumstances of the case,[61] especially taking into account the timing and subject of the reservation.[62]

A second question arises of whether any dispute connected with the undelimited area should be excluded automatically. It should be noted at the outset that the invocation of a declaration under Article 298 does not as such oust the tribunal's jurisdiction. A Party to a dispute cannot determine unilaterally whether the exclusion applies in a given case.[63] Besides, the *South China Sea Arbitration* shed useful light

on the interpretation of declaration under Article 298. The Philippines had challenged the existence and extent of the maritime entitlements claimed by China in the South China Sea. The Arbitral Tribunal in its *Award on Jurisdiction and Admissibility* found that this was not a dispute over maritime boundaries since the Philippines had not requested the Tribunal to delimit any overlapping entitlements between the two States.[64]

Notwithstanding a declaration under Article 298, a dispute connected with Articles 74(3) and 83(3) UNCLOS might be brought before a court or a tribunal. Other obligations under UNCLOS (which does not call upon the breach of the obligation to enter into provisional arrangement and/or not to jeopardize or hamper the reaching of the final agreement)[65] may indeed provide potential legal bases for proceedings under Part XV: the "due regard" obligations (Articles 56[2] and 58[3] UNCLOS), exclusive rights of exploration and exploitation of the natural resources of the continental shelf (Articles 56[1] and 77[1] UNCLOS),[66] laws and regulations regarding drilling on the continental shelf (Article 81 UNCLOS), operation of law enforcement vessels (e.g., Articles 73, 224–227, 232 UNCLOS),[67] cooperation of States bordering enclosed or semi-enclosed seas (Article 123 UNCLOS),[68] obligation to protect and preserve the marine environment (Part XII UNCLOS), exclusive right to conduct maritime scientific research (Article 246[5] UNCLOS), obligation to settle disputes by peaceful means (Article 279 UNCLOS), and good faith and abuses of rights (Article 300 UNCLOS).[69] Finally, it should be added that making a declaration under Article 298 does not mean that a State does not have to comply with the obligation to settle disputes by peaceful means, expeditious exchange of views regarding the settlement of the dispute, invitation to conciliation as well as the general principle of good faith and abuse of rights.[70]

V. Request for the Prescription of Provisional Measures

Another option for a claimant State to address unilateral conduct committed in an undelimited area potentially in violation of Articles 74(3) and 83(3) is to request provisional measures as provided for in Article 290 UNCLOS.[71] Such measures aim at preserving the *status quo* of the litigation in question pending the proceedings and/or avoiding an aggravation of the dispute between the parties.[72]

5.1 Conditions

Article 290 UNCLOS serves two situations. (1) Its paragraph 1 deals with the situation where "the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the disputes or to prevent serious harm to the marine environment, pending the final decision." (2) Its paragraph 5 gives compulsory residual jurisdiction to prescribe provisional measures to any court or tribunal agreed to between the

parties or, failing such agreement within two weeks from the date of the request for provisional measures, to ITLOS pending the establishment of an arbitral tribunal pursuant to Part XV UNCLOS.

Neither the existence of a claim to an area of EEZ or continental shelf *per se*,[73] nor the existence of a maritime boundary dispute *per se*, are sufficient bases for the prescription of provisional measures under Article 290 UNCLOS. Indeed, certain conditions are required to be fulfilled for the prescription of such measures. Pursuant to it, the prerequisite is that *prima facie* the court or tribunal would have jurisdiction to hear the case. It is the case where "there is nothing which manifestly and in terms excludes the Tribunal's jurisdiction."[74] As discussed above, there is an uncertainty as to the effect of a declaration under Article 298(1)(i)(a) on disputes arising under Articles 74(3) and 83(3) UNCLOS. Besides the *prima facie* jurisdiction, there are additional requirements to be satisfied if provisional measures are to be prescribed: the risk of irreparable prejudice[75]; urgency, "that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to the rights at issue before the final decision is delivered"[76]; the existence of a link between the rights claimed and the provisional measures requested[77]; and the plausibility test, or the need to show that the rights claimed on the merits and sought to be protected are at least plausible.[78] A court or tribunal is free to indicate provisional measures different from those requested.[79] Compliance with them must be prompt.[80]

It is worth mentioning that, instead of acts Suriname characterized as maritime enforcement, the Arbitral Tribunal in *Guyana/Suriname* specified that peaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under UNCLOS. Indeed, it could have invoked compulsory dispute resolution provided for in Section 2 of Part XV UNCLOS, which provides among other things the request to prescribe provisional measures.[81] While assessing whether the conduct of the State concerned breached Articles 74(3) and 83(3), the fact that the request to such measures was not considered as an option to cease the alleged lawful conduct and to safeguard its rights might be taken into account by a court or tribunal.

5.2 Provisional Measures with Respect to the Obligation Not to Jeopardize or Hamper the Reaching of a Final Agreement

The request for provisional measures with respect to the obligation not to jeopardize or hamper the final agreement may be strategically useful to preserve the *status quo* that might otherwise be upset by the unilateral action undertaken by a State in an undelimited area pending a judicial decision. These measures intend to guarantee that the negotiations as such remain meaningful.

The recourse to such measures might be justified to preserve the sovereign rights of State in the case of drilling exploration. In the *Aegean Sea Continental Shelf* order, the ICJ held that the establishment of installations on or above the seabed of the continental shelf as well as the actual appropriation or other use of the natural

resources of the areas of the continental shelf disputed may provide grounds for the request of provisional measures. It also considered that exploration activities involving a risk of permanent (not "of a transitory character") physical damage to the seabed or subsoil or to their natural resources of the continental shelf may merit provisional measures.[82] In the *Ghana/Côte d'Ivoire* order, Côte d'Ivoire requested the Special Chamber to order suspension of all seismic exploration activities, drilling activities and the establishment of installations on the seabed of the continental shelf which caused physical harm to it[83]—summarized as "all ongoing oil exploration and exploitation operations." Taking into account the significant and permanent modification of the physical characteristics of the area in dispute, the considerable financial risk for Ghana (and its concessionaires) and serious danger to the marine environment that suspension of ongoing activities might entail,[84] the Chamber ultimately ordered Ghana to refrain from undertaking new drilling in the disputed area—but did not order cessation of those activities already underway. In light of this, it is safe to assume that States becoming aware of the arrival of an oil rig and drilling ship in an undelimited area should request provisional measures to prevent drilling activities from being undertaken.

The above observation leads to consideration as to whether such measures may prevent seismic activities generally perceived as less invasive than drilling operations. In the *Aegean Sea Continental Shelf* order, the ICJ held that seismic exploration, being of transitory character, does not by itself suffice to justify the indication of interim measures of protection.[85] In line with this is the *Ghana/Côte d'Ivoire* order where the Chamber did not order suspension of all seismic surveys, despite the request by Côte d'Ivoire. That said, it is worth highlighting that the ICJ, in the *Aegean Sea Continental Shelf* order, said: "[n]o complaint has been made that this form of seismic exploration involves any risk of physical damage to the seabed or subsoil or to their natural resources."[86] Interestingly enough, a recent article brings to light the potential adverse effects of seismic surveys on the marine environment in or near the area in question due to the high volume of acoustic energy commonly released during seismic operations.[87] Yiallourides concluded: "the potential adverse effects of seismic noise on the marine environment, if adequately presented by the complaining party before the Tribunal, may well justify the prescription of provisional measures of protection under Article 290 UNCLOS and may, therefore, provide an adequate remedy for the complaining party."[88]

Among the rights connected to the exploration and exploitation of the natural resources of the continental shelf, some may create a risk of irreversible prejudice as the acquisition and use of information concerning the resources of the undelimited area. Seismic exploration studies and analysis may provide an advantage to the State possessing it during delimitation negotiations. The State can effectively assess the potential value of the oil and gas resources through the information obtained, including as the outer configuration of the reservoir, its internal structure and its size, as well as the accessibility and quality of its resources.[89] According to the Côte d'Ivoire request, "the sovereign rights of the coastal State relating to the exploration of the continental shelf and the exploitation of the natural resources thereof include not

only the right of that State to regulate access to them but also its right to possess and control all information relating to them."[90] The Special Chamber ruled that these rights fall within the ambit of a State's exclusive rights.[91] It ordered Ghana "to take all necessary steps to prevent information resulting from past, ongoing or future exploration activities conducted by Ghana, or with its authorization, in the disputed area that is not already in the public domain from being used in any way whatsoever to the detriment of Côte d'Ivoire."[92] One should note that, in the *Aegean Sea Continental Shelf* order, the ICJ found that to acquire information concerning the natural resources of areas of the continental shelf is one that might be capable of reparation by appropriate means and thus did not create a risk of irreparable prejudice to rights in issue.[93]

Provisional measures may be justified in the context of the prevention of serious harm to the marine environment. In the *Ghana/Côte d'Ivoire* order, the Special Chamber noted that Côte d'Ivoire's allegations of risk of serious harm to the marine environment due to the activities conducted by Ghana in the disputed area were insufficiently documented.[94] However, in its views, such risk was of great concern.[95] It held that the complete suspension of ongoing activities conducted by Ghana could pose "a serious danger to the marine environment resulting, in particular, from the deterioration of equipment."[96] Therefore, the Chamber imposed on both States the general obligation of cooperation in relation to the protection and preservation of the marine environment in UNCLOS and general international law. It also invited them "to act with prudence and caution to prevent serious harm to the marine environment."[97] It subsequently ordered Ghana to carry out strict and continuous monitoring of its activities in the disputed area with a view to ensuring the prevention of serious harm to the marine environment.[98] The added value of these measures could be to "underline a sense of urgency arising out of the duty to cooperate enshrined in part XII of the Convention and general international law."[99]

Provisional measures may also prove to be useful to prevent a State from increasing fishing activities in undelimited areas to the point where such stocks are in danger of becoming over-fished.[100]

Finally, the prevention of an armed incident in undelimited areas may likely be the subject of provisional measures.[101] In the aftermath of Suriname's threat to use force by mooring a warship against the rig, Guyana planned to seek such measures from the ITLOS pending the constitution of the Arbitral Tribunal. However, it did not submit its request. In its Statement of Claim, Guyana requested, *inter alia*, that Suriname shall, pending the decision of the Tribunal:

(1) refrain from any threat or use of armed force in the maritime zone under dispute or any other measures that would aggravate, prolong, or render more difficult the solution of the dispute submitted to the Annex VII Tribunal;

(2) refrain from any conduct in the nature of reprisals against Guyana or its nationals, including in particular its fisher-folk, in retaliation for Guyana's recourse to the compulsory procedures under the 1982 Convention.[102]

5.3 Provisional Measures with Respect to the Obligation to Enter into Provisional Arrangements

The request for provisional measures with respect to the obligation to enter into provisional arrangements seems to have less practical utility. The issue arises of whether a court or tribunal may order a provisional agreement that the parties themselves were unable to agree on in order to protect the substantive rights of the parties pending the proceedings. As Klein rightly pointed out, it is doubtful that a court or tribunal should be able to go so far as imposing such arrangement since there is no obligation to come to provisional arrangements (but a mere obligation to make every effort to enter into negotiations).[103] Instead, it might be ordered to cooperate until the final decision on the maritime delimitation—that is the obligation yet contained in Articles 74(3) and 83(3) UNCLOS. Such measures, however, may likely create a more suitable climate for negotiations of provisional agreements while underlining a sense of urgency.

VI. Maritime Law Enforcement

Another option for a claimant State to address unilateral conduct undertaken in an undelimited area is the coastal State's enforcement of sovereign rights with regard to living or non-living resources. One may wonder whether such an enforcement measure undertaken against the other party to the dispute (or against its vessels) would conform to the Articles 74(3) and 83(3) UNCLOS. Indeed, any such law enforcement activity against vessels of the other State might be considered inconsistent with the obligation not to jeopardize or hamper. While it is true that this response to unilateral conduct may exacerbate the dispute between the States, such an action in an undelimited area should not automatically be ruled out in every case.[104] What is more, such a response might be considered as a meaningful response to a unilateral act undertaken in undelimited area, especially in the need for urgency to prevent infringement of a State's rights, that is, "to preserve the interests of the coastal State *after* activities have started and while they take place."[105] Considered as a last resort option, a State may, therefore, incur international responsibility for the breach of Articles 74(3) and 83(3) UNCLOS while having recourse to law enforcement and not having tried in good faith to address the situation earlier by other means.[106]

Besides, to enforce its laws and regulations in an undelimited area, a State has to strictly observe the requisites set down both by national legislation and by international law.[107] Maritime law enforcement involves two levels of legal prescriptions: (1) it has to be permitted by international law which defines the conditions to resort to force and the limits on the degree of force to apply; and (2) it has to be prescribed by national legislation which indicates when, if necessary, law enforcement power is to be exercised and with what degree of force.[108]

A question to be addressed is the dividing line between the use of force in the exercise of law enforcement activities and the (threat of) use of force under Article

2(4) of the UN Charter. In *Guyana/Suriname*, following failed diplomatic efforts with Guyana to cease all oil exploration activities in the undelimited area, two patrol boats from the Surinamese navy approached the CGX's oil rig and drill ship and ordered the ship and its service vessels to leave the area within twelve hours[109]: if they would not do so, "the consequences would be theirs."[110] The Arbitral Tribunal admitted that "there was no unanimity as to what these 'consequences' might have been."[111] Based primarily on the testimony of witnesses involved in the incident, it held that the order to leave the area constituted an explicit threat that force might be used if the vessels did not comply.[112] The Tribunal rejected Suriname's argument that the measures undertaken were reasonable and proportionate law enforcement measures to preclude unauthorized drilling in a disputed area of the continental shelf.[113] It considered that Suriname's action "seemed more akin to a threat of military action rather than a mere law enforcement activity."[114] As a result, it concluded that Suriname's threat of force amounted to both a threat of the use of force in contravention of the UNCLOS, the UN Charter, and general international law,[115] and a violation of the obligation not to jeopardize or hamper the reaching of a final delimitation agreement.[116]

Practically, the fact remains that to delineate the legal line separating maritime law enforcement from the use of force seems to be a far from clear-cut exercise. One view is that merely the nature of the activities may qualify the legal framework of the reaction. It has been argued: "if the use of force or threat of the use of force […] aims at protecting sovereignty or sovereign rights, such as the right to explore the natural resources of the continental shelf, especially in disputed maritime areas, then article 2(4) and article 51 of the UN Charter comes into play."[117] On the other hand, it has been said that the determination of the international legal nature of the forcible action depends upon the circumstances surrounding the case. Criteria such as the functional objective of the forcible action, the status of the entity subjected and location and jurisdictional aspects, can serve in this regard.[118] Another possible methodology to draw the distinction might be to compare the offending State's legislation with the regulations of other States and analyze the terms of the international legal basis which permitted the enforcement action, as the Court did in the *Fisheries Jurisdiction* case.[119] To determine exactly when the situation becomes serious enough to trigger the application of Article 2(4) UN Charter, the criterion of gravity can be interpreted considering the place where the litigious action took place and the seriousness of the action must be appreciated, depending upon the context in which it occurred.[120] In any event, in the exercise of enforcement action, the use of force is permitted as a no-alternative option only.[121]

VII. Implementation of Lawful Countermeasures

Provided that countermeasures are in conformity with the rules on State responsibility,[122] a State can take countermeasures in response to an alleged breach of Articles 74(3) and 83(3) UNCLOS with the aim of inducing compliance by another State.

7.1 Lawfulness of Countermeasures in Undelimited Area

The purpose of countermeasures is to induce another State to comply with its obligations,[123] and not to have a punitive aim. Countermeasures are thus intended to be instrumental, i.e., "they are taken with a view to procuring cessation of and reparation for the internationally wrongful act."[124] Note that a State may also resort to retorsion, i.e., unfriendly conduct not taken as a response to an internationally wrongful act.[125]

In order to be justifiable, a countermeasure must meet certain conditions: it must be taken in response to a previous wrongful act of another State; be directed to that State[126]; be temporary in character[127]; be as far as possible reversible in its effect[128]; be a necessary and proportionate response[129]; it must not involve any departure from the peremptory norms, or obligation to refrain from the threat or use of force as embodied in the UN Charter.[130]

Considering the obligation to meaningfully negotiate "in a spirit of understanding and cooperation" in particular, some concerns may arise as to whether a State can have recourse to countermeasures in the negotiation phase. On the question of whether the negotiations and such measures could go hand in hand, the *Air Service Agreement* award might be of interest. The Arbitral Tribunal held as follows:

> 85. It is tempting to assert that when Parties enter into negotiations, they are under a general duty not to aggravate the dispute, this general duty being a kind of emanation of the principle of good faith. […]
>
> 91. It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.[131]

Accordingly, when there are accompanied by an offer to negotiate in particular, countermeasures are available during the negotiations phase. Before taking it, a claimant State is required to call upon another State to fulfill its obligations as well as to notify it of any decision to take countermeasures and offer to negotiate with that State.[132] The State has dispensed with the notification requirement in a situation of urgency to preserve its rights, nonetheless.[133] The prohibition of countermeasures while negotiations are being carried out in good faith was furthermore deleted from the final version of the Draft Articles on State Responsibility.[134] That said, in a provisional arrangement, States may explicitly exclude countermeasures with respect to the performance of the obligations under Articles 74(3) and 83(3) UNCLOS by a provision precluding the suspension of performance of an obligation under any circumstances.[135]

A State may resort to countermeasures against another State that is acting wrongfully. This State acts at its peril since it bases its actions solely on its unilateral assessment of whether wrongful conduct committed by another State actually occurred.[136] When taking countermeasures, the assessment of the existence of such a wrongful act presupposes an objective standard.[137] However, as best captured by Judge Paik, the "key criterion is whether the actions in question would have the effect of endangering the process of reaching a final agreement or impeding the progress of negotiations to that end. In other words, it is a result-oriented notion."[138] He further noted: "[i]n assessing whether the conduct of States would have the effect of jeopardizing or hampering the reaching of the final agreement, several factors may be considered. In particular, the type, nature, location, and time of acts as well as the manner in which they are carried out may be relevant."[139] A State taking countermeasures may act wrongfully if it is determined that a prior wrongful act did not exist. On another note, while countermeasures can be used for conduct taken in breach of a provisional agreement, it may not be resorted to for failure to reach such an arrangement since the obligation to negotiate does not imply the actual reaching of it.

7.2 Permissible Countermeasures

The question of proportionality is central to the consideration of what kind of countermeasures are available to a State.[140] Proportionality seeks to commensurate the character and effects of a countermeasure with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.[141] Additionally, an important consideration intended to restrain the conduct is that a State should choose, as much as possible, countermeasures capable of being reversed. An act is considered reversible if it can later be undone, i.e., if it can permit the resumption of performance of the obligations suspended as a result of countermeasures.[142]

"By its very nature, drilling is irreversible because once the rock has been crushed it cannot be reconstituted."[143] It is therefore debatable that a State may conduct drilling operations as a countermeasure. It has been argued elsewhere, however, that "in terms of oil and gas exploitation countermeasures would only be available if the dispute involved an area with very limited resources," i.e., Australian oil companies in the Western Sahara.[144] Doubt can equally be shed on whether a State can carry out seismic activities as a proportionate response to a prior wrongful act. Even though one may argue that a State can conduct drilling activities or undertake seismic exploration as countermeasures, doing so will certainly aggravate the dispute. In this regard, it is relevant to note that countermeasures operate "more as a shield than a sword" to protect the State against an otherwise well-founded accusation of wrongful conduct.[145] But such measures could not strike down the obligations under Articles 74(3) and 83(3)[146]—although compliance with them is temporarily suspended, such obligations remain in force.

On the other hand, a State could take acts consisting in abstentions. For instance,

it may withdraw from negotiation (even in a field other than maritime delimitation), or suspend a treaty obligation, such as an arrangement permitting nationals and fishing vessels of the other Party to harvest in its EEZ.

7.3 The Relation Between Countermeasures and Dispute Settlement Mechanisms

The question arises as to whether the recourse to countermeasures is conditional upon prior exhaustion of international dispute settlement procedures. Part of the response might be found in the *Guyana/Suriname* award. As mentioned earlier the Arbitral Tribunal found that peaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under UNCLOS.[147] As a result, a judicial body faced with the alleged violation of Articles 74(3) and 83(3) UNCLOS may take into consideration the non-recourse to Part XV. The ILC nonetheless concluded that the recourse to countermeasures was not conditioned on the recourse to dispute settlement procedures.[148] This is not to say, however, that countermeasures must not be viewed as *ultima ratio*. They are justified as the only means at the disposal of a State to respond to the peril at a particular time. The limited object and exceptional character of countermeasures as a response to internationally wrongful conduct are acknowledged.[149]

Furthermore, the fact that the dispute is pending before a court or tribunal precludes the imposition of countermeasures.[150] It does not apply if the State refuses to cooperate in the procedure, for instance, by non-appearance, through non-compliance with a provisional measure order, or through to refusal to accept the final decision of the court or tribunal.[151]

VIII. Conclusion

In undelimited maritime areas, pending agreement on maritime boundary delimitation, the UNCLOS enjoins States Parties to make every effort to enter into provisional arrangements of a practical nature, and not to jeopardize or hamper the reaching of a final agreement. Facing unilateral acts conducted in such an area, a coastal State has several options available to which it might respond meaningfully. The State can protest against the conduct, enter into discussions regarding provisional arrangements to establish the modalities of the unilateral action, or complain about the action to the UN General Assembly and/or Security Council. A State may equally counter such unilateral action by the recourse to compulsory dispute resolution under Part XV, Section 2, UNCLOS. If the option is not available due to a declaration made under Article 298, other legal bases subject to the compulsory dispute settlement mechanism that do not call upon the breach of Articles 74(3) and 83(3) UNCLOS might be used. Moreover, if the course of action so requires, a State has the option to respond meaningfully through the request of provisional measures. The request for such measures with respect to the obligation to enter into a provi-

sional arrangement seems, however, to have less practical utility. Finally, it is reasonable to infer that the obligation not to jeopardize or hamper the reaching of a final agreement limits somewhat the ways in which a State can meaningfully respond to a unilateral activity undertaken in an undelimited area. This is especially true regarding maritime law enforcement activities and the implementation of lawful countermeasures. These two responses may increase the likelihood of jeopardizing or hampering negotiations on a boundary, and have the potential to exacerbate matters still further.

Notes

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2. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 397 ("UNCLOS").

3. See generally: *Report on the Obligations of States Under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas* (London: British Institute of International and Comparative Law, 2016) ("BIICL Report"), pp. 40–112, paras. 134–397.

4. "Kenya Recalls Its Ambassador to Somalia as Territorial Row Escalates," *Reuters*, 17 February 2019, available at https://af.reuters.com/article/topNews/idAFKCN1Q60BY-OZATP?feedType=RSS&feedName=topNews. Accessed 10 May 2019.

5. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, *Application Instituting Proceedings*, p. 8, para. 25.

6. *Ibid.*, Memorial of Somalia, p. 144, para. 8.34.

7. See "Japan protests Chinese activity near disputed islands," *Washington Post*, available at https://www.washingtonpost.com/world/asia_pacific/japan-protests-chinese-activity-near-disputed-islands/2019/06/17/9ca11a14-90ea-11e9-956a-88c291ab5c38_story.html?utm_term=.e87c1400fc11.

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9. See "Beijing Defends East China Sea Activities After Japan Protests," *South China Morning Post*, 2 August 2017, available at https://www.scmp.com/news/china/diplomacy-defence/article/2105153/beijing-defends-east-china-sea-activities-after-japan; see also "Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on December 3, 2018," available at https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1618558.shtml, accessed 10 May 2019.

10. "Venezuela Navy Confronts Exxon Oil Ship in Guyana Border Dispute," *Reuters*, 23 December 2018, available at https://www.reuters.com/article/us-guyana-venezuela-oil/venezuela-navy-confronts-exxon-oil-ship-in-guyana-border-dispute-idUSKCN1OM0BK. Accessed 10 May 2019.

11. *Ibid.*

12. *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean (Ghana/Côte D'Ivoire)*, *Judgment of 23 September 2017*, Case No. 23, pp. 170–172, paras. 627, 629 ("*Ghana/Côte D'Ivoire* Judgement").

13. Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, *RIAA*, vol. XXX, 1, p. 130, para. 459 ("*Guyana/Suriname*"); Myron H. Nordquist, N.R. Grandy, S.N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* vol. 2 (Leiden: Martinus Nijhoff, 1993), pp. 815, 984.

14. *Guyana/Suriname*, *op. cit.*, p. 130, para. 460.
15. *Ibid.*, p. 172, para. 630.
16. *Ibid.*, para. 461.
17. *North Sea Continental Shelf*, *Judgment*, *I.C.J. Reports 1969*, p. 47, para. 85 ("*North Sea Continental Shelf*").
18. *Ibid.*, p. 48, para. 87.
19. *Ghana/Côte D'Ivoire* Judgement, *op. cit.*, pp. 166, 171, paras. 605, 628.
20. Rainer Lagoni, "Interim Measures Pending Maritime Delimitation Agreements," *American Journal of International Law* 78(2) (1984), p. 354, https://doi.org/10.2307/2202280.
21. See *Ibid.*, pp. 349–354.
22. *Ghana/Côte D'Ivoire* Judgement, *op. cit.*, p. 172, para. 630.
23. Guyana/Suriname, *op. cit.*, pp. 132–133, 137, paras. 467, 470, 479–481.
24. *Ghana/Côte D'Ivoire* Judgement, *op. cit.*, pp. 166–173, paras. 606–634.
25. Christophe Eick, "Protest," *Max Planck Encyclopedia of Public International Law* (2006) available at https://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1460?rskey=cpe7AO&result=1&prd=OPIL, https://doi.org/10.2307/2202280. Accessed 10 May 2019.
26. *Ibid.*
27. *Ghana/Côte D'Ivoire* Judgement, *op. cit.*, pp. 42–43, paras. 130–136.
28. See Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "ARSIWA") in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp No. 10, UN Doc. A/56/10 (2001), art. 43.
29. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *Preliminary Objections*, *Judgement*, *I.C.J. Reports 2016*, 833, p. 849, para. 38.
30. SC Res 395 (25 August 1976), Complaint by Greece against Turkey, p. 16.
31. *Ibid.*
32. *Aegean Sea Continental Shelf*, *Interim Protection*, *Order of 11 September 1976*, *I.C.J. Reports 1976*, p. 13, para. 42 ("*Aegean Sea Continental Shelf* Order").
33. *Ibid.*, art. 283(1).
34. *Ibid.*, art. 283(2).
35. *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, p. 149, para. 382 ("*Chagos Marine Protected Area Arbitration*") available at https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf. Accessed 10 May 2019.
36. *Ibid.*, p. 147, para. 378.
37. See *MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures*, *Order of 3 December 2001*, ITLOS *Reports 2001*, p. 107, para. 60.
38. *Arbitration Between Barbados and the Republic of Trinidad-and-Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them*, Decision of 11 April 2006, *RIAA*, vol. XXVII, pp. 206–207, paras. 201–205.
39. *Chagos Marine Protected Area Arbitration*, *op. cit.*, p. 146, para. 381.
40. UNCLOS, art. 286.
41. See *In the Matter of a Conciliation Before a Conciliation Commission Constituted Under Annex V to the 1982 United Nations Convention on the Law of the Sea Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, *Decision on Australia's Objections to Competence*, PCA Case no. 2016–10, 19 September 2016, pp. 16–22, paras. 65–82.
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43. See Natalie Klein, "Provisional Measures and Provisional Arrangements," in Alex G. Oude Elferink, Tore Henriksen and Signe V Busch (eds.), *Maritime Boundary Delimitation: The Case Law: Is It Consistent and Predictable?* (Cambridge: Cambridge University Press, 2018) pp.

124–125; Robert Beckman, "International Law, UNCLOS and the South China Sea," in Robert Beckman et al., *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Cheltenham: Edward Elgar Publishing, 2013), p. 84; Vasco Becker-Weinberg, *Joint Development of Hydrocarbon Deposits in the Law of the Sea* (Berlin-Heidelberg: Springer, 2014), p. 103, https://doi.org/10.2307/2202280; Enrico Milano and Irini Papanicolopulu, "State Responsibility in Disputed Areas on Land and At Sea," *Zeitung Für Ausländisches öffentliches Recht Und Völkerrecht* 71(3) (2011), p. 621; Irini Papanicolopulu, "Enforcement Action in Contested Waters: The Legal Regime," in 6th IHO-IAG ABLOS Conference: "Contentious Issues in UNCLOS—Surely Not?" (International Hydrographic Bureau, Monaco, 2010), p. 7 available at https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S7P2-P.pdf, accessed 15 February 2019; Gillian Triggs and Dean Bialek, "Australia Withdraws Maritime Disputes from the Compulsory Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea," *The International Journal of Marine and Coastal Law* 17(3) (2002), p. 426, https://doi.org/10.2307/2202280; Lagoni, *op. cit.*, p. 368. Accessed 10 May 2019.

44. See, however, *In the Matter of a Conciliation Before a Conciliation Commission Constituted Under Annex V to the 1982 United Nations Convention on the Law of the Sea Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, op. cit.

45. *Ghana/Côte D'Ivoire* Judgment, *op. cit.*, Counter Memorial of Côte d'Ivoire, p. 239; *Ibid.*, Rejoinder of Côte d'Ivoire, pp. 57, 120, 124, 126, 164, 172.

46. *Ibid.*, Counter Memorial of Côte d'Ivoire, p. 122; *Ibid.*, Rejoinder of Côte d'Ivoire, pp. 123–127.

47. "Ghana: Declaration Relating to Article 298," available at https://treaties.un.org/doc/Publication/CN/2009/CN.890.2009-Eng.pdf. Accessed 10 May 2019.

48. *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte D'Ivoire)*, *Provisional Measures*, *Order of 25 April 2015*, *ITLOS Reports 2015*, Request of Côte d'Ivoire, p. 8, para. 10 ("*Ghana/Côte D'Ivoire* Order"); *Ghana/Côte D'Ivoire* Judgment, *op. cit.*, Rejoinder of Côte d'Ivoire, pp. 123–127.

49. Ghana: Withdrawal of declaration relating to Article 298 available at https://treaties.un.org/doc/Publication/CN/2014/CN.568.2014-Eng.pdf. Accessed 10 May 2019.

50. *Ghana/Côte D'Ivoire* Judgment, *op. cit.*, p. 166, para. 604.

51. Donald R. Rothwell and Tim Stephens, *The International Law of the Sea*, 2d ed. (Oxford: Hart Publishing, 2016), p. 493.

52. UNCLOS, art. 298(2).

53. *Ibid.*, art. 298(5).

54. While the declaration under article 36(2) ICJ Statute is a declaration of inclusion, the declaration under article 298 UNCLOS is one of exclusion.

55. *Case Concerning Right of Passage Over Indian Territory (Preliminary Objections)*, *Judgment of November 26th*, *1957*, *I.C.J. Reports 1957*, p. 142.

56. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1984*, p. 467 (Separate opinion of Judge Mosler).

57. *Ibid.*, p. 420, para. 63 (emphasis added). on an inherent right to terminate without a period of notice, see: *Ibid.*, pp. 471–513 (Separate opinion of Judge Oda); *Ibid.*, p. 553 (Separate opinion of Judge Sir Robert Jennings); *Ibid.*, pp. 618–621 (Dissenting opinion of Judge Schwebel). See also Andrew Serdy, "Article 298. Optional Exception to Applicability of Section 2," in Alexander Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (München/Oxford/Baden-Baden: Beck/Hart/Nomos, 2017), p. 1932.

58. *Nicaragua v. United States of America*, *op. cit.*, p. 420, para. 63.

59. Triggs and Bialek, *op. cit.*, p. 427.

60. *Ibid.*

61. *Nicaragua v. United States of America*, *op. cit.*, p. 467 (Separate opinion of Judge Mosler).

62. Triggs and Bialek, *op. cit.*, p. 427.

63. See *The "Arctic Sunrise" Case (Kingdom of the Netherlands V. Russian Federation)*, *Provisional Measures*, Order of 22 November 2013, 230, p. 259, para. 8 (Joint separate opinion of Judges Wolfrum and Kelly).

64. *In the Matter of an Arbitration Before an Arbitral Tribunal Constituted Under Annex*

VII to the 1982 United Nations Convention on the Law of the Sea Between the Republic of the Philippines and the People's Republic of China, *Award on Jurisdiction and Admissibility*, PCA Case no. 2013–19, 29 October 2015, p. 61, para. 157.

65. *Ibid.*, pp. 140–147, paras. 397–412.

66. See, however, BIICL Report, *op. cit.*, p. 20, para. 69.

67. See, however, UNCLOS, art. 297 and 298(1)(b).

68. It is uncertain that Article 123 can support a self-standing claim. See, however, Christopher Linebaugh, "Joint Development in a Semi-Enclosed Sea: China's Duty to Cooperate in Developing the Natural Resources of the South China Sea," *Columbia Journal of Transnational Law* 52(2) (2014), pp. 542–568.

69. It is uncertain that Article 300 can support a self-standing claim. See, for instance, Killian O'Brien, "Article 300. Good Faith and Abuse of Rights," in Alexander Proelss, *op. cit.*, pp. 1939–1940.

70. See UNCLOS, art. 279, 283, 284, 300.

71. See also Statute of the International Court of Justice, art. 41.

72. See Cameron Miles, *Provisional Measures Before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2017), pp. 174–223; Rüdiger Wolfrum, "Interim (Provisional) Measures of Protection," in *Max Planck Encyclopedia of Public International Law* (2006) available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e32?prd=EPIL, accessed 15 February 2019, https://doi.org/10.1093/law:epil/9780199231690/e32. Accessed 10 May 2019.

73. See *Land Reclamation in and Around the Straits of Johor (Malaysia v. Singapore)*, *Provisional Measures*, *Order of 8 October 2003*, *ITLOS Reports 2003*, p. 22, para. 71 (hereinafter *Malaysia v. Singapore*).

74. *Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, the MOX Plant Case (Ireland v. United Kingdom)*, *Order N°3 Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures*, *24 June 2003*, p. 5, para. 14.

75. See, for instance, *Ghana/Côte D'Ivoire* Order, *op. cit.*, p. 155, para. 41.

76. *Ibid.*, p. 156, para. 42.

77. *Ibid.*, p. 159, para. 63.

78. *Ibid.*, p. 158, para. 58.

79. *Ibid.*, p. 164, para. 97.

80. UNCLOS, art. 290(6).

81. *Guyana/Suriname*, *op. cit.*, pp. 137–138, paras. 482–484 (the Tribunal stated that "[t]he obligation to have recourse to these options is binding on both Guyana and Suriname.").

82. *Aegean Sea Continental Shelf* Order, *op. cit.*, p. 10, para. 30.

83. *Ghana/Côte D'Ivoire* Order, *op. cit.*, Request of Côte d'Ivoire, pp. 12–15, paras. 21–23.

84. *Ibid.*, pp. 163–164, paras. 89, 99.

85. *Aegean Sea Continental Shelf* Order, *op. cit.*, p. 11, para. 32.

86. *Ibid.*, p. 10, para. 30.

87. Constantinos Yiallourides, "Protecting and Preserving the Marine Environment in Disputed Areas: Seismic Noise and Provisional Measures of Protection," *Journal of Energy & Natural Resources Law* 36(2) (2018), pp. 144–150, https://doi.org/10.1080/02646811.2017.1403741.

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89. *Ghana/Côte D'Ivoire* Order, *op. cit.*, Request of Côte d'Ivoire, pp. 17, 18, paras. 30, 33. See Stephen Fietta, "Guyana/Suriname," *American Journal of International Law* 102(1) (2008), p. 127, https://doi.org/10.1017/S0002930000039877.

90. *Ghana/Côte D'Ivoire* Order, *op. cit.*, Request of Côte d'Ivoire, p. 17, para. 30.

91. *Ibid.*, p. 164, paras. 94–95.

92. *Ibid.*, p. 166, para. 108(1)(b).

93. *Aegean Sea Continental Shelf* Order, *op. cit.*, p. 11, para. 33. See *Ibid.*, p. 28 (Separate opinion of Judge Elias).

94. *Ghana/Côte D'Ivoire* Order, *op. cit.*, p. 159, para. 67.

95. *Ibid.*, p. 160, para. 68.

96. *Ibid.*, p. 164, para. 99.
97. *Ibid.*, pp. 160–161, paras. 72–73.
98. *Ibid.*, p. 166, para. 108(1)(c).
99. *Malaysia v. Singapore*, *op. cit.*, pp. 46–47 (Separate opinion of Judge Chandrasekhara Rao).
100. See *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, *Interim Protection*, *Order of 17 August 1972*, *I.C.J. Reports 1972*, p. 17; *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures*, *Order of 27 August 1999*, *ITLOS Reports 1999*, pp. 297–301, para. 90.
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136. Reports ILC, *op. cit.*, p. 130.

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138. *Ghana/Côte D'Ivoire* Judgement, *op. cit.*, p. 3, para. 6 (Separate opinion of Judge Paik).

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150. ARSIWA, *op. cit.*, art. 52(3)(b).

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The Future of Baselines as the Sea Level Rises: Guidance from Climate Change Law

Michael J. Strauss

Structured Abstract

Article type: Research paper

Purpose—As the future legal treatment of states' baselines is put into question by the rise in the global mean sea level, scholars have considered the issue from the perspective of the law of the sea, but not from the perspective of climate change law. This article seeks to examine the role that climate change law can play in determining the future of baselines.

Design, methodology—The article examines the issue as it has been considered to date by summarizing the literature and assessing the arguments for and against keeping current baselines. It then describes the primary climate change conventions and their relevance to the issue.

Findings—The article demonstrates that consideration of climate change law injects vital new information into the debate on the future legal treatment of baselines. It finds that the legal obligation created by climate change law for states to take actions that mitigate the effects of climate change precludes states from acting on the premise that sea level changes are driven by natural forces alone—a premise that prevailed when UNCLOS was negotiated and which underlies arguments based on UNCLOS alone that baselines are ambulatory.

Practical implications—The information in the article introduces the relevance

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of climate change law into the scholarly and diplomatic debate on the future legal treatment of baselines.

Originality, value—The subject of this article is unique and not available in other published work. It provides insights that can prove essential in the debate on the future of baselines.

Keywords: baselines, climate change law, sea level rise, UNCLOS

I. Introduction

The anticipated submergence of low-lying territory in many countries as a result of the rising sea level will be an unprecedented event in the history of sovereign states. One of the challenges it generates for international law concerns what should happen to the baselines from which territorial waters, contiguous zones and exclusive economic zones are measured. The outcome will determine future spaces of maritime sovereignty and sovereign rights around the world, ultimately affecting the interests of all states.[1] Examination of the issue by two specialized committees of the International Law Association (ILA) yielded different views about how to proceed.

As a dynamic event, the sea level rise will progressively disrupt the logic that underlies existing international rules for setting baselines. As a global event, a multilateral response is justified. In this regard, there are several paths in international law by which a unified practice among states can be achieved: (1) by multilateral agreement on new norms, an approach suggested by the work of the ILA committees; (2) by the emergence of new norms through the unilateral and grouped actions of individual states, an approach that may be influenced by decisions that some states have already taken[2]; and (3) by the adjudication of contentious issues that produce legal precedents.

A multilateral response could involve any or all aspects of the situation—baselines, maritime zones or sovereign rights. It could involve their nature, the norms that apply to them or both. The range of options is therefore quite broad. With respect to baselines, there are two possible orientations: changing their locations to preserve their compliance with existing legal criteria for baseline determination, or changing the criteria to allow the baselines to legally stay where they are. Deciding that baselines should be ambulatory to reflect evolving physical realities would shrink the legal dimensions of many states' land territory and shift their maritime zones inward, and may cause low-lying island states to cease to exist unless special provisions for them are made.[3] On the other hand, keeping the baselines in place would create inequalities in states' relationships with maritime areas—the extent of submerged land would vary by state, leaving the baselines of some further out to sea than the baselines of others. Nonetheless, either option can serve as a conceptual core around which a future territorial order is developed.

To date, there has been no consensus among scholars about which course of action would be more appropriate under international law. In reviewing the literature, it is observed that the future of baselines has consistently been considered,

quite naturally, from the perspective of the law of the sea. However, the UN Convention on the Law of the Sea (UNCLOS),[4] which elaborates the rules for establishing baseline locations, neither anticipates the rising sea level nor offers unambiguous guidance for situations that might put baseline locations into question once they are set.

It may, therefore, be useful to consider the legal treatment of baselines from an additional perspective. The body of international climate change law that has developed after UNCLOS was concluded in 1982 seems particularly appropriate. It is directly relevant to sea level rise because it creates the obligation for states to curtail a primary cause of it: emissions of "greenhouse gases" that are responsible for increasing temperatures globally. Climate change law consists of a series of multilateral agreements of which the most notable are the UN Framework Convention on Climate Change (UNFCCC) of 1992,[5] the Kyoto Protocol to the UNFCCC of 1997[6] and the Paris Agreement of the Conference of the Parties to the UNFCCC of 2015.[7]

Prior to the Paris Agreement, climate change law was considered by some scholars to hold little prospect for mobilizing states to act on issues relating to the sea. The UNFCCC regime had become "so mired down as to seem incapable of effective action" on such matters, according to David Freestone, who wrote: "I do not see it as a forum for overt policy formation or for the crystallization of customary international law rules on the regime of islands, on the evolution of coastal baselines, or on the very existence of states inundated by climate change induced sea level rise."[8]

Indeed, there has been no discernible effort to seriously consider climate change law in the discussion on baselines since the Paris Agreement. Nonetheless, the obligation it creates will affect the points where the land of coastal and island states come into contact with the sea—precisely the points designated by UNCLOS in its rules for determining baseline locations. Thus, climate change law not only has a legitimate role but arguably an essential one in shaping the future legal treatment of baselines. Using it as a source of guidance also allows us to place more firmly into the discussion a fundamental principle of international law that was arguably considered without sufficient emphasis while UNCLOS has been the sole basis for considering the fate of baselines: that of the stability of state boundaries.

II. Current Rules for Establishing Baselines

A state's territory has multiple components, but land is the fundamental one. It comprises the geographic reference from which the state extends its authority into adjacent aspects—water, air and subsoil. Although the supremacy of land developed into an underlying tenet of international law in the past few centuries, it was not always explicit or clear until modern times.[9] Today it is unquestioned. The International Court of Justice affirmed it in the *North Sea Continental Shelf Cases* (1969) by asserting that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward."[10] The writings of modern legal scholars are equally unambiguous in declaring that "(t)he land dominates the sea … by the inter-

mediary of the coastal front,"[11] or that "all maritime entitlements derive from the land."[12] Texts of contemporary legal instruments, including UNCLOS, treat the dominant status of land as being so evident that it does not require stating.[13]

The seaward rights of states exist in internationally agreed zones, measured outward from baselines where the land meets the sea. In these zones, states may exercise varying degrees of sovereign authority. The first zone, extending up to 12 nautical miles outward, contains the territorial sea where the state with adjacent land has sovereignty while ships from other states have the right of innocent passage.[14] The next band outward is the contiguous zone, with a limit of 24 nautical miles from the baseline; in this zone a state may enforce its customs, fiscal, immigration and sanitary laws and regulations.[15] Finally, there is the exclusive economic zone (EEZ), which may go out as far as 200 nautical miles from the baseline. A state may also have exclusive economic rights in the area that is 200–350 nautical miles out from its baseline or up to 100 nautical miles beyond the isobath marking a depth of 2,500 meters if the continental shelf, as a "natural prolongation" of the state's land territory, extends that far from the land. In the EEZ, a state has sovereign rights over natural resources in the water, on the seabed or in the subsoil, as well as rights to engage in other economic activities,[16] although special rules apply to the portion that is further than 200 nautical miles outward.[17]

In describing these zones and the associated rights in detail, UNCLOS also establishes the criteria for determining the baselines from which they are measured. A "normal baseline" is "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."[18]—put another way, "the line of intersection of the sea and the coast at low tide."[19] The low-water line shown on charts can reflect various datum measures, of which common ones are the lowest astronomical tide,[20] mean low-water springs,[21] mean lower low water[22] and mean sea level.[23] Baselines along coastlines where there are various natural and constructed features are subject to special rules; features accommodated this way include coral reefs,[24] deeply indented coastlines and coasts fringed by islands (where straight baselines may be drawn),[25] mouths of rivers,[26] bays,[27] constructed port facilities,[28] and areas of land that are above water at low tide but submerged at high tide.[29] Specific baseline rules also apply to archipelagic states.[30]

III. Views of Scholars and the ILA Committees

In the first decades after UNCLOS was concluded, it was assumed by numerous scholars that as the sea level rose, baselines would eventually be forced to change on the basis of its provisions,[31] even if this was not always considered a desirable occurrence in view of the multitude of implications it would have for states and the global maritime economy. Clive Schofield, for example, argued in 2010 that:

> there is a growing need for a departure from the traditional norm of ambulatory normal baselines and consequently shifting maritime jurisdictional limits in the interests of providing marine users with stability, clarity and certainty.[32]

The weight of state practice also fostered the suggestion that baselines are ambulatory, according to Julie Lisztwan, who adds that even states which have taken the position that official published charts should prevail over physical changes when determining baselines would not always hold that view firmly (the United Kingdom, while negotiating its maritime boundary with Belgium, abandoned the use of a point used in setting its baseline when the feature eroded and became submerged while the negotiations were underway).[33] Lisztwan further notes that the weight of legal authority appears to favor baselines having an ambulatory nature; the International Law Commission, for example, indicated during the drafting of the 1958 Convention on the Territorial Sea and Contiguous Zone that deviations arising between published baselines and actual coastlines can be grounds for legally challenging the baselines.[34]

The ILA committees that have more recently considered baselines and their rules in relation to future situations have been venues for examining the issue in a concentrated and comprehensive manner. With their members including numerous scholars whose writings on baselines and the rising sea level had constituted much of the prior literature on the subject, their work is extremely valuable. The first was the Committee on Baselines under the International Law of the Sea, created in 2008 in the context of widespread public acceptance of the scientific community's conclusion that sea level would rise as a result of climate change. Among its objectives was to assess whether the law pertaining to normal baselines was in need of clarification or development.[35] In 2012 the committee decided that normal baselines should be considered in law as ambulatory:

> The Committee concludes that the existing law of the normal baseline applies in situations of significant coastal change caused by both territorial gain and territorial loss. Coastal states may protect and preserve territory through physical reinforcement, but not through the legal fiction of a charted line that is unrepresentative of the actual low-water line.[36]
>
> […]
>
> The Committee concludes that the normal baseline is ambulatory, moving seaward to reflect changes to the coast caused by accretion, land rise, and the construction of human made structures associated with harbour systems, coastal protection and land reclamation projects, and also landward to reflect changes caused by erosion and sea level rise. Under extreme circumstances the latter category of change could result in total territorial loss and the consequent total loss of baselines and of the maritime zones measured from those baselines. The existing law of the normal baseline does not offer an adequate solution to this potentially serious problem.[37]

The committee took the view that "the loss of a State's territory to rising sea levels is not primarily a baseline or law of the sea issue" but a broader issue entailing numerous concerns of international law that warranted a dedicated examination by a separate committee. This led the ILA to create in 2012 the Committee on International Law and Sea Level Rise, which did not blindly accept the Baselines Committee's conclusion. During a 2016 working session of the new committee, co-rapporteur Freestone "said first and foremost the Committee will not second guess the findings

of the Baselines Committee but it is considering advantages of ambulatory or fixed baselines or of fixed outer limits of maritime zones as well as how such lines might be fixed *de lege ferenda*."[38]

The Committee on Sea Level Rise took the approach "that coastal States maintain […] their existing baselines, established in accordance with the LOSC,[39] in their current position, […] notwithstanding physical changes in coastline and basepoints brought about by sea level rise."[40] It justified this on grounds that "the interests of the international community would at this stage not be best served by a proposal undermining existing negotiated and established maritime boundaries."[41] It took the view that its proposals should "seek to minimize proposed changes in settled law of the sea" as well as "facilitate orderly relations between States and, ultimately, the avoidance of conflict."[42] The ILA, on the basis of the committee's report, adopted a resolution in 2018 in which it

> ENDORSES the proposal of the Committee that, on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline.[43]

As the committee weighed its position on the future legal treatment of baselines, multiple arguments were presented both in favor of and against keeping the existing baselines intact. The arguments in support of retaining the current baselines generally reflected the convenience of avoiding certain procedures that altered baselines would require, the broader legal convenience of keeping the existing regime, or a sense that states should not pay a disproportionate legal price relative to their role in the cause of climate change:

— The coastal States' charts that define their baselines and their maritime zones would remain in force and not require the reassessment and recharting that might be required by the effects of ongoing sea level change; alternatively, other appropriate means of defining baselines could be employed such as the use of geographical coordinates rather than the use of nautical charts, something that is already evident from State practice;

— Coastal States would retain their existing entitlements to maritime zones of the widths prescribed by the LOSC, notwithstanding the loss of territory and/or basepoints;

— Perverse incentives to artificially preserve baselines and basepoints that might otherwise become invalid under the current law of the sea regime would be removed;

— The current exclusive authority (sovereignty) of the coastal State over its territory would be maintained, recognizing that the mix of the land and internal waters within that area has shifted;

— The status quo regarding the allocation of national maritime zones and com-

mon spaces under the law of the sea that has occurred on the basis of the existing law—assuming no sea level rise—would be maintained;

— Continuation of existing obligations under international law with respect to particular ocean areas would be safeguarded;

— Coastal and island States would be shielded from these adverse impacts of climate change, to which few contributed.[44]

By contrast, the arguments against keeping current baselines unchanged were grounded mainly in legal reasoning that implied the continued adequacy of the UNCLOS baseline rules relative to the ability of affected states to adapt to the consequences of applying them:

— If a coastal State were to maintain a chart showing a legal baseline which no longer reflects the position of the actual low water mark, then this would be a legal fiction and, according to the conclusions of the Baselines Committee that, as a matter of international law, the normal baseline is ambulatory, a breach of that rule;

— Coastal States may find themselves with offshore areas of territorial sea or even EEZs where the physical features which generated those maritime zones have submerged or because of rising sea level have ceased to retain the characteristics required by the LOSC to be fully-entitled "islands" under Article 121(1);

— Coastal States would still need to update their navigational charts, even though the charts representing the legal baseline might remain the same; otherwise the legal fiction might pose risks to safety of navigation. The ongoing updating of charts is, however, an existing obligation for the purposes of ensuring safety of navigation, as IHO guidelines suggest charts should always show the limits of the territorial sea and the EEZ, based on the previously drawn baseline;

— It could be argued that by maintaining existing baselines coastal States were preventing high seas areas from expanding, and preventing territorial sea areas from becoming EEZ, and this might be seen as contrary to a global public interest, in that these new high seas areas would be subject to high seas freedoms (some of which apply within the EEZs too).[45]

These arguments reveal a certain imbalance in their character. Those supporting the view which became the committee's recommendation—that current baselines should not be altered—focused on issues other than the future viability of the UNCLOS baseline rules. Without the identification of legal deficiencies in their application going forward, the integrity of the rules might be deemed to be preserved. Given that laws generally are not revised in the absence of a demonstrable need, this can be viewed as a weakness. Additionally, the argument that certain states merit favored treatment due to their physical situations or past actions is not easily aligned with the principle that states are equal under international law regardless of their circumstances or their actions relative to the law, as the states that may have contributed more substantially to climate change were not necessarily violating any legal norms.

Of the arguments on both sides that were significant enough to warrant inclusion in the committee's report, what is notable is that none derived from climate

change law. Yet the agreements that comprise climate change law collectively provide a legal rationale for the committee's recommendation to keep the existing baselines intact.

IV. The Climate Change Agreements

The term "climate change" in international law generally reflects the definition contained in the UNFCCC:

> a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[46]

Climate change caused by human activity is evidenced by a rise in the earth's temperatures—the phenomenon known as "global warming." The activity in question consists of emissions of "greenhouse gases," which the UNFCCC defines as "gaseous constituents of the atmosphere, both natural and anthropogenic [human-produced], that absorb and re-emit infrared radiation."[47] Among the principal greenhouse gases are carbon dioxide, methane and nitrous oxide.[48] According to the Intergovernmental Panel on Climate Change (IPCC), the increase in carbon dioxide emissions has been due primarily to the use of fossil fuels in transportation, electricity generation and industry, while the increased methane and nitrous oxide emissions derive mainly from agricultural activity.[49]

Temperatures recorded around the world since the late 19th century provide strong and abundant evidence of global warming,[50] with climate models unable to explain the trend without taking into account human activity.[51] The IPCC has concluded that "(m)ost of the observed increase in global average temperature since the mid–20th century is very likely due to the observed increase in anthropogenic GHG [greenhouse gas] concentrations."[52]

The rise in the global mean sea level is a consequence of two factors that directly result from global warming: thermal expansion of the water, in which the volume of the world's seawater becomes greater as its temperature rises[53]; and the melting of land-based ice (the ice sheets that cover areas such as Greenland and Antarctica, as well as glaciers) that add water to the seas.[54] Scientists disagree on the relative contribution of each factor to the rising sea level but concur that both are involved.[55] Agreement also exists that the sea level rise is "one of the more certain impacts of human-induced climate change."[56] According to the IPCC, the acceleration of the rise is evidenced by sea level data that "indicate a transition in the late 19th century to the early 20th century from relatively low mean rates of rise over the previous two millennia to higher rates of rise," with the acceleration likely to have continued since then.[57] Satellite data show a further acceleration in the sea level rise since 1993.[58]

The UNFCCC stipulated that parties to the convention "should take precautionary measures to anticipate, prevent or minimize the causes of climate change

and mitigate its adverse effects."[59] Article 4 specified the actions to be taken in this regard:

> Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks[60] of all greenhouse gases not controlled by the Montreal Protocol,[61] and measures to facilitate adequate adaptation to climate change[62];
>
> Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors[63];
>
> Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification […].[64]

Although the UNFCCC commitments were non-binding, the Kyoto Protocol created binding targets that obliged developed countries to reduce greenhouse gas emissions during 2008–2012 to levels that would cause the global average emission level to be 5 percent below the level of 1990.

> Individual States' commitments to reductions are differentiated with a view to meeting the 5 per cent overall target: the European Community and all its member States are committed to 8 per cent reductions, the United States to 7 per cent and Japan and Canada to 6 per cent. New Zealand, the Russian Federation and Ukraine will stabilize emissions at 1990 levels, whilst some States negotiated an actual increase in emissions.[65]

This was to be followed by further binding commitments for reductions during 2013–2020 as specified by the Doha Amendment to the protocol,[66] although as of this writing (May 2019) the Doha Amendment had not entered into force due to an insufficient number of instruments of acceptance.[67] To some extent this became a moot issue as the Paris Agreement of 2015 mandated stronger and faster reductions in greenhouse gases; it created obligations for all states to establish national processes that would contribute to limiting the global temperature rise to less than 2°C above pre-industrial levels by the end of this century and to take action toward further limiting the rise to less than 1.5°C.[68]

Importantly, the Kyoto Protocol and the Paris Agreement require reductions in the actual emissions of greenhouse gases rather than reductions in their rates of increase. Thus, they are meant to restore a circumstance that had existed in the past, obliging states to limit greenhouse gas emissions to levels that correspond to an ear-

lier climatic situation. However, this situation is neither stated nor described. Similarly, there is no identification of a desirable global mean sea level.

These are not the only gaps. The UNFCCC mandates that the "adverse effects" of climate change should be mitigated, and while it does not define what constitutes an "adverse effect" it is evident from the attention being given to the rising sea level that it counts as such. Also, by not defining "mitigate," the agreements leave the term to cover a range of actions from slowing the rate at which the sea level rises to causing the sea level to decline. In view of this haziness, it is vital to know whether a sea level decline can result from the obligations created by climate change law.

Scientific studies have determined that if greenhouse gas emissions are halted or if their concentration in the atmosphere is stabilized, the global mean surface air temperature would stabilize or decline slowly but the sea level would keep rising for a time because it does not react in lockstep with the timing and magnitude of emissions.[69] The IPCC anticipates that the "(s)ea level rise will continue beyond 2100 even if global warming is limited to 1.5°C [above pre-industrial levels] in the 21st century."[70] Nonetheless, the thermal expansion of sea water as a key factor in the sea level rise "is in principle reversible."[71] A stabilization or decline in air temperatures would also stabilize or reverse the melting of polar ice caps and glaciers, the other factor in the sea level rise. The speed of the process may be influenced by actions other than reducing greenhouse gas emissions alone, notably geoengineering—"the deliberate large-scale intervention in the earth's natural systems to counteract climate change"—which can involve techniques to manage solar radiation or to remove carbon dioxide from the atmosphere.[72] Geoengineering options deemed by scientists to be capable of reducing the sea level include aerosol injections of sulfur dioxide into the stratosphere and the more costly placement of a network of mirrors in space.[73] In one scientific modeling exercise, "an immediate reduction in insolation [solar radiation] produces dramatic lowering of sea level for several decades."[74]

V. Applying Climate Change Law to Baselines

Considered in a broad sense, the international agreements to mitigate the adverse effects of climate change are founded on a recognition that these effects can be slowed or halted or reversed. The agreements serve as declarations of this recognition by giving it legal substance: they create international obligations for states to act toward achieving specified mitigation objectives. In doing this, it can be argued, they preclude states from acting on the premise that the adverse effects of climate change cannot be mitigated. The agreements also serve as recognition by states that without deliberate action to alter the human causes of climate change, its adverse effects—including sea level rise—would continue to worsen indefinitely.

At the time UNCLOS was negotiated, sea level changes that would be significant enough to affect baseline locations were envisioned as events that (1) occur through entirely natural causes; (2) occur very gradually, often measured in geologic time;

and (3) could entail either rising or falling water levels.[75] It can be posited that the prevailing knowledge about sea level variations—that they were natural but extremely slow—allowed UNCLOS to be elaborated without addressing whether baselines should be ambulatory or fixed; resolving this would have been essential when the baseline rules were drafted if a changing sea level had been viewed as an active factor in their functioning. The argument that baselines are ambulatory thus emerged in the context of sea level changes on a global scale being perceived as vague future events: baselines would be adjusted either landward or seaward in line with the earth's long-term physical evolution.[76] Despite a sense that ambulatory baselines would yield "an unsatisfactory result" in the event of an extreme sea level change,[77] the notion became dominant in interpretations of UNCLOS.[78]

In the years since UNCLOS was elaborated, more has been learned about the causes and dynamics of sea level variations. This has spurred climate change law to develop on the basis of knowledge that the current sea level rise (1) has human activity as its primary cause; (2) is occurring more quickly and with a greater magnitude than would be possible from natural forces; and (3) cannot be slowed, halted or reversed without deliberate human intervention. Understanding the pivotal role of human involvement gives sea level variations a previously unknown degree of predictability—and controllability. Climate change law recognizes that sea level rise can be managed, and the obligations it creates for states are the agreed means. This removes a contextual pillar from the ambulatory baseline argument: the slow, naturally occurring rises and falls in the sea level that the UNCLOS negotiators had envisaged.[79] As Davor Vidas remarks, UNCLOS "was tailored to the geographical circumstances of its own time, not the ones yet to come."[80] Climate change law signals that a naturally occurring fall in the sea level is no longer envisaged, which means that ambulatory baselines would, in practice, apply only to a continual rise—unless there is human intervention. This in itself does not render the notion of ambulatory baselines incompatible with international law, but, as we shall see below, a managed reversal of the rise can bring the ambulatory baseline notion into collision with one of its key principles: that of the stability of state boundaries.

This is because the concept of ambulatory baselines implies the necessity of legal thresholds to establish when baseline locations should be altered, to ensure a just and orderly process that occurs with some uniformity[81] and to avoid potential conflicts[82] as states are inclined to use UNCLOS baseline rules as a tool for maximizing their territorial claims.[83] Climate change law has rendered such legal trigger points problematic: with the sea level rise, legal thresholds could require states to move their baselines landward while the states create circumstances that can oblige them to move the same baselines seaward. Avoiding this conundrum by limiting how frequently the same baseline may be altered[84] would undercut the very notion of ambulatory baselines by embedding within it the legitimate presence of baselines that are fixed for periods during which sea level changes of baseline-altering magnitudes may occur. Conversely, declining to limit the frequency of baseline changes could lead to the same baseline being altered at short enough intervals to conflict with the principle of stable state boundaries.

This principle is among the most important in international law because of its contribution to the maintenance of international peace and security.[85] It stipulates that states' territorial dimensions, once agreed with other states, are not changeable unless further agreements or exceptional circumstances occur. In the case of coastal and island states, their dimensions are determined partly or completely by maritime boundaries established through baselines. "Once created in accordance with international law, a boundary is protected and assumes finality and permanence,"[86] writes Malcolm N. Shaw, who refers to the principle as "an overarching postulate of the international legal system" that shields states from disruptive challenges to their territorial integrity.[87] The International Court of Justice has affirmed that an established boundary cannot fulfill the objective of achieving stability and finality "if the line so established can, at any moment, and on the basis of a continuously available process, be called in question […]."[88]

The global outcome of states' compliance with climate change law will not be known for some time, whether that be decades, a century or several centuries. However, the prospect that the sea level will recede and submerged land will reappear well within the lifetime of states is something that can be anticipated as the result of the obligations it creates. This can create an exception to the compatibility of ambulatory baselines with international law: baseline alterations would arguably violate the stable boundaries principle if they occur in response to physical changes in the land/sea interface that can be reasonably presumed to be temporary due to the mitigation of the adverse effects of climate change. The ambulatory baselines argument might be supported by the view that UNCLOS entails a sort of advance agreement on maritime boundary changes, but this can be challenged on grounds of vagueness with respect to specific boundaries. Meanwhile, climate change law discourages the presumption that a higher sea level will have the permanence necessary to justify new baseline boundaries, thereby reinforcing the position of the ILA Committee on Sea Level Rise that existing baselines should stay intact.

Climate change law was not created with the express intent to supersede UNCLOS, but it suggests that states have replaced the premise that sea level may rise or fall through natural causes with one that considers the rising sea level as a human-induced process that natural forces alone cannot alter. This makes the universality with which climate change law has been embraced by states particularly relevant to this discussion, as states do not assume new binding legal obligations lightly—they do so after assessing and accepting the need for them. As of May 14, 2019, the Paris Agreement had 197 signatories, of which 185 had ratified the agreement.[89] This makes it one of the most broadly endorsed international agreements in history,[90] building on the high acceptance of preceding climate change accords.[91] By way of comparison, the number of states approving the Paris Agreement is substantially greater than the number that have approved instruments which establish various *jus cogens* norms, such as the Convention against Genocide (151 parties)[92] or the Convention against Torture (166 parties).[93] More important for this discussion is the comparison with UNCLOS, which had 157 signatories and 168 parties.[94]

While UNCLOS may have spawned the debate about whether baselines should

be ambulatory or fixed, the law of the sea is not the sole aspect of international law that can be tapped in resolving it. This becomes visible when climate change law is taken into account. The Paris Agreement and other instruments of climate change law do not specifically address baselines, but they can be transformative in terms of guidance. In this respect, they inject vital new information to consider—the state obligations described herein, their object and purpose, and the scientific knowledge underpinning them—that can strengthen both the legal and logical arguments in support of fixed baselines.

Notes

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3. See, e.g., Valentina Baiamonte and Chiara Redaelli, "Small Island Developing States and Climate Change: An Overview of Legal and Diplomatic Strategies," *Journal of Public and International Affairs* 28 (2017), pp. 6–26.

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14. UNCLOS, Art. 2–32.

15. UNCLOS, Art. 33.

16. UNCLOS, Art. 55–75

17. UNCLOS, Art. 77–82.

18. UNCLOS, Art. 5.

19. International Law Association, "Report of the Committee on Baselines under the International Law of the Sea," 2012, p. 32, http://ilareporter.org.au/wp-content/uploads/2015/07/Source-1-Baselines-Final-Report-Sofia-2012.pdf, accessed September 12, 2018.

20. "(T)he lowest level which can be predicted to occur under average meteorological conditions and under any combination of astronomical conditions," see UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea—Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (New York: United Nations, 1989), p. 43.

21. "(T)he average, throughout a year when the average maximum declination of the moon is 23 1/2 degrees, of the heights of two successive low waters during those periods of 24 hours (approximately once a fortnight) when the range of the tide is greatest," see *ibid.*, p. 43.

22. "(T)he mean of the lower of the two daily low waters over a long period of time," see *ibid.*, p. 43.

23. "(T)he average level of the sea surface over a long period, preferably 18.6 years, or the average level which would exist in the absence of tides," see *ibid.*, p. 43.

24. UNCLOS, Art. 6.

25. UNCLOS, Art. 7.

26. UNCLOS, Art. 9.

27. UNCLOS, Art. 10.

28. UNCLOS, Art. 11.

29. UNCLOS, Art. 13.

30. UNCLOS, Art. 47.

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The European Union and Counterterrorism in the Gulf of Guinea: Enough Is Not Enough

Fru Norbert Suh I

Structured Abstract

Article type: Research paper

Purpose—Having focused primarily on other forms of threats to security such as maritime piracy, smuggling, illegal unreported and unregulated fishing, bunkering, trafficking, etc., literature on counterterrorism in gulf zones is comparatively sparse. This paper aims to fill this gap by identifying and explaining the European Union (EU)'s counterterrorism framework in the Gulf of Guinea (GoG).

Approach—With data obtained from terrorism/counterterrorism literature, including documented reports and other written sources, a comparative analysis and a theory dubbed objective reality-induced counterterrorism were used to identify and understand the EU's counterterrorism approach in the GoG.

Findings—Although the EU may have invested increased money, troops, and political capital in handling terrorism in the GoG, there is still a major mismatch between the scale of violence affecting this region and the EU's response.

Practical implications—The research provides evidence that unless the EU redoubles its efforts in the GoG, international terrorism will further gain ground there and it will be difficult for the EU to gain control of the struggle and thus legitimacy as partner in the worldwide anti-terrorism struggle.

Originality—The paper reveals the weaknesses of the EU's counterterrorism approach in a relatively little-known GoG zone and that knowledge about such can

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improve the quality of its struggle against international terrorism. Findings have important implications for counterterrorism stakeholders.

Keywords: Boko Haram (BH), counterterrorism,
European Union (EU), Gulf of Guinea (GoG),
objective counterterrorism, subjective counterterrorism, terrorism

I. Introduction: The EU's Counterterrorism in Context and Approach

The academic field of gulf zone security studies has some reason to be embarrassed with the emergence of terrorism on waterways and coastal lands. Having focused primarily on other forms of threats to security such as maritime piracy, smuggling, illegal unreported and unregulated fishing, bunkering, trafficking, etc., literature on counterterrorism in gulf zones is comparatively sparse. Gulf zone safety and security has long been perceived and reduced to those visible criminal activities on the waterways, with little or no attention to unlawful violence on coastal lands, let alone dealing with them. Global interest in the GoG has expanded significantly in recent years. The growth of terrorism and the migration crisis in this relatively little-known zone all mean that the world must think about the GoG. Despite newfound attention, international efforts to counter terrorism in the region remain inadequate.

Since the September 11 attacks, the EU has become increasingly concerned with security challenges linked to international terrorism. However, the scope of the EU's counterterrorism efforts has varied from one region to another. In some areas (such as the Middle East, North Africa [MENA] and Sahel), the EU has used objective counterterrorism and in others (e.g., GoG), it has been subjective in its involvement. In the Middle East, the EU collaborated within the force-multiplying framework of the Global Coalition to Defeat ISIS, and thanks to such effort, the Coalition, which had already liberated Fallujah, Ramadi, and Tikrit, launched the military campaign to liberate Mosul and Raqqah.[1] This military-led counterterrorism can be understood on the grounds that ISIS pursued mass-casualty terrorist attacks against European symbolic targets and public spaces within Europe, along with a marked increase in the rate of returning foreign terrorist fighters from Syria and Iraq.[2]

In North Africa and the Sahel, the EU and member states have been objectively involved in counterterrorism. In 2011 for example, the EU developed the "European Union strategy for security and development in the Sahel," identifying poverty, States' weak capacity of governance, the regional repercussions of the Libyan conflict, narcoterrorism, and religious fundamentalism as the threats to European countries emanating from Sahelian countries.[3] The EU also supported the Malian government in protecting the population and safeguarding the territorial integrity of Mali from terrorist attacks. Indeed, the EU's objective counterterrorism in North Africa and Sahel can be explained by the fact that the EU and some member states have been

targets of terrorist groups operating in both regions. Chaos in Libya, persistent pockets of terrorism in Algeria, and terrorist groups affiliated with al-Qaeda in the Islamic Maghreb and ISIS have also exploited the Tunisia-Algeria-Libya triangle to traffic weapons and jihadis.[4] The French-led Operation Barkhane in the Sahel is succeeding in disrupting some jihadi networks in northern Mali.

Paradoxically, the terrorism-affected GoG has remained relatively unaffected by the EU's objective counterterrorism framework. This paper attempts to address three questions: (1) why the EU does not care enough in the struggle against international terrorism in the GoG; (2) how it does not care enough; and (3) why it should care enough.

This paper argues that the EU's subjective counterterrorism in the GoG is a consequence of misconception of the scope of the terrorist threat from that zone. The EU seems to underestimate the scope of danger terrorism from the GoG represents. This can be explained by the naïve belief that EU interests are not the primary targets of terrorists, and no spectacular terrorist attack on European soil has been reported to have come from the region. The EU seems to be feeling the pinch of migration, maritime piracy, bunkering, smuggling, and illegal unreported fishing than any other form of threat to its security coming from the GoG. Regrettably, EU nationals have been victims of kidnappings and other forms of terrorist threats. Although the EU may have invested increased money, troops, and political capital in handling terrorism in the GoG in recent years, this research finds that there is still a major mismatch between the scale of violence affecting this region and the EU's response.[5] If the EU is not objectively involved, it can make the pursuit of its interests more complicated in this new zone of safe havens and refuge by criminal networks and terrorist groups. An objective counterterrorism policy will reflect a wider EU approach to counterterrorism given that the EU has an institutional maritime connection with GoG States.

The work begins with an examination of the background of EU–GoG relations within the framework of terrorism and the foundations of terrorism in the GoG. The methodology is then examined with a focus on two theories (objective and subjective reality-induced counterterrorism). The next section demonstrates how the EU does not care enough about counterterrorism. This is followed by an analysis of the reasons behind the EU's counterterrorism reluctance and the reasons why the EU should care enough. In the conclusion, an attempt is made to justify assumptions with a specific recommendation to overcome the problems of counterterrorism arrangements in the GoG.

1.1 The Foundation of Terrorism in the GoG

According to Martin Miller, terrorism has its roots in political violence with origins in the pre-modern era, as a necessary part of the contestation over the legitimacy of established authority, and aspirations to power at the expense of unarmed civilians.[6] This implies that political violence is as old as mankind and, as he rightly puts it, all things political begin with God or Aristotle. What may be difficult is to

situate a particular type of terrorism within the framework of a geographical location and era. Political violence in the GoG could be traced back to the pre-colonial era. Inter- and intra-tribal wars characterized daily life among settled tribes along the vast expanse of water stretching from Liberia to Gabon. West African empires were involved in wars of both conquest and defeat, and the struggle was over the control of geographical space, power and authority. Political violence expressed in warfare is therefore a tradition known to and practiced by the people of Africa, including the GoG.[7]

With the advent of colonialism, political violence in the GoG took the form of (armed) resistance against European colonial penetration into the interior and colonial administration. Although most of the resistances ended with the defeat of Africans, it did not put an end to attempts by subgroups to use violence against established colonial authority. Pockets of resistance persisted against European colonial administration. After World War I and World War II, the creation of United Nations Trusteeship framework, and its promotion of independence and self-government of colonial peoples, the quest for independence by some mandate/trust territories was still acquired through bloodshed. Although most GoG states gained independence through negotiation with outgoing European colonial rulers during the late 1950s and 1960s, some experienced wars between colonial and white settler regimes and armed GoG nationalist insurgents. For example, Portugal fought African nationalist insurgencies in Angola, Mozambique, and Guinea-Bissau during the 1960s and early 1970s, which led to a military coup in Lisbon in 1974 and a sudden withdrawal from Africa.

Nevertheless, it was the discovery of oil and gas in the GoG and the inability of States in the region to secure these resources that led to the foundation of modern non-state terrorism in the region. Armed subgroups have not excluded from the trending scramble for oil and gas. The number of recorded terrorist groups and violent insurgencies has increased as a result of the discovery of oil and gas resources. This has in turn led to the development of counterterrorism and counterinsurgency frameworks, with the collaboration of foreign partners including the EU, the U.S. and China. However, it is the U.S. that is championing the military framework of counterterrorism at this moment in time.[8]

1.2 Background to EU–GoG Relations: The Weak Consideration for Terrorism

The EU is an intergovernmental organization of 28 European States whose aim (among others) is to foster stability, security and prosperity, democracy, fundamental freedoms and the rule of law not only within Europe but also at the international level, including the GoG. As an economic and political union, the EU's long-term goal is to envision the establishment of common economic, foreign, security, and justice policies, and this cannot be achieved unilaterally.

The GoG is made up of the political and geographical union of States located in West Africa, Central Africa, and Southern Africa, nearest to the South Atlantic

Ocean. Insecurity at sea is major challenge and some of the States acknowledge that they cannot deal with it without cooperating with the other States bordering the Gulf. This means that the boundaries of the GoG are not only determined by geography but also security. From this standpoint, any State which is not necessarily located at the sea but breeds terrorism and is closest to one located at sea could be considered part of the GoG. An example is Chad, which though not a geopolitical member of the GoG Commission (GGC), is bound to cooperate with other GoG countries through the Multinational Joint Task Force (MJTF), to combat Boko Haram (BH), suggesting that insecurity linked to terrorism is reducing the boundaries of the GoG. Terrorism in Mali (in Sahel) is also proving the need to think of the possibility of it joining the GGC, given that together with Nigeria, Mali also provides valuable examples of the longstanding interaction between the Sahel and the GoG.

Security is not the only determinant of the GoG. The GoG also refers to the oil producing States at the fringe of the Atlantic Ocean. Thus, whereas States like Benin, Togo and Ghana that are comfortably sitting in the GoG are excluded from the geopolitical delimitation, countries like Gabon and Angola, which though oil producers, are geographically not on the Gulf and located in central and southern Africa, are included. Whatever the determinant used, concerns for security in the region is the main task of the Gulf of Guinea Commission (GGC). Founded in 1999, the GGC comprises Angola, Cameroon, Congo, Democratic Republic of Congo (DRC), Gabon, Equatorial Guinea, Nigeria, and São Tomé and Príncipe, and is open to other members.

The EU and the GoG are linked through various partnership and cooperation frameworks linking the EU to Africa and the African Union (AU). But the history of the EU's relation with the GoG dates as far back as the 15th century, when the area was first opened to European countries for international trade and commerce.[9] However, cooperation between the EU and Africa started in 1957 with the signing of the Treaty of Rome. It provided for the "Regime of Association," as well as for the creation of European Development Funds (EDFs), aimed at giving technical and financial aid to African countries, many of them still colonized at the time. Britain's accession to the European Community in 1973 paved the way for the extension of the Europe-Africa cooperation to the Commonwealth countries, whether African, Caribbean or Pacific (ACP).

The Georgetown Agreement, the ACP Group's fundamental charter, was signed in 1975, when the first Lomé Convention came into force. This marked the beginning of cooperation between Europe and the ACP Group. A new chapter on respect for human rights was included in the amended text of the convention, along with chapters on good governance, democracy and the importance of the rule of law.

A new cooperation model, called the Cotonou Agreement, was signed in Benin in June 2000 by the EU and by the then–77 ACP countries, representing 1 billion people (a sixth of the world population). It came into force in 2003 with a projected lifespan of 20 years. One of its underlying principles is that poverty is incompatible with a global trading environment.

A most recent partnership agreement is the Joint Africa–EU Strategy (JAES)

whose objective is "to address global challenges and common concerns such as human rights, […] terrorism, the proliferation of Weapons of Mass Destruction and the illicit trafficking of Small Arms and Light Weapons […]" among others.[10]

This background demonstrates two things: first the link between the EU and the GoG is indirect and second, counterterrorism as an issue has not been given the attention it deserves. This implies firstly that the EU's intervention in matters concerning the GoG as an autonomous geopolitical entity is indirect—through the AU, the continental political structure. Secondly, this provides an understanding of the EU's reluctance in countering terrorism in the region, given that the relationship from inception is dominated by economic determinants.

Table 1: EU Crisis Management in West Africa in 2010

Nature	Score
Unity	3/5
Resources	3/5
Outcome	4/10
Total	10/20

Source: European Foreign Policy Scorecard 2010, European Council on Foreign Relations (ECFR, March 2011, London, p. 101).

Economic determinants notwithstanding, the EU has entered into partnership agreements against funding terrorism with some regional organizations. A good example is the partnership collaboration between the EU and the Central Africa subregion in the fight against financial malpractice including terrorism.[11] In 2007, during the Lisbon conference, the EU and the AU jointly recognized the threat of terrorism in the Africa–EU strategic partnership.[12] The GGC also condemns terrorism and recognizes the need to cooperate with others to combat terrorism. In Article 4 (f) of the 1999 Treaty, member states pledge the "non-utilisation of the territory of one State for activities directed against the sovereignty and territorial integrity of another Member State."[13] Article 24 authorizes the Commission to "enter into cooperation agreements with other regional organisations, Inter-governmental Institutions and third parties." The GGC appears to be the legal body with whom the EU needs to enter into agreement with to counter terrorism.

Unfortunately, the EU's security framework in the GoG is limited to combating crimes directly linked to maritime activities such as piracy, bunkering, illegal unreported fishing, etc. To do so, the EU has been implementing its Maritime Strategy indirectly, through a regional Action Plan that addresses these problems through cooperation, capacity building and information sharing—promoting the regional appropriation of the response process.[14] For example, in 2013 the EU approved a small anti-piracy mission, CRIMGO (Critical Maritime Routes in the Gulf of Guinea). Although such missions reveal the EU's willingness and capability to secure ocean trade routes, it is different from European Naval Force (EUNAVFOR), which is present off the coast of Somalia and is well known to project the EU's naval power.

II. Methodology

2.1 Comparative Analysis

The paper begins by observing the EU's counterterrorism engagements in three regions where the EU counterterrorism framework operates. These regions include the Middle East and North Africa (MENA), Sahel and the GoG. With data from terrorism/counterterrorism literature, including documented reports and other written sources**,** two categories of counterterrorism frameworks were obtained: objective and subjective counterterrorism. These two categories of counterterrorism interventions were then compared in terms of their usages by the EU and the difference in countering the threat. It was found that subjective counterterrorism was mostly used in the GoG and in other regions the EU privileged the use of objective counterterrorism.

A comparison is also made at the level of the types of actors involved and the nature of their counterterrorism. It was found that the players involved in counterterrorism in the GoG has no bearing. The actors include both States (Britain, France, the U.S., etc.) and international/intergovernmental organizations (the AU, EU, UNO, etc.). However, the approach and degree of counterterrorism engagement in the GoG has varied from one actor to the other, with the EU showing remarkable reluctance compared to China, France and the U.S. This comparative dimension adds evidence to the EU's reluctance and provides an explanation of why it should care enough.

2.2 Objective Reality-Induced Counterterrorism Theory

An attempt is made to explain the EU's subjective counterterrorism policy in the GoG with recourse to a theory dubbed objective reality-induced counterterrorism theory. This theory is drawn from the realist theory according to which States tend to react (sometimes out of proportion) when their interests are credibly at stake and in the absence of such, States adopt softer counter insecurity approaches. Realists tend to further assume that terrorism is an existential threat the military can handle.[15] Objective reality-induced counterterrorism theory purports that objective counterterrorism is induced by a credible threat of danger from terrorism. Conversely, the absence of an objective threat to security from terrorism limits the probability of objective counterterrorism. This is the case with the EU in the GoG. The EU tends to minimize the scope of terrorist threats from the GoG, probably because of the absence of credible danger that could lead to a spectacular-type terrorist attack on the EU's interests at home and abroad.

Terrorism represents an objective threat to security only to the extent that it inflicts considerable impact to victims. The damage caused by terrorism is used to measure the scope of the threat and as a testimony of the effective existence of terrorism. Actors tend to adjust under such circumstances. The U.S. attack on Iraq after 9/11 was a response to the 9/11 attacks, although the invasion could not be jus-

tified by Saddam Hussein's possession of weapons of mass destruction; nor was it possible to demonstrate a connection between Saddam and international terrorism.[16] The absence of such a spectacular attack on European targets coming from the GoG cannot induce counterterrorism retaliation from the EU of such a magnitude. The fear of terrorism from the GoG has not been institutionalized by the EU—i.e., it has not been incorporated as a belief, practice, or feeling into the EU's repertoire of taken-for-granted knowledge of the world and its behavioral routines.[17] If the fear of terrorism from the GoG had been institutionalized, terrorism would have been recognized as a situation to be addressed by an affirmative counterterrorism approach. However, on the other hand, the production of the self-same fear can make terrorists capitulate.[18] Unfortunately, terrorism in the GoG is regarded more as substate affair than as an international affair. When the EU fails to act proportionately to terrorism in the GoG, the people of the GoG resent it and this resentment becomes a basis for terrorism's support. As Cornelia Beyer puts it "Terrorists capitalise on the frustration, which they need to legitimise their actions and to find human resources for recruitment. They not only capitalise on it, they instrumentalize it by attempting, or promising to attempt, a recreation of the equilibrium, and to reinstall 'justice,' or even a certain alternative regional or world order."[19]

2.3 Approaches to Counterterrorism: Objective vs. Subjective Counterterrorism

To give a standard definition of what counterterrorism is, let alone terrorism, is complicated. This complication is partly linked to the variety of actors who have used violence to instill terror, including the many justifications given for the use the violence.[20] Terrorism can simply be understood as the use of violence to create fear in a wider audience in order to obtain compliance or political gain. The Office of the United Nations High Commissioner for Human Rights defines terrorism as "acts of violence that target civilians in the pursuit of political or ideological aims."[21] The UN General Assembly's Declaration on Measures to Eliminate International Terrorism, in its resolution 49/60, states that terrorism includes "criminality acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purpose and that such acts" are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other natures that may be invoked to justify them. But terrorism does not only target humans; it also involves unlawful and intentional attempt to cause or threaten to cause serious damage to public or private property, including a place of public use, a government facility, public transportation system, infrastructure facility or the environment. The damage or threat thereof is likely to result in economic loss when the purpose of the conduct, by its nature or context, is to intimidate a population or to compel a government or an international organization to act or to abstain from an act.[22] Victims of terrorism include both physical and legal entities and this suggests that not even superpowers (e.g., the U.S.)

or international organizations (e.g., the EU) are spared from terrorism. From this perspective addressing terrorism should be the concern of all, not only States.

Counterterrorism literature so far considers counterterrorism as activities intended to prevent terrorist acts or eliminate terrorist groups. This overarching approach to counterterrorism fails to indicate which specific counterterrorism activity really makes a difference. For example, which is more efficient in the struggle against terror: diplomatic or military strategies? This study distinguishes between objective and subjective counterterrorism.

2.4 Objective Counterterrorism

Objective counterterrorism is the use of hard power[23] to combat terrorism. This includes a range of capabilities such as military tactics, techniques and strategies that states and organizations use to combat or prevent terrorism. Objective counterterrorism is a repost or retaliation to a spectacular terrorist attack, which in itself represents an objective threat to security. It therefore has a strong consideration for terrorism as an objective threat to security. As Howard puts it "Today's terrorism is not ideological like Communism or capitalism, with values that can be debated in the classroom or voted on at the polls. Rather, it is an adaptation of an ancient tactic and instrument of conflict."[24]

A monstrous terror attack is likely to prompt a military counterterrorist reaction that is often out of proportion. A good example is the U.S. military invasion of Iraq following 9/11. It considers counterterrorism as a punitive operation in which negotiation has no place. After all, U.S. policy is to not negotiate with terrorists. As Howard explains "Giving in to terrorist demands will prompt more terrorist activity. This is especially true for hostage situations, because negotiations with terrorists could potentially force the United States to risk having to meet certain demands for ransom or safe hostage."[25]

This counterterrorism approach has a strong pre-emptive and preventive effect and its benefits cannot be overemphasized.[26] Without a military offensive component, the War on Terror cannot be won.[27] The absence of a spectacular terrorist attack on U.S. soil some 15 years after 9/11 can be said to be a product of this counterterrorism approach, though it was also with the help of soft approaches. The disciplined centralized organization that carried out the 9/11 attacks is no more. Most of the group's senior and midlevel leaders are either incarcerated or dead, while the majority of those still at large are on the run and focused at least as much on survival as on offensive operations.[28] It was through a military operation, and not through negotiation, that Osama Bin Laden was captured.

This approach is efficient in addressing transnational non-state actors who possess or are likely to possess weapons of mass destruction (WMDs). As Russell Howard, writes "Pre-emptive strategy is necessary in a post–Cold War security environment, when America's most dangerous adversaries are transnational, non-state actors who have access to weapons of mass destruction (WMDs) and intend to use them."[29] It is also relevant for dealing with state terrorism; Saddam Hussein or Kim

Jong Il may have held back from striking the U.S. for fear of retaliation though it did not stop the Taliban from hosting Osama bin Laden.[30] It is believed that an efficient war against terrorism must mean a war (in the military sense) against political groups who choose terror as a tactic, although in certain conditions action and reaction can be excessively out of proportion.[31]

The EU's counterterrorism approach in the GoG can be understood to be subjective partly because of the excesses associated with objective counterterrorism. The objective approach is weak when it comes to dealing with the ideological dimension of terrorism, which suggests that it does not address the roots of terrorism. It may also erode support if it is used out of proportion. It is estimated that since the beginning of the war on Iraq, support for U.S. policy has eroded even further and hatred for the U.S. in the Muslim world today is greater than before.[32]

2.5 Subjective Counterterrorism

Subjective counterterrorism involves the use of soft power practices in the struggle against international terrorism. The approach is often motivated by feelings of the absence of an objective threat to security from terrorism, i.e., the absence of a spectacular-type attack. It involves a range of diplomatic, piecemeal, dialogue, mediation and negotiation tactics in conflict situations. It is associated with the comprehensive counterterrorism approach often used to describe the EU's counterterrorism strategy. Persuasion is a major instrument of this approach and diplomacy is used to win the war of ideas.[33] It believes that dialogue or negotiation is necessary because non–State actors have no formal diplomatic voice. It can enable terrorists to understand the circumstances involved and have a deterrent effect by preventing an attack from happening.[34]

In spite of its ability to promote discipline and effectiveness in dealing with the ideological dimensions of terrorism, the pre-emptive effect of subjective counterterrorism is weak. Under such an approach, it is likely that terrorism will gain more ground. The subjective counterterrorism approach requires a lot of caution and time (usually for humanitarian but also other concerns) to deal with terrorism, which is sometimes to the advantage of terrorist groups. It is this counterterrorism approach used by the EU that is condemned in this study because, in a way, it minimizes the magnitude of the terrorist threat from the GoG. Americans were warned regularly of the danger of catastrophic terrorism—and Osama bin Laden explicitly declared war on the United States in his fatwa of February 1998.[35] A few years later, the result was 9/11. Therefore, the EU is not expected to ignore similar declarations from Abubakar Shekaw, a well-known terrorist group leader from the GoG.

III. How the EU Does Not Care Enough

Evidence on the ground about the EU's counterterrorism policy in the GoG indicates that the EU's approach is not an objective one, and this reveals the limits

of the EU's policy. The EU's approach to counterterrorism in the GoG is a reluctant one, characterized by indirect engagements, indifference, diplomatic weaknesses, piecemeal interventions, excessive caution, humanitarian actions, and overall an absence of a coherent security-led approach. Indirect counterterrorism takes the form of providing financial, military and diplomatic support to the United Nations (UN) and African Union (AU).[36] The EU's military mission has assisted UN peacekeepers in the Central African Republic (CAR). In the DRC in 2010, the EU joined U.S. and African governments in persuading Kabila to accept a compromise that gave the UN force a new mandate when Kabila announced that he wanted UN peacekeepers to leave the DRC before the national elections. The training of local security forces is also an indirect intervention of the EU. Common Security and Defence Policy (CSDP) missions have trained local security forces in GoG countries such as the CAR, Niger, and Mali. However, CSDP operations faced a threat from budgetary pressures, the preference by some member states to channel security policy via organizations such as NATO, and a failure to build the EU's collective capacity by sharing resources and expertise between member states.[37] For instance, Germany, which is normally wary of operations in Africa pledged to send up to 600 troops to the UN mission in 2016.[38] It also reveals a lack of a coherent approach among EU member states. In Mali, a proposal by the European Council secretariat for a CSDP mission to support governance in states affected by al-Qaeda failed to win approval. The Council even went as far as agreeing to close a security-sector reform mission in Guinea-Bissau that had been operating since 2008.[39] In January 2013 when France intervened to halt forces advancing on Bamako, the capital of Mali, the EU was reluctant to support French troops. The main gap in EU support was in combat forces: proposals to deploy a French-German-Polish EU Battlegroup to Mali were dismissed on the grounds that it might have to go to Syria. African countries sent troops instead and France has complained about other European nations' limited role in African missions.[40] This indirect form of intervention meant that the broader task of counterterrorism has been left to individual member states (with France taking the lead) and the AU and UN, who have been accused by NGOs of showing excessive caution in handling some violent incidents.

Table 2: Some EU Military Missions in GOG States, 2002–2016

Name	Abbreviation	Personnel	Start	End
European Union Military Operation in the Democratic Republic of Congo (2003)	EUFOR Artemis	1,800	June 12, 2003	September 1, 2003
European Union Military Congo Operation in the Democratic Republic of Congo (2006)	EUFOR	2,300	March 17, 2008	March 15, 2009
European Union Training Mission in Mali	EUTM Mali	500	February 18, 2013	—

Name	Abbreviation	Personnel	Start	End
European Union Military Operation in the Central African Republic	EUFOR RCA	600	February 10, 2014	March 23, 2015
European Union Training Mission in the Central African Republic	EUTM RCA		July 16, 2016	—
European Union Capacity Building Mission in Mali	EUCAP Sahel Mali		April 2014	—
European Union Military Advisory Mission in the Central African Republic	EUMAM RCA		March 2015	July 2016
European Union in Support of Security Sector Reform in Guinea-Bissau	EUSSR Guinea-Bissau		February 12, 2008	September 30, 2010
European Union Security Sector Reform Mission in the Democratic Republic of Congo	EUSEC RD Congo		June 8, 2005	2016
European Union Police Mission in Kinshasa	EUPOL Kinshasha		April 12, 2005	June 30, 2007
European Union Police Mission in the Democratic Republic of Congo	EUPOL RD Congo		July 1, 2007	September 30, 2014

Source: Author's compilation.

Among the security competitors in the GoG, the EU has been consistently less active in developing an assertive security approach. In the domain of cooperation, the fact that Nigeria, the most significant littoral state is actively cooperating with China for investment in her oil industry and now even in regard to naval ships, which is surely a challenge to the historic predominance of Europeans in the region. China is also said to now have more personnel in blue helmets in Africa than any other permanent member of the Security Council, including an infantry company, while the EU remained focused in military action in Iraq and other parts of the Middle East.[41] European pledges at the September leaders' summit in New York were dwarfed by China's promise of 8,000 and China has contributed 220 troops to the UN mission, MONUSCO, in DRC. The U.S. has been active in developing naval and coastguard diplomacy in the GoG led by the U.S. military's own specialist African Regional Command (AFRICOM). The American military continues to transfer equipment to the Nigerian military, especially in the context of the high-profile BH terrorism. As evidenced by the transfer of ex–Coastguard vessels, the U.S. has had a longstanding interest in improving the security of West Africa, in part no doubt reflecting its strategic importance in terms of the global oil supply, but also in terms of countering the terrorist threat. AFRICOM has made the GoG one of its highest priorities. It continues to offer training and advice on coastal security and stands ready to provide more substantial assistance once requested by the countries

of the region. Early in 2007, the U.S. announced that it would create a single Africa combatant command to bring together all the security programs the U.S. supports on the continent.

Piecemeal interventions were observed in some crisis situations. Apparently, the EU's assistance to countries in the GoG afflicted by armed conflict has been perceived as relatively generous and comparatively disinterested.[42] During the crises in Sierra Leone and along the Ivory Coast, the EU failed to intervene adequately. Rather Britain and France felt compelled to act, though their actions came across as politically motivated postcolonial interventions. Generally, the EU has been active in funding national and international efforts in disarmament, demobilization, and reintegration of combatants (DDR); security sector reform; and state reconstruction.[43] However, it was less successful in civilian operations relating to security sector reform in Guinea-Bissau in 2009 and 2010, and so far, the EU has not considered launching a maritime operation to prevent or repress acts of terrorism in the GoG, as it has with Operation Atlanta off the coast of Somalia.[44]

There is significant evidence that the EU is not doing enough to counter terrorism in the GoG and has rather been indifferent and proven to not be a credible security competitor at all levels—preferring to intervene indirectly through international efforts and as individual member States or to divert military efforts to other fronts. This is an indication that counterterrorism in the GoG is yet to be a priority for the EU. This can be explained by the misconceived and misconstrued perception the EU has about the scope of threat of terrorism from the GoG. What follows is a possible explanation.

IV. Why the EU Does Not Care Enough

There is an EU misconception of the scope of the terrorist threat from the GoG. The EU's reluctance to directly involve itself in counterterrorism activities can be explained by the naïve perception that her interests at home and abroad are not the primary targets of terrorists from the GoG. Indeed, no EU member state has been the victim of a spectacular terrorist attack originating from the GoG. However, the absence of such does not imply that the terrorist threat from the GoG to Europe is not valid. This misconception is also a consequence of a perception among EU policymakers that terrorism can be dissociated from other forms of threats and hence counterterrorism efforts can be carried out in isolation from other forms of engagement.[45] No GoG citizen or group thereof has ever been arrested or suspected for implication in acts of terrorism in any European country, yet that does not mean it could never occur, or that other forms of crime are not linked to terrorism from the GoG. This also implies that EU policymakers seem content to believe that spectacular terrorist attacks on EU interests can only come from traditional and well-known terrorism-prone individuals, groups and regions.

Connected to this misconception is the priority the EU gives to other forms of security threats such as migration. The EU seems to be more concerned with migra-

tion than any other form of threat to its security coming from the GoG. In 2015, European attention again focused on the Sahel and North Africa, triggered by the flood of migrants crossing the Mediterranean Sea to Europe. In response, an international conference in November 2015 in the Maltese capital of Valetta brought European and African governments together to address the migration challenge.[46] The focus was on reducing migrant flows from the Sahel and other parts of the GoG, particularly those passing through Morocco as well as Niger, Algeria, and Libya. Although peace and security were parts of the joint declaration during the 5th Africa–EU Partnership Summit, migration dominated talks at the summit. During the summit peace and security were understood only to the extent that they reflected "strong cooperation for effective, inclusive and accountable governance, to combat corruption, and recognize the role of civil society, the media and democratic institutions,"[47] not the threat of terrorism and how to deal with it. This is an indication that terrorism seems to be isolated from other forms of security threats.

The EU's subjective counterterrorism policies in the GoG can also be explained by the fact that the EU perceives African security as the domain of former colonial powers like France and inveterate advocates of the UN like Sweden and Ireland. The definition of the GoG sometimes takes into consideration the historical connection of the countries of this region to Europe. By virtue of their heritage, countries in this region speak a variety of languages, from English to French, Portuguese and Spanish. This perception has negatively affected the EU's ability to deploy considerable military missions in conflict zones in the GoG. The EU's deployed military missions are known to be small and short-lived such as the ones in the DRC and Chad in the mid–2000s. For example, the 2003 EU Military Operation in the DRC (EUFOR Artemis) consisting of 1,800 personnel was a short-term EU–led UN authorized military mission to the DRC during the Ituri conflict. Although the GoG is a growing source of concern to the EU, some EU members continue to take an interest in their former colonies (France focuses on the Ivory Coast, Britain on Nigeria, Ghana and Sierra Leone, and Portugal on Guinea-Bissau and Equatorial Guinea). France continues to wield influence over and at times even militarily intervene in the affairs of several of its ex-colonial West African States. States of the GoG also tend to pay more attention to action plans from Beijing, Washington, Paris and London, than to policy documents from Brussels. It is on the basis of this that the EU is exercising unproductive caution when it comes to counterterrorism.

Conflicts of interest with some GoG States and resistance from the self-same states have limited the EU's antiterrorism intervention capacity in that region. The EU has had difficulty building a stable relationship with some GoG States. Indeed, they have found common ground on some situations, such as the Darfur crisis, but they have also split over Zimbabwe as many GoG governments accused the EU of using human rights as a cover for colonial-style interference.[48] It is likely that an EU direct counterterrorism intervention and policy in the GoG will be interpreted as violation of the right to sovereignty and non-interference in the internal affairs of the States concerned. The growing criticism of European military stations on African soil corroborates this assumption. Sometimes, too, European attempts to engage in

counterterrorism end in stalemates due to resistance from States who are unwilling to cooperate meaningfully or implement prescriptions the EU will want them to take. The self-same GoG States are the ones who sometimes deny the EU's offer of military and other forms of assistance. At some point in Mali, the EU focused on training the army, but the government insisted on launching an offensive against separatists in the north. Overall the EU has had difficult relations with governments in the region, which are very keen to avoid international meddling in their affairs. Although not part of the GoG, Egypt has resisted European offers to provide counterinsurgency training, preferring additional military equipment as a priority. Egypt's attitude is also reflected in the behavior of other African States who are selective in the kind of support they want from the EU, e.g., they generally prefer financial to direct military support. In 2013, African governments were more willing to send troops to Mali and CAR, with financial support from the EU, the U.S., and other Western powers, than to accept an offer of military assistance. GoG States have also felt no need for any European naval force off West Africa because they have the capacity to handle maritime security challenges. Moreover, many of them are conscious of their maritime sovereignty and can exercise it. Senegal, for example, once arrested Russian super-trawlers engaged in allegedly illegal fishing activities, and Nigeria did the same with Chinese-owned trawlers in 2014. However, this argument is not convincing enough if it is considered that the EU has the capacity to intervene with or without the express consent of the government of States as it has done elsewhere. Thus, resistance from GoG governments does not significantly justify counterterrorism non-intervention.

The EU's counterterrorism reluctance could also be a consequence of the failure to perceive terrorism as a collective problem and counterterrorism as a collective struggle. This argument partly explains the individual approach adopted by member states in counterterrorism. EU States still consider the responsibility for terrorism and counterterrorism in the GoG as a collective problem and struggle. Some EUFOR missions have remained a source of contention between member States, some member States have prioritized collaboration with non–EU States, and they have sometimes differed in their approach. The EUFOR RCA mission remains a source of contention between France and many other EU members, notably Britain, which questions whether it is feasible to rebuild CAR.[49] France continues to complain about other European nations' limited role in African missions and has cultivated Francophone African governments to support its counterterrorist mission (Operation Barkhane) while collaborating with the U.S. on intelligence gathering in Niger. Finally, whereas France pushed, in tandem with African States, for strong UN political support and potentially funding for a proposed regional taskforce, Britain urged a more cautious approach. The European Commission earmarked €50 million for the multinational force, but failed to disburse it immediately due to these disagreements. In 2010, EU member states clashed with the U.S. over the cost of continuing UN peacekeeping in Liberia, which held tense but relatively peaceful presidential elections.[50]

V. Why the EU Should Care Enough

5.1 Terrorism from GoG as an Objective Threat

As an objective threat to the EU's interests, terrorism has been identified as causing physical and material damage to the EU's interests and that of its member States. The GoG is part of what one European diplomat calls the "security belt" given its growing relevance to European interests.[51] It remains an area in which the EU retains real leverage and its instability demands sustained attention. The EU and its member States have interests that range from strategic, economic, humanitarian, political, historical and value-based, all of which are under threat of extinction by terrorist activities. There is good reason to think the EU has economic interests in the GoG, primarily because it is involved in import and export exchanges. Although trade relations between the fifteen EU member countries and the GoG have been described as marginal,[52] it is in the economic interest of the EU to step this up. The EU, being a net-importer of energy, receives 7.1 percent of its oil from the GoG. Nigeria is by far the largest source of oil for the EU; Nigerian oil imports to Europe account for as much as the entire rest of the region.[53] Unfortunately, in the midst of this booming oil business, terrorism is just around the corner. Terrorists have infiltrated the oil business in order to get their own share.

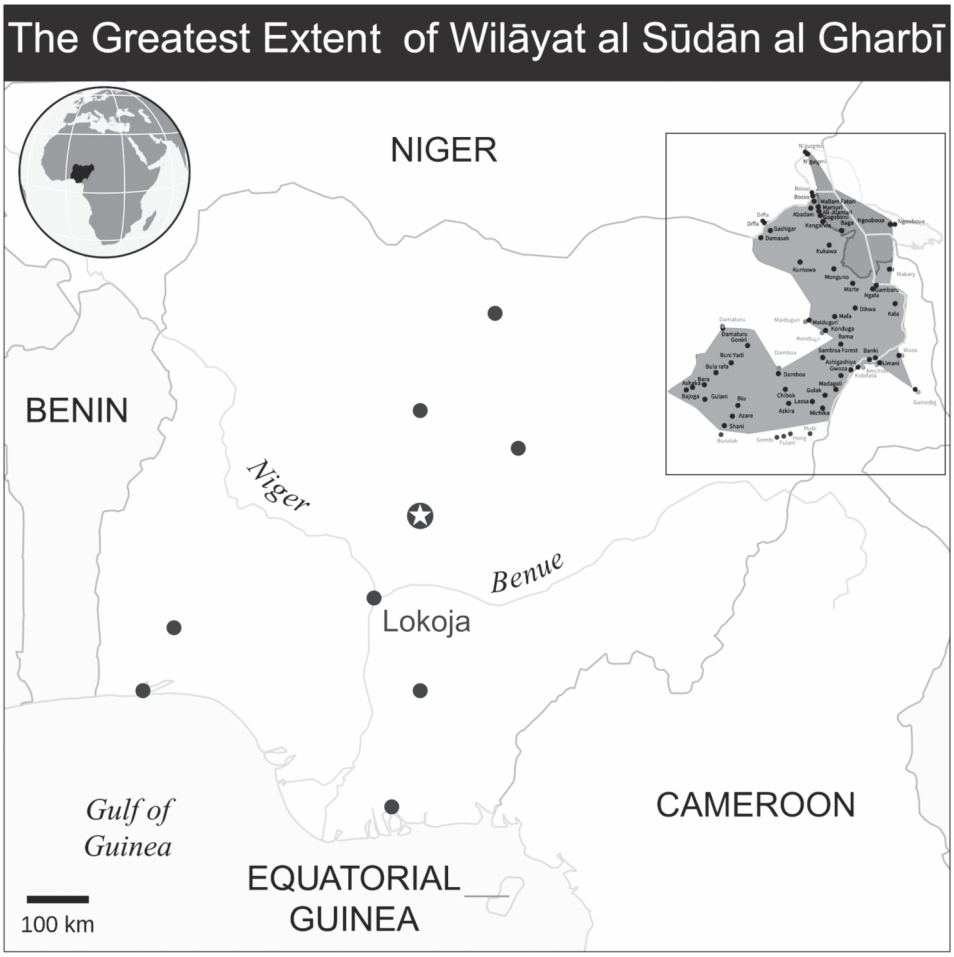
There is every reason for the EU to believe the world is witnessing the internationalization of yet another Islamist militant grouping from the GoG.

Table 3: Terrorist Groups and Areas/Countries of Operation in the GOG and Neighboring Countries

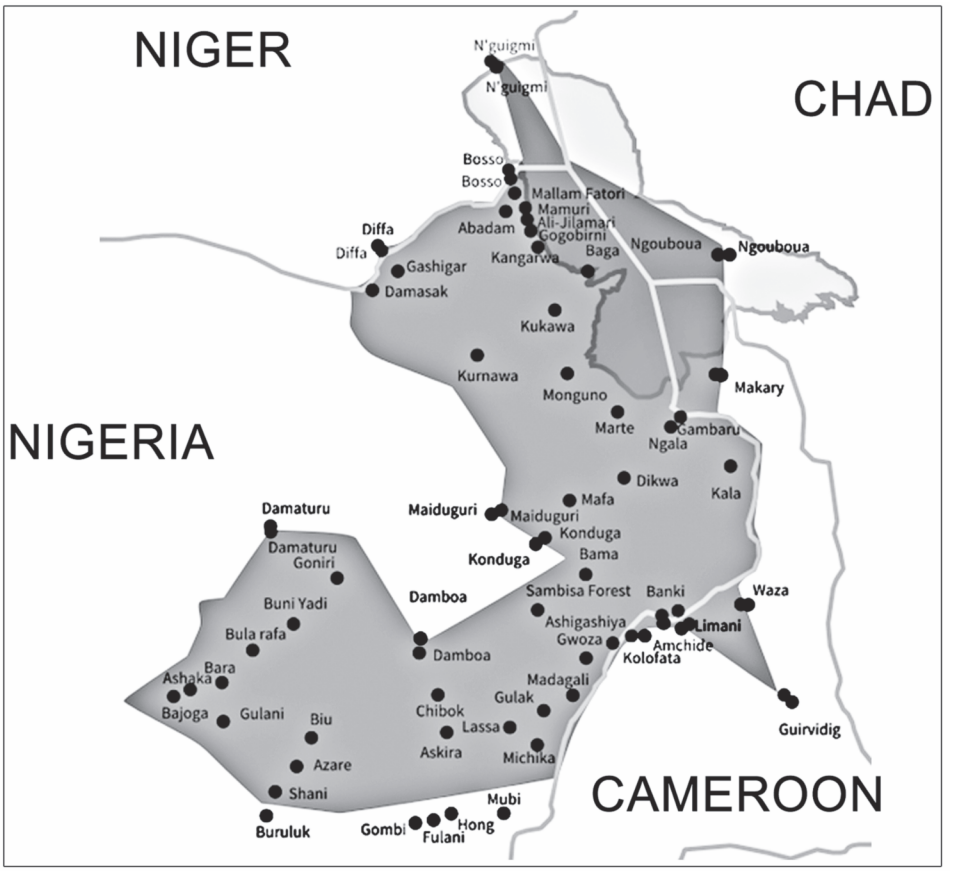
Terrorist Group	Region/Country of Operation
Boko Haram (BH)	West and Central Africa (Cameroon, Chad, Niger, Nigeria)
Movement for Oneness and Jihad in West Africa	Algeria, Mali, Niger
Lord Resistance Army (LRA)	Central African Republic, Chad, Democratic Republic of Congo, South Sudan, Uganda
Jama'a Nusrat ul Islam wa al-Muslimin' (JNIM) (Group to Support Islam and Muslims or GSIM)	Mali, Niger, Algeria, Libya, Mauritania, Tunisia, Chad, Burkina Faso, Morocco
Al-Mourabitoun ("The Sentinels")	Algeria, Burkina Faso, Ivory Coast, Libya, Mali, Niger
Al-Qa'ida in the Land of Islamic Maghreb (AQIM)	Algeria, Niger, Mauritania, Malia, Tunisia, Libya, Morocco, Chad, Niger
Allied Democratic Forces (ADF)	Democratic Republic of Congo and Uganda
Ansar Dine (AAD)	Mali, Senegal, Mauritania
Ansar ul Islam	Burkina Faso and Mali
Ansaru	Nigeria and Mali

Source: Author's compilation.

Boko Haram is the dominant terrorist group in the GoG with international connections. First, BH deliberately fashioned itself after the Taliban in Afghanistan, including taking up the names "Nigerian Taliban" and "Black Taliban."[54] Second, the sect's founder, Mohammed Yusuf, was accused of receiving money from Al-Qaeda.[55] Third, key figures in BH are understood to have met with the AQIM (Al-Qaeda in the Islamic Maghreb) leadership in neighboring Niger and the group has claimed to have sent its members to Afghanistan, Lebanon, Pakistan, Iraq, Mauritania and Algeria for military training.[56] Fourth, evidence is emerging that BH also has ties with the Somali militant group Al-Shabaab. Indeed, a spokesman for the group has claimed that BH fighters had been sent to Somalia and Yemen for further training.[57] BH's spokesman went on to state: "We want to make it known that our jihadists have arrived in Nigeria from Somalia where they received real training on warfare who [*sic*] made that country ungovernable…. This time round, our attacks



The maximum extent of Boko Haram in January 2015 shown in dark gray (detail) (Wikipedia). (See detail on following page.)



will be fiercer and wider than they have been."[58] Fifth, there is also evidence that at least one hundred BH fighters are part of the Movement for Unity and Jihad in West Africa (MUJAO). This grouping split off from AQIM in order to focus on the jihad in West Africa and the Sahel regions. In jihadi training camps in Gao in northern Mali, BH recruits make up the bulk of the trainees. Such external influence over BH is also witnessed in the changing choice of targets. On August 26, 2011, the group targeted the UN headquarters in the capital Abuja. Finally, geographically, there is evidence to suggest that BH itself may be morphing into a regional entity, if one considers that its members are spread across Cameroon, Chad, Niger and Mali. These elements suggest that BH has potential assets traditional and well-known terrorists groups have at their disposal, and it is of paramount interest for the EU to understand that its counterterrorism is failing partly because it does not want to recognize this wider context of terrorism in the GoG.

In addition, the EU's interests in the GoG have been targets of terrorist groups. As part of its operational activity, terrorist groups have made recourse to kidnappings and hostage taking of citizens from EU member countries. The risk to EU citizens of being kidnapped by religiously inspired terrorist groups is particularly great. Besides money, AQIM for example, has demanded the withdrawal of French troops

from Mali and the release of its incarcerated operatives. AQIM continued to hold EU citizens hostage in the Sahel region. In October 2012, al-Qaeda leader Ayman al-Zawahiri suggested that his followers should take British, French, Italian or U.S. citizens hostage, with a view to influencing negotiations regarding prisoners in Afghanistan.[59] In 2012, MUJAO was another group responsible for the kidnapping and detention of French, Italian and Spanish nationals. MUJAO also announced its intention to destroy French strategic interests, especially in Niger, Senegal and the Ivory Coast.[60] In Nigeria, nationals from France, Germany, Italy and Britain were kidnapped in 2012. In March, a Briton and an Italian were killed in northwest Nigeria by a group linked to Ansar al-Muslimin fi Bilad al-Sudan (Supporters of Muslims in Sub-Saharan Africa), also known as Ansaru, during a special forces raid. Both had been abducted in 2011. In December, a French engineer was kidnapped in Rimi in northern Nigeria during a well-planned operation. Ansaru split in 2012 from BH, citing disapproval of BH's targeting of Nigerian civilians. Both groups maintain a shared goal of enforcing Islamic law throughout the country and have conducted kidnappings of EU citizens involved in construction projects in northern Nigeria.[61] Ransom for a European family could be up to 3 million Euros—in February 2013, BH received such a ransom in exchange for a French family.[62] BH was responsible for the August 26, 2011, bomb attack on the UN building in Abuja that killed at least 21 people and wounded dozens more and in February 2013, BH claimed responsibility for kidnapping seven French tourists in the far north of Cameroon and obtained ransom payments for their release.

Attacks on non-combatants have also been associated with the group. In 2014, BH killed approximately 5,000 Nigerian civilians in various attacks. The kidnapping of 276 female students from a secondary school in Chibok, Borno State, brought global attention to BH's activities and highlighted its deliberate targeting of non-combatants, including children. In 2015, the group continued to abduct women and girls in the northern region of Nigeria, some of whom it later subjected to domestic servitude, other forms of forced labor, and sexual servitude through forced marriages to its members.[63] Between January 3 and 7, 2015, BH carried out a massacre in Baga, Borno State; reported casualties ranged from 150 to more than 2,000 killed, injured, or disappeared. The January 2015 attacks and other BH operations in surrounding smaller villages in 2015 displaced an estimated 35,000 people and allowed BH to gain control of Borno State. In February, BH expanded into Cameroon with an attack on the northern town of Fotokol, where it murdered residents inside their homes and in a mosque. On April 6, BH militants disguised as Islamic preachers killed at least 24 people and wounded several others in an attack near a mosque in Borno State; the attackers gathered people in the village of Kwajafa, offering to preach Islam, then opened fire.[64]

Although these kidnappings and atrocities have been ascertained to be motivated by the terrorist group's desire to acquire funding through ransom payments for the release of hostages, acquisition of heavy weapons and recruitment of fighters from poor populations, they represent a patterned mode of operation observed among well-known terrorist organizations and of which the EU should be wary.

Unfortunately, it was not until after 2013 and 2014 that the EU began to recognize the scale of security challenges emerging from the GoG, when refugees and migrants began to cross the Mediterranean in large numbers. Beyond this recognition, there is a need for an effective counterterrorism strategy.[65]

Terrorism as an objective threat from the GoG is also linked to illegal migration, criminality and smuggling into Europe. The influence of the GoG, particularly that of Nigeria, has also grown because of deeper smuggling networks and increased BH presence, combined with a tradition of migration to Europe. Crossing the Mediterranean from Libya now costs just 700 Libyan dinars (460 Euros at the official exchange rate, but as little as 240 Euros on the black market).[66] Meanwhile, there are increasing reports that once migrants begin the journey from the GoG, smugglers do not allow them to change their mind and "jump off the train."[67] These recent flows from the GoG fall into the gray zone of "survival migrants" who flee not individual persecution or discrimination as refugees, but rather generalized violence. Survival migrants constitute the vast majority of global migration flows. The number of arrivals by sea from Nigeria alone to Italy via Libya rose from 6,951 in 2014 to 17,886 in 2015, an increase of more than 157 percent, the second highest after Sudan, with an increase of over 253 percent.[68] This implies that Nigeria has been one of the primary countries of origin of migrants from the GoG. A case in point of terrorism linked to criminality is the existence of armed gangs throughout northern Nigeria—these number in the thousands and include such groups as the Almajirai, Yan Tauri, Yan Daba, Yan Banga and Yan Dauka Amariya. These gangs provide a ready pool of recruits for extremists.[69] It is therefore imperative for the EU to collaborate with Nigerian authorities to neutralize these armed groups as part of the broader fight against BH. BH also benefits from Nigeria's geographic positioning as a hub for drug trafficking. About a quarter to two-thirds of the cocaine moving from South America to Europe passes through the West African countries of Cape Verde, Mali, Benin, Togo, Nigeria, Guinea-Bissau, and Ghana. Increasingly, BH is becoming a larger player in Nigerian drug smuggling.[70]

The GoG has been identified as a new area for recruitment and redeployment with the objective of expanding the confrontation field beyond the traditional zone of operations (including the Middle East and North Africa). For example, BH is extending to the Sahel and Lake Chad Basin regions and has been able to copy the Al Qaeda use of suicide attacks and improvised explosive devices (IEDs), as well as employing teenagers and disabled individuals as suicide bombers. There is the danger that if the EU does not energetically intervene, it could be seen as being an indirect accomplice to terrorism.

The changing global environment also points to a need to redouble the EU's efforts in this area, given the following main factors. First, territorial gains in Iraq and Syria will sooner or later lead to a situation where remaining Da'esh fighters will move to "safe havens," including in Yemen or Somalia, but also in Sahel and the GoG. Second, after losing control of significant terrain, some IS members were seeking to leave the combat zone, either to return home, or to travel to other conflict areas (for example to Afghanistan; within the Middle East and North and West

Africa; Central, South or Southeast Asia), potentially increasing the risk of more organized spectacular-type attacks in Europe in the medium to long term.[71] Austria, for example, reported that it was particularly affected by migrant flows originating from conflict areas in Africa and Asia, although there is not enough evidence to assess whether potential terrorists have been systematically smuggled in via these flows.[72] The Austrian government did, however, state that in several cases the suspicion that certain individuals were members of a terrorist organization was substantiated, and that some individuals who came to Austria along with the migrant flows were arrested for suspicion of supporting, or being a member of IS.[73]

IV. Conclusion

Misconceptions regarding the scope of the terrorist threat from the GoG induced the EU to adopt a subjective counterterrorism approach, understood as soft power practices in the struggle against terrorism. This approach is opposed to the objective counterterrorism herein considered as the use of hard power (primarily military) to combat terrorism—an approach the EU uses in traditional terrorist bastions of the Middle East and North Africa.

The EU's approach to counterterrorism in the GoG is a reluctant one, characterized by indirect engagements, indifference, diplomatic weaknesses, piecemeal interventions, excessive caution, humanitarian actions, and an overall absence of coherence. The EU tends to undermine the scope of threat of terrorism owing to the fact that so far, no spectacular-type attack on the EU's interests at home and abroad is said to have originated in the GoG. In fact, the EU seems to perceive that her interests at home and abroad are not the primary targets of terrorists from the GoG. This is indeed a misconception given that the threat of terrorism from the GoG is objective and real, requiring objective counterterrorism. Terrorist groups such as BH (dominant group) and Ansaru in West Africa, parts of Central Africa, and the Sahel, AQIM and MOJWA in North and West Africa, and LRA in Central Africa, are using violence or threatening to use it against soft, usually unarmed human and symbolic targets. As part of its operational activity, these groups have made recourse to kidnappings and taking citizens from EU member countries hostage. Terrorism as an objective threat from the GoG has been linked to illegal migration, criminality and smuggling into Europe. Unfortunately, there is a major mismatch between the scale of violence affecting this region and the EU's response.

The EU is therefore invited to rethink its counterterrorism approach and consider an affirmative and objective policy. This paper strongly recommends a military offensive component of the EU's counterterrorism in the GoG. Without a military offensive component, the war on terror cannot be won, argues Barry Posen,[74] and as Russell Howard concludes, "When terrorists or their support structures can be found and fixed, pre-emptive and preventive attacks will accomplish more against them, dollar for dollar, than the investment in passive defences."[75]

Notes

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10. See JAES context declaration.

11. See *Journal officiel de l'Union Européenne* "Accord d'étape vers un accord de partenariat économique entre la communauté Européenne et ses états membres, d'une part, et la partie Afrique Centrale, d'autre part," Article 105, 2009.

12. See Lisbon, December 9, 2007 16344/07 (Presse 291).

13. The recent collaboration between Cameroon and Nigeria to extradite suspected Cameroon Anglophone secessionists arrested in Nigeria could be interpreted as acting to respect this treaty.

14. See Council of the EU Report, 2015.

15. For a revealing discussion of this, see David Frum and Richard Perle, *An End to Evil: How to Win the War on Terror* (New York: Random House, 2003).

16. Georg Sørensen, "'Big and Important Things' in IR: Structural Realism and the Neglect of Changes in Statehood," in Ken Booth (ed.), *Realism and World Politics* (London: Routledge, 2011), p. 111.

17. See Neta C. Crawford "Rethinking 'Man'" in Booth (ed.), *ibid.*, p. 166.

18. The U.S. invasion of Iraq was as much about creating fear and paralysis among the Iraqi military as it was about using the U.S. military's advantages in information, speed, and manouvering to destroy Iraqi military forces or kill their soldiers.

19. Cornelia Beyer, "Hegemony, Equilibrium and Counterpower: A Synthetic Approach," in Booth (ed.) (2011), p. 242.

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21. See Office of the United Nations High Commissioner for Human Rights "Human Rights, Terrorism and Counter-Terrorism," Fact Sheet No. 32, p. 5.

22. *Ibid.*

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33. *Ibid.*
34. *Ibid.*
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39. European Foreign Policy Scorecard 2010, p. 101.
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42. Patrice Sartre, *Responding to Insecurity in the Gulf of Guinea* (New York: International Peace Institute, July 2014)
43. *Ibid.*
44. *Ibid.*
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62. See "Nigeria's Boko Haram 'Got $3M Ransom' to Free Hostages," BBC (UK), April 27, 2013, https://www.bbc.com/news/world-africa-22320077, accessed August 1, 2018.

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67. *Ibid.*

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Biographical Statement

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Floating Armories and Privately Contracted Armed Security Personnel on Board Ships: Balancing Coastal State Security Concerns Against Navigational Freedom

Sindhura Natesha Polepalli

Structured Abstract

Article Type: Research Paper

Purpose—Balancing navigational freedom against coastal State security concerns in the context of privately contracted armed security personnel (PCASP) on board ships and floating armories (FA) at sea.

Design, Methodology, Approach—A comparative analysis of the standpoint of the private maritime security industry and flag, port and coastal States alongside the role of the International Maritime Organization (IMO). The character of the territorial sea (TS) and the exclusive economic zone (EEZ) are examined in light of relevant maritime incidents and provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

Findings—Maritime incidents demonstrate that FA and PCASP on board ships can be non-peaceful and can prejudice coastal State security. However, current regulations do not satisfy coastal State security concerns. To meet this lacuna, the role of the IMO is indispensable. Meanwhile, the "prior notification" requirement can be viewed as a precautionary measure of Maritime Domain Awareness. The resolu-

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tion lies in serving the cause for coastal State security through a functional interpretation of the ambiguous UNCLOS provisions regarding the prior notification requirement.

Practical Implications—The study contributes to the study of conflict management concerning coastal State security regulations levied on ships of third States—which otherwise enjoy the right to innocent passage in the TS and the high seas freedom of navigation in the EEZ.

Originality, Value—The topic has not largely been touched upon. This paper makes original contributions in drawing its independent resolution.

Keywords: coastal state security, exclusive economic zone, floating armories, freedom of navigation, innocent passage, maritime security, navigational freedom, piracy, privately contracted armed security personnel, territorial sea

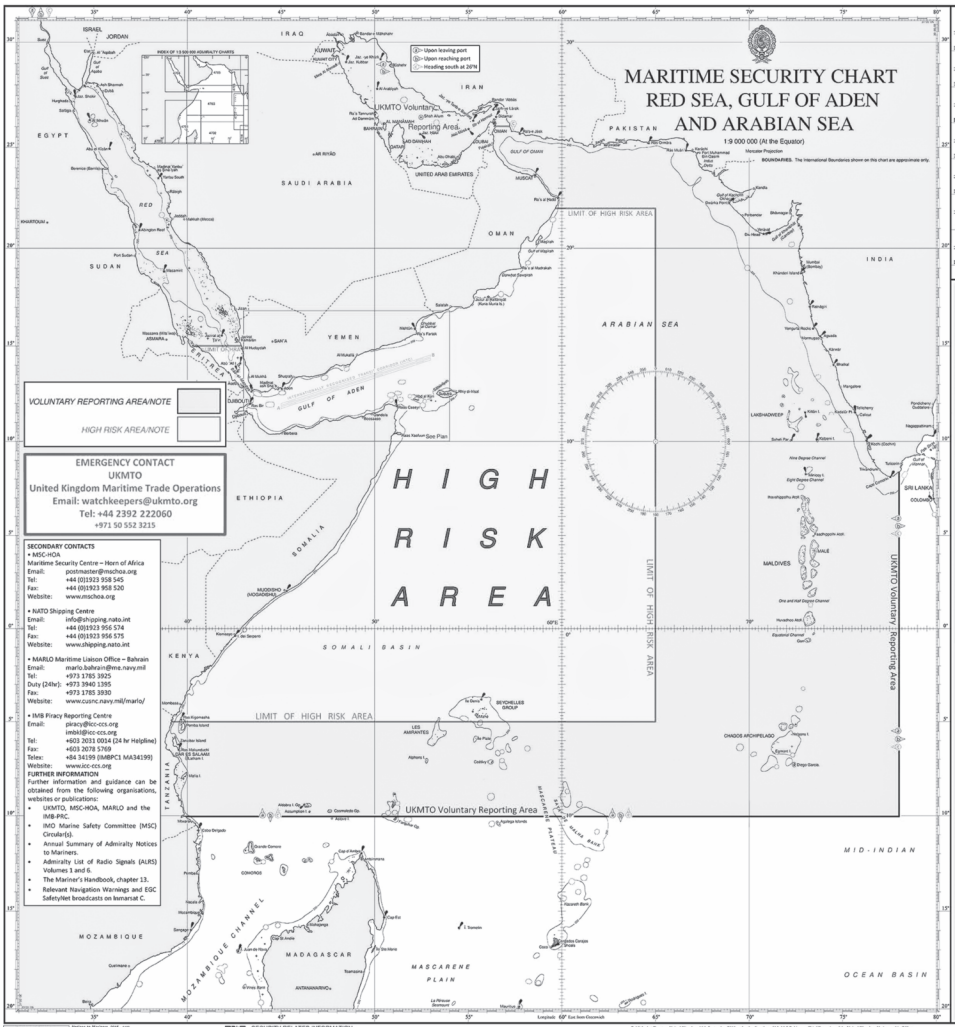
I. Introduction

The piracy affecting Somali waters caused tremendous losses to merchant vessels transiting the Gulf of Aden, a strategic link between the Mediterranean Sea and the Indian Ocean.[1] Maritime piracy and armed robbery against ships posed a grave risk to vessels and seafarers as they extended into the Red Sea, the Indian Ocean and surged off the west coast of Africa.[2] Such increase in violence and criminality at sea triggered various governmental and shipping industry initiatives for protection against them.[3] Though joint-counter piracy efforts by the stakeholders resulted in a steady decline in pirate attacks, the United Nations Security Council expressed its concern over the ongoing threat of "resurgent piracy and armed robbery at sea" in the Gulf of Aden and the Somali Basin.[4]

A. Effective Response to Piracy in the High Risk Area

Warships began to increasingly serve as anti-piracy patrol tools in mid–2009 and this effort to tackle piracy in the Gulf of Aden was supported by the Multinational Task Force 151, European Union Naval Force, North Atlantic Treaty Organization and independent national naval patrols from China, Russia, India, etc.[5] Further, to enhance better coordination, platforms like Shared Awareness and Deconfliction (hereinafter SHADE) for the States and the Maritime Security Centre—Horn of Africa (hereinafter MSCHOA) for the shipping industry, surfaced.[6] In 2011, the International Maritime Organization (hereinafter IMO) adopted Best Management Practices (hereinafter BMP) developed under the auspices of the International Chamber of Shipping (hereinafter ICS) for the protection of Seafarers from Somali-based piracy.[7] BMP assists ships in avoiding, deterring or delaying maritime piracy and armed robbery attacks at sea.[8]

For the purpose of BMP, an area within the designated Voluntary Reporting Area of the United Kingdom Maritime Trade Operations (hereinafter UKMTO)[9]



HRA in the Western Indian Ocean (United Kingdom Hydrographic Office, Maritime Security Chart Q6099).

where there is a considerable higher piracy risk and within which self-protective measures are most likely to be required is termed as a High Risk Area (hereinafter HRA).[10] BMP application throughout the HRA helped in avoiding piracy by making it effective to determine the location of the operating pirates and prepare alternative travel routes based on circumstances influencing that area.[11]

B. Emergence of Privately Contracted Armed Security Personnel and Floating Armories at Sea

The employment of Privately Contracted Armed Security Personnel (hereinafter PCASP)[12] through Private Maritime Security Companies/Contractors (hereinafter

PMSC)[13] and Vessel Protection Detachments (hereinafter VPD)[14] was another international response to tackle the scourge of maritime piracy and armed robbery against ships. However, the unwillingness of the coastal States off the West African coast to tolerate a third party's PCASP usage on board ships made such operation cumbersome in that region.[15] Moreover, due to the inability of private security to deter pirate attacks occurring in the territorial waters of the West African coast, in comparison to the High Seas as in the case of the HRA in the western Indian Ocean, the PCASP usage boomed in the latter region.[16]

PMSC pre-position PCASP and weapons at key ports of the coastal States in the Red Sea or Indian Ocean to support the prompt embarkation of clients' vessels.[17] To store weapons and accommodate personnel, PMSC employ commercially available Floating Armory (hereinafter FA) vessels that operate as static or mobile offshore logistics facilities.[18]

Determination of the number of PMSC currently operating in the Indian Ocean region has been difficult due to the lack of a central registry for their licensing or qualifications.[19] However, it has been estimated that as of 2012, more than 140 PMSC specializing in anti-piracy operations have been operating off the Somali coast.[20]

An increase in PCASP usage noted a decrease or temporary disappearance of pirates, thereby enhancing a peaceful transit through the Somali waters.[21] Additionally, the international community witnessed a failure in piracy attempts due to the presence of armed security where the military was not involved.[22] This surfaced the efficiency and cost-effective result of employing PCASP on board merchant vessels, thereby instigating a boom in their usage.[23]

Nevertheless, the lack of concrete regulations governing operation of VPD, FAs and PCASP on board merchant ships created problems. For example, in February 2012, two Italian marines on board an Italian-flagged commercial oil tanker, *Enrica Lexie,* killed two Indian fishermen on suspicion of piracy which resulted in a diplomatic fallout between India and Italy.[24]

In addition, controversy persists pertaining to the size and type of vessels that can be used to store weapons.[25] In 2013, an FA ship, *MV Seaman Guard Ohio*, owned by AdvanFort, a U.S.–based PMSC, was impounded and the crew and armed guards aboard were detained after it entered Indian territorial waters with illegal arms without adequate permission.[26]

Prominently, the crime of piracy is a breach of *jus cogens* and the employment of PCASP on board vessels is a means of defense against *bona-fide* pirates or terrorists who are *hostis humani generis*, or enemies of all mankind.[27] However, acts of PCASP can certainly not be unreasonable or unjustified.[28] Neither can they result in sudden panic and unprovoked use of force at the first sight of an approaching boat or dinghy.[29]

In the light of the above background, this paper seeks to balance navigational freedom against coastal State security concerns. In attempting to do so, Section II studies the industry self-regulations applicable to private maritime security service providers. Section III reflects on the IMO's contributions as a guide and a recommendatory

body to PMSC, shipowners, coastal, port and flag States. Section IV analyzes the security concerns of coastal States contrasting the right of innocent passage in the territorial sea (hereinafter TS) and the freedom of navigation in the exclusive economic zone (hereinafter EEZ) guaranteed under the United Nations Convention on the Law of the Sea, 1982 (hereinafter UNCLOS). Having reviewed all these aspects, Section V encapsulates the intended balance.

II. Industry Self-Regulation

Industry self-regulation is a regulatory process designed by private actors outside the governmental decision-making arena.[30] It is a voluntary form of sectoral governance that implies the requirement of decisive cooperation among industry stakeholders. Nevertheless, despite existing concerns pertaining to its accountability, credibility and enforceability, industry self-regulation retains the capacity to compete with or supplement national regulatory norms.[31]

Today, PMSC self-regulation is primarily in the form of several soft law instruments such as codes of conduct established by industry trade associations.[32] Commonly, when terms of a code of conduct are incorporated into a contract with a supplier, they become legally binding as *de facto* minimum standards.[33] Considering especially that States have been rather slow-paced in regulating or developing regulations for private maritime security activities, PMSC self-regulation functions as a potential source of global governance and a medium for raising standards in this industry.[34] Thus, it is critical to gauge their role and effectiveness.

A. Montreux Document

The "Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict" (hereinafter Montreux Document) is an intergovernmental document established by the efforts of the Swiss Government and the International Committee of the Red Cross in 2008.[35] The international legal obligations under the Montreux document are cultivated from international humanitarian law, human rights agreements and customary international law.[36] It carves a non-exhaustive list of good practices positioned for peacetime, thereby evidencing that it is not strictly confined to armed conflict.[37] Precisely, it reiterates that States are not relieved of their international obligations despite PMSC's private nature.[38]

Though the Montreux Document is non-binding and was drafted to apply to private security services provided on dry land, it is also "meant to provide practical guidance in other contexts," inclusive of protecting merchant shipping against piracy.[39] Its character, therefore, gives it a prospective rather than a reactive regulatory approach towards PMSC.[40] Notably, States such as the Bahamas, the Marshall Islands and Cook Islands have signified the Montreux Document's provisions in their recommendations to the IMO.[41]

B. International Code of Conduct

The "International Code of Conduct for Private Security Service Providers" (hereinafter ICoC) was adopted in 2010.[42] It builds on the foundations of the Montreux Document[43] and is a set of principles for private security providers formulated by the multi-stakeholder initiative convened by the Swiss government.[44] It has a two-fold operation covering principles of conduct and principles of management of the private security personnel.[45] Since it signifies the necessity of developing independent governance and oversight mechanism as well as responsible administration of the Code,[46] the ICoC Association (hereinafter ICoCA) has been created.[47]

Currently, ICoC has over 700 signatory companies[48] endorsing their responsibility to uphold the rule of law, human rights and clients' interests.[49] It enjoys some force of statutory and/or contractual obligation on the private security providers. This is evident from the fact that various national and international regulatory initiatives require ICoC compliance or ICoCA membership either as a matter of law or as a prerequisite for obtaining private security contracts with a State or an international organization.[50] Besides, not only do States consider it as model for PMSC compliance of industry regulations[51] but also its usage could serve as a basis for the IMO to develop more formal guidelines regulating PCASP deployment on board merchant ships.[52] Appreciably, the views of the international community are hardening an essentially "soft law" approach towards ICoC.[53]

C. Best Management Practices

After the IMO resolved to implement BMP,[54] the Maritime Security Committee (hereinafter MSC) drew attention to the revised version of the BMP, i.e., BMP4, to keep them "alive, relevant, dynamic and updated."[55] BMP4 strongly recommends applying BMP throughout the HRA[56] and outlines that non-observance of BMP prescriptions advances severe consequences.[57]

BMP4 refers to three fundamental requirements, *viz.* registration at MSCHOA, reporting to UKMTO and implementation of Ship Protection Measures.[58] Notably, BMP4 supports unarmed PMSC usage, but does not endorse or recommend the general usage of armed PMSC.[59] However, it recommends armed/unarmed PMSC usage only pursuant to voyage risk assessment by ship operators and subject to flag States' approval.[60]

Interestingly, when considering armed guards, BMP4 asserts deployment of VPD as the recommended option to protect vulnerable ships.[61] It expresses that armed PMSC is only an "additional layer of protection" and not an alternative to BMP.[62] Subsequently, it recommends the presence of guards on board vessels to be included in the reports of UKMTO and MSCHOA—who are marked as the key contacts for Naval or military organizations.[63]

Notably, where BMP recommendations were followed, cases of successful pirate attacks were reduced.[64] Significantly, BMP recommendations have been reflected in the national regulations of popular ship registries such as Panama[65] and Liberia.[66]

Thus, BMP is an integral industry regulation of precautionary nature that can best protect ships against pirate attacks.

D. Industry Guidelines

In 2011, "Industry Guidelines for the Use of PMSC as Additional Protection in Waters Affected by Somali Piracy" (hereinafter Industry Guidelines) were developed by BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF, IG P&I Clubs.[67] They serve as a guide to shipping companies that decide to engage PMSC or any additional protection against piracy and/or armed attack.[68] Much like BMP, they recognize the usage of non-lethal means of self-protection as the industry's responsibility and subject to risk analysis, prefer VPD for protecting vulnerable merchant ships when considering armed guards.[69]

Industry Guidelines provide a selection criteria founded on commercial due diligence for engaging PMSC.[70] This includes checking the criminal background, employment history and military background of the PMSC personnel, i.e., PCASP, along with assessing their medical, physical and mental fitness.[71] They require PMSC's sound understanding of the relevant UNCLOS sections, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Convention for the Safety of Life at Sea including the International Ship and Port Facility Security Code.[72] Also, PCASP are required to be acquainted with the appropriate principles or guidelines or rules for the use of force.[73] Besides, they provide that PCASP are to be trained to safely operate on different vessels transiting in the marine environment and handle equipment such as weapons, where armed.[74]

Industry Guidelines indicate the unlikeliness for the risk analysis to determine the onboard security team size to be less than four personnel.[75] They provide for the inclusion of a Team Leader and recommend one PCASP to be qualified as a team medic.[76] They make it a prerequisite to clearly define, document and discuss the command and control structure between the Ship Operator, Master and the PMSC Team Leader.[77] Subsequent provisions signify responsible and consistent management of weapons and ammunition on board through documenting compliance of the relevant legislative requirements.[78] Also, they provide for record-keeping and reporting of circumstances where weapons are discharged.[79] In addition, the owners are to ensure, for themselves and their personnel, maintenance of an insurance coverage that is non-prejudicial to the ship owners' insurance coverage.[80]

Importantly, the industry asserts governmental responsibility for ensuring freedom of navigation on the high seas and the protection of the right of innocent passage.[81] Also, PMSC are to provide a detailed plan of their proposed security team deployment in compliance with flag state requirements including, *inter alia*, their conceptual understanding of the "right of innocent passage" in territorial waters and the extent of compromising this right as opposed to the freedom of navigation on the high seas.[82] Considerably, various flag States like India, Liberia and the United Kingdom (hereinafter UK) have regulations that complement and are consistent with the Industry Guidelines.[83]

E. GUARDCON Standard Contract

GUARDCON is an agreement for the hiring of services of private maritime security guards, armed or unarmed, on ships.[84] It was developed by BIMCO to assist the industry, and in particular shipowners and their P&I Clubs.[85] In 2012, BIMCO issued the latest version of the GUARDCON and forwarded it to the 90th session of the Maritime Safety Committee (hereinafter MSC).[86]

GUARDCON provides for responsibilities and liabilities of parties, dealing especially with insurances and the potential use of force on board ships.[87] Significantly, it is not limited to the current HRA and can be employed within any geographical area agreed between the owners and the contractors.[88] It has a multifunctional character since it can be used for both single and multiple transits.[89] Its provisions do not substitute the exercise of due diligence and are negotiable.[90] It is a confidential document with an exception to the other party's prior written consent or the request of a government or its agency to the extent required by law.[91]

GUARDCON stipulates for the contractors to provide a security team comprising of at least four suitably qualified, trained and experienced security personnel, including a team leader.[92] The security team's profile includes protecting and defending the vessel during the transit against any "actual, perceived or threatened acts" not only limited to piracy but also extending to "violent robbery and/or capture/seizure."[93] It signifies BMP measures and procedures and requires the owners to liaise with the UKMTO and MSCHOA accordingly.[94]

Despite its provisions, GUARDCON disclaims any guarantee as to the vessel's security during the provision of security services.[95] It only attempts to raise security companies' standards for insurance coverage for risks as well as permits and licenses for the lawful transport and carriage of weapons.[96]

III. IMO Guidance and Recommendations

IMO, a specialized United Nations agency, addresses issues relating to international shipping by adopting uniform rules and standards for the shipping industry.[97] It aims to mandate safe and secure trade and travel by sea by managing and mitigating possible threats to maritime security.[98] For this purpose, it has been developing suitable regulations and guidance through the MSC with inputs from IMO's Facilitation Committee and Legal Committee.[99] Being operationally based on the consensus of its Member States, it is an extremely effective decision-making platform.

In 2011, "piracy and armed robbery against ships" was included in the agenda of MSC's 89th session.[100] This session approved Interim Recommendations for flag, port and coastal States and Interim Guidance to shipowners, ship operators, and shipmasters regarding PCASP usage on board ships in the HRA.[101] In 2012, MSC's 90th session revised these interim recommendations and further agreed on the Interim Guidance to PMSC providing PCASP on board ships in the HRA (hereinafter

MSC.1-Circ.1443).[102] These documents are to be conjunctively read along with the "Questionnaire on information on port and coastal State requirements related to PCASP on board ships"[103] and other IMO recommendations and guidance for preventing and suppressing piracy and armed robbery against ships.[104]

Notably, IMO neither endorses nor condemns carriage of arms and PCASP usage on board ships.[105] It directs the responsibility on individual flag and coastal States to determine the legality, appropriateness of and conditions for PCASP usage.[106] Therefore, reviewing IMO's contribution in this field is significant.

A. Revised Interim Recommendations for Flag States

"Revised Interim Recommendations for Flag States Regarding the Use of PCASP on Board Ships in the HRA" (hereinafter MSC.1-Circ.1406-Rev.3) resulted from three revisions of the interim recommendations for flag States that were approved at the 89th MSC session.[107] MSC.1-Circ.1406-Rev.3 does not endorse or institutionalize PCASP usage on board vessels.[108] Instead, it urges flag States to consider the possibility of escalation of violence resulting from the usage of firearms and carriage of armed personnel on board vessels.[109] It also requires flag States to clarify the national policies pertaining to the carriage of armed security personnel to the masters, seafarers, shipowners, operators and companies.[110]

MSC.1-Circ.1406-Rev.3 recommends flag States position a PCASP authorization policy, including conditions for such authorization.[111] It primarily suggests flag States consider the appropriateness of PCASP usage under national legislation.[112] Secondly, if determined appropriate, it recommends the establishment of a policy that, *inter alia*, includes a minimum criteria for PCASP compliance, possession of valid accreditation certification by PMSC for PCASP employment and a procedure for authorizing PCASP usage that meet minimum flag States requirements.[113] It suggests that such policies may also directly refer to the applicable national laws relating to the PCASP's carriage and use of firearms along with the obligation to report and keep records.[114] The requirements of MSC.1-Circ.1406-Rev.3 are embodied in various national regulations such as those in India, Liberia, the UK and Panama.[115]

B. Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters

"Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of PCASP on Board Ships in the HRA" (hereinafter MSC.Circ.1405-Rev.2) indicates the application of flag State jurisdiction to ships using PMSC and PCASP.[116] MSC.Circ.1405-Rev.2 states that PCASP usage is not an alternative to BMP and other protective measures.[117] It suggests shipowners ensure flag State consultation early in their consideration of PCASP usage and recommends such consideration only after a thorough risk assessment.[118]

MSC.Circ.1405-Rev.2 suggests determining not only the security team size before their deployment on board but also an appropriate hierarchy in its compo-

sition, i.e., the appointment of a Team Leader.[119] Notably, it recommends the master report to the appropriate military authorities the intended transit or transiting of the ship carrying PCASP, firearms and security related equipment through the HRA.[120] In addition, it holds the shipowners and ship operators responsible for familiarizing this guidance to the master and the crew.[121]

MSC.Circ.1405-Rev.2 recapitulates the provisions of Industry Guidelines pertaining to PMSC selection, command and control structure, responsible management of firearms and ammunition, the rules on the use of force and the obligation to report and keep records.[122] Appreciably, States such as India, Liberia, Panama and the UK have incorporated its provisions.[123]

C. Revised Interim Recommendations for Port and Coastal States

"Revised Interim Recommendations for Port and Coastal States Regarding the Use of PCASP on Board Ships in the HRA" address the need for the development of a regulatory regime specifically for port and coastal States.[124] They particularly urge coastal States bordering the Indian Ocean, Arabian Sea, Gulf of Aden and Red Sea to put in place relevant policies and procedures which are consistent with international law.[125] They also advocate for governments to refrain from establishing policies that "interfere with the navigation of ships" or hinder or are capable of hindering "the continuation of maritime trade."[126]

Importantly, they encourage governments to consider factors pertaining to "embarkation," "disembarkation" and "vessel calling" prior to developing national policies and related procedures concerning PCASP usage on board vessels.[127] These considerations include requiring PCASP identification; storage, security and control of firearms and security related equipment—proposed for embarkation and those retained on board—coupled with notifications and documentation of their embarkation and disembarkation.[128] Also, if applicable, they require documentation denoting the authorization of PCASP, firearms and security related equipment.[129]

D. Interim Guidance to Private Maritime Security Companies

MSC.1-Circ.1443 sets out interim guidance to PMSC.[130] Since it considers restriction of the Montreux Document to situations of armed conflict and the ICoC to land-based security companies, it disregards their direct applicability to PMSC.[131] Therefore, it intends to meet, in the interim, the necessity for regulating PCASP usage on board ships transiting the HRA.[132]

MSC.1-Circ.1443 recognizes a flag State's right to not authorize PCASP usage on board ships.[133] It highlights coastal State sovereignty enjoyed within the TS subject to the rule of innocent passage under UNCLOS and other rules of international law.[134] It acknowledges exclusive flag States jurisdiction on the high seas over ships carrying PCASP on board and their consequent duties under UNCLOS.[135] Importantly, it

reaffirms the subjective nature of PCASP deployment and advises PMSC to seek "appropriate" and "applicable" approvals from competent authorities in flag States, countries where PMSC is registered and countries in which operations are conducted or managed—including countries through which PCASP may transit.[136]

MSC.1-Circ.1443 suggests PMSC operate with the awareness, understanding, reflection and consideration of the applicable laws of "flag, port and coastal States" regarding the "transport, carriage, storage and use of firearms and security-related equipment and the use of force."[137] They are also required to have a "sound understanding" of the piracy situation and piracy threat in the HRA in addition to the latest BMP version, specifically for ship protection measures.[138]

MSC.1-Circ.1443 mirrors the provisions of Industry Guidelines and MSC.Circ. 1405-Rev.2 pertaining to selection, size, composition and equipment, vetting and training of PCASP, command and control structure, responsible management of firearms and ammunition, insurance, rules on the use of force and reporting and record-keeping of circumstances where firearms have been discharged.[139] Therefore, flag State regulations complementing provisions of Industry Guidelines and MSC.Circ.1405-Rev.2 are substantially in line with MSC.1-Circ.1443.[140]

IV. Coastal State Authority

Since FAs and PCASP on board ships majorly operate in international waters, jurisdiction over them is largely vested in flag States—whose laws and policies in this regard fluctuate from an outright prohibition to recommending their usage.[141] However, a flag State's exclusive jurisdiction is not absolute and there are several occasions where other States are granted, in varying degrees, a share of the flag State's legislative or enforcement jurisdiction.[142] Particularly, coastal States may decide to regulate international shipping in order to address a certain concern.[143] Coastal State jurisdiction over foreign merchant ships may not only be territorial or rather zone-based, but may also derive from international agreements and/or established international standards and practices.[144]

Today, there are differing opinions concerning the extent of coastal State jurisdiction for regulating innocent passage enjoyed by foreign vessels in the TS and the high seas freedom of navigation in the EEZ.[145] This is more so in the case of ships that transit a coastal State's TS or EEZ while carrying PCASP on board. In 2011, IMO's Facilitation Committee particularly urged coastal States bordering the Indian Ocean, Arabian Sea, Gulf of Aden and Red Sea to "raise awareness of their relevant national legislation, policies and procedures relating to the carriage, embarkation and disembarkation of firearms and security-related equipment through their territory and the movement of PCASP."[146] While certain States like Spain, the Islamic Republic of Iran and Israel do not have any particular procedure or specific requirement for the transit of ships carrying PCASP on board through their TS and/or Contiguous Zones, other States like India, Maldives and Australia require an advance notification.[147]

States are no longer strangers to terrorism-related incidents emanating from

the maritime domain and hence, there is a necessity for them to accumulate coordinated efforts for the prevention of threats to their security or sovereignty.[148] Precisely, this is evidenced by the development of national policies applying Maritime Doman Awareness (MDA).[149] For example, Canada and the U.S. incorporated MDA within their national policies to detect, deter and defeat potential threats to their sovereignty, security and safety.[150]

Considerably, it is interesting that India seeks advance information, as a measure of MDA, concerning navigation of FAs and vessels carrying PCASP in its TS and EEZ. This view is discussed below.

A. The Indian Security Imperative

India's stance arises from its security concerns triggered not only by the increased presence of floating armories near its coastline but also by its past experience. Maritime traffic, in an attempt to avoid the HRA-related additional war risk premium, has become increasingly intimate to the Indian coastline, which is the largest in the western Indian Ocean, and this, consequently, has interfered with the Indian shipping and fishing fleets.[151] Also, India's geographical positioning in a region with active operation of terrorist groups has exposed it to various terrorist attacks.[152] Moreover, India is still being confronted by concerns of possible terror attacks proceeding from its coasts.[153]

To India, a "security incident" in its TS is constituted when PCASP or VPD encounter pirates or when they mistake fishing boats in its EEZ for pirate skiffs and use force against them.[154] India questions the very legality of FAs being termed as "merchant ships," since it regards FA operations as being dissimilar to those of merchant ships.[155]

I. MSC.94/14/2

In 2014, India's submission to MSC sought development of guidelines for regulating FAs.[156] It highlighted the "nebulous area" exposed by FAs supplying PCASP to cargo ships.[157] It estimated the operation of approximately 18 FAs carrying over 7,000 weapons on the high seas.[158] Importantly, India asserted that the presence of FAs close to the Indian coasts raises security concerns, especially in case of their illegitimate operation in the absence of an international regulatory mechanism concerning PCASP usage on board merchant vessels.[159]

India substantiated its security concerns by illustrating the detention of *MV Seaman Guard Ohio,* a special purpose vessel manned with excessive number of armed guards, where the police seized 35 assault rifles and 5,680 rounds of ammunition.[160] It also underlined the 1991 explosions to demonstrate that past terror attacks paved their way through the sea borders into India.[161] Further, it instanced the 2011 terrorist attacks where the 10 responsible *Lashkar-e-Taiba*[162] terrorists entered Mumbai via sea, killing as many as 175 people and injuring 291.[163]

Drawing from these security concerns, India contended the existence of a coastal State's inherent right to protect its marine environment up to its EEZ.[164] Conse-

quently, it deemed it "imperative," within the larger framework of MDA, to "mandatorily" share with the concerned coastal State authorities the details of PCASP on board ships that sail through its EEZ or the FAs transiting or operating in such waters.[165] However, MSC deliberations did not support this proposal.[166]

II. MSC.97/19/11 and MSC.98/15/2

In 2016, India proposed the development of an international regulatory framework for FAs, as a new output.[167] This submission analyzed the "largely *bona-fide* concerns" arising, *inter alia*, from the non-availability of pertinent FA details, ambiguous insurance and charterparty requirements, lack of port State control and adequate industry standards, lack of clarity in stakeholders' liabilities and in applicability of international treaties, standards, guidelines and IMO Conventions/Codes to FAs.[168]

Building on this submission, India proposed "draft guidelines on FAs" at MSC's 98th session to assist Member States, shipowners, ship operators and seafarers on the usage of merchant ships as FAs (hereinafter MSC.98/15/2).[169] MSC.98/15/2 seeks to ensure FAs' safety and security.[170] Significantly, it attempts to define FAs as "cargo ships, often anchored in international waters and used to store weapons, ammunitions and related equipment such as body armour and night vision goggles."[171] It, further, categorizes them as under:

1. companies that operate armories for storage: companies provide the resources, ships, armoury facilities and other logistics supports; weapons are transferred by the company providing the security personnel, such weapons are stored for the period of time that the related personnel are using the facilities of the armoury;
2. complete service providers: companies that operate storage facilities, but also provide weapon systems for rent by security personnel undertaking operations; and
3. fully integrated security service provider: the company provides logistics, ships, operators, weapons and ammunition directly.[172]

MSC.98/15/2 requires FAs to obtain flag State permission along with other applicable documentation and certification under international law.[173] It also requires documentation of arms licensing and record keeping of all FA transactions.[174] Importantly, it requires the "nearest coastal State" to be informed about all activities of an FA anchored/stationed in international waters, until its departure from such location and discontinuation of all activities.[175] It also assigns the discretion to coastal States to direct and provide the frequency of periodical reporting.[176] Significantly, MSC.98/15/2 requires advance communication to the coastal State of the entry of private armed guards and foreign-owned firearms into ports or TS.[177]

B. The Right of Innocent Passage of Floating Armories and Ships Carrying Privately Contracted Armed Security Personnel on Board

Coastal States retain authority over their TS, subject to the right of foreign ships to innocent passage. The concept of innocent passage is based on freedom of navi-

gation.[178] UNCLOS signifies that foreign vessels possess the right of innocent passage provided such passage is not prejudicial to coastal States' "peace, good order or security."[179] The determination of what these terms constitute has been left to the discretion of coastal States.[180] However, to be innocent, it is requisite that the passage is "continuous and expeditious" and it conforms with UNCLOS and other rules of international law.[181] Moreover, to determine its innocence, the "manner" in which passage is carried out is important.[182]

UNCLOS provides a non-exhaustive list of prejudicial activities for determining whether a foreign vessel's passage is innocent.[183] There is difference of opinion regarding the acts covered within the ambit of this list.[184] Besides, to regulate innocent passage, coastal States enjoy discretion to adopt laws and regulations.[185] Also, to prevent "non-innocent" passage, coastal States have the right to take "necessary" steps, which can include stopping, visiting, inspecting, diverting from the TS, detaining as well as forcing foreign ships involved in "non-innocent passage" to a coastal port for the institution of legal proceedings.[186]

Nonetheless, coastal States are to refrain from imposing requirements that are discriminatory against foreign ships or have the practical effect of denying or impairing the right of foreign ships to innocent passage.[187] But, this right may be interfered with in certain instances for the protection of a coastal State's "security," including weapons exercises.[188] However, the interpretation of the concept of "security" is subjective.[189] For example, the *Corfu Channel Case* confirmed the right of warships to "innocent passage" without previous authorization in peacetime as an international custom.[190] However, state practice in this regard appears to be variable.[191]

The right of innocent passage is also tested in case of ships carrying hazardous substances. Many States have claimed a right to exclude such shipments from their TS while some contentiously propose a prior notification requirement for such transits.[192] Nonetheless, international shipping witnessed a recent development of Ship Reporting Systems (hereinafter SRS) and Vessel Traffic Service (hereinafter VTS), which concern a coastal States' right to request information from a ship in its coastal waters.[193] This development may have been arguably derived from a coastal State's prescriptive powers under UNCLOS.[194]

Evidently, UNCLOS enables coastal States to undertake deterrent and preventive measures to restrict passage of foreign ships which are not innocent. Besides, national laws demonstrate that the regime of innocent passage can only be interfered with in situations where coastal State interests override flag State interests.[195] Likewise, foreign vessels in a coastal State's TS must conform to the coastal State's navigational security legislation.[196]

Interestingly, the presence of a military element in a ship operation appears to suggest a shift from their peaceful character to a threatening one. For example, the U.S. agent Elihu Root argued in the *North Atlantic Coast Fisheries Arbitration* that warships did not have the right to pass through the TS "without consent … because they threaten. Merchant ships may pass because they do not threaten."[197] Accordingly, the operational nature of FAs and PCASP on board ships raises suspicions regarding their prejudicial nature to innocent passage in various circumstances. For

instance, PCASP practicing with weapons and/or ammunitions through drills, manouvering or weapons testing/firing, etc., on board ships transiting a coastal State's TS would qualify as "exercise or practice with weapons."[198] Such practice would change their character, thereby deeming their passage as "non-innocent."[199] Besides, if PCASP embark, disembark and load or offload weapons and/or ammunitions on board ships within a coastal State's TS, such acts would potentially imply "taking on board a military device"; thereby, qualifying their passage as "non-innocent."[200]

The analysis above indicates that the operational nature of FAs and merchant ships carrying PCASP is capable of compromising coastal security, especially within a coastal State's TS. Moreover, the absence of uniform international regulations invokes presumptions of their misuse. In such scenarios, the tendency of coastal nations to resort to precautionary and defensive measures is demonstrated by the *MV Seaman Guard Ohio Case*.[201]

C. Freedom of Navigation in EEZ for Floating Armories and Ships Carrying Privately Contracted Armed Security Personnel on Board

EEZ exhibits a *sui generis* character. It differs from the high seas and the TS and is distinctly regulated. UNCLOS demonstrates the navigational rules in the EEZ and protects the freedom of navigation therein for all States.[202] Additionally, the EEZ regime under UNCLOS imports the provisions relating to the high seas and other pertinent rules of international law, subject to their compatibility with Part V of UNCLOS.[203] However, a coastal State's right to prescribe certain laws and regulations for foreign-flagged ships in its EEZ is a subject of controversy.[204]

UNCLOS accords coastal States with "sovereign rights" in the EEZ for the purpose of exploring, exploiting, conserving and managing all resources, i.e., living and non-living economic resources.[205] Interestingly, coastal States and other States exercising their rights and duties in a coastal State's EEZ are to reciprocate "due regard" to each other's rights and duties.[206] It is noteworthy that coastal States have far reaching jurisdiction for taking "necessary measures" to ensure compliance of their laws and regulations enacted for exercising their sovereign rights and regulating ship-based pollution.[207]

Besides, there is no limitation or particular requirement on the range of enforcement measures that a coastal State can avail for itself.[208] This inevitably raises concerns of a coastal State's likelihood to unjustifiably interfere with the freedom of navigation in its EEZ.[209] Therefore, it becomes practicable to gauge the reasonableness of measures that a coastal State may construe as "necessary" to employ against any actual interference to its sovereign rights in its EEZ. Justifying and determining reasonableness of a particular measure is largely dependent on the relevant facts of each case.[210]

However, State practice tends to indicate the expansion of coastal State powers in the EEZ. For instance, Brazil, Bangladesh, Malaysia, India and Pakistan do not permit foreign military exercises or manouvers without consent within their EEZ.[211] Accordingly, it is argued that "a new norm of customary international law appears

to have emerged that allows coastal States to regulate navigation through their EEZ based on the nature of the ship and its cargo."[212]

In 2011, India mandated all Indian and foreign commercial merchant vessels with armed guards and weapons to provide a Pre-Arrival Notification for Security (hereinafter PANS) prior to their entrance and transit through the Indian EEZ and the Indian Search and Rescue Region.[213] Interestingly, India's claim for PANS was only vindicated a year later with the *Enrica Lexie Case* where the court observed,

> There is no gainsaying the fact that the effect and consequences of such a gruesome act ensues in the territory of India. This incident has a direct bearing on the lives and livelihoods of that section of Indian population engaged in fishing … this incident has instilled in the fishermen community of India a sense of fear and insecurity about the safety and security of their lives at sea.[214]

This incident firmly demonstrated that, under the guise of freedom of navigation, the poorly regulated PCASP on board merchant ships possess the capability of interfering in a coastal State's rightful engagement of economic activities in its EEZ. Such instances underline that the security aspect of the EEZ cannot be discounted while focusing on economic aspects.

The *Enrica Lexie Case* unfolds the conflict between freedom of navigation of FAs and ships carrying PCASP and the rights and jurisdiction of coastal States in their EEZ. Considerably, the resolution for such conflict, as per the contemplation of UNCLOS, is to be founded on equity, relevant circumstances, respective interests of the parties involved and the whole international community.[215]

V. Conclusion

The fragility of world security has dramatically amplified in the recent years. Moreover, Section IV manifests that for a State like India, which has to bear the contemporaneous reality of its neighborhood, terrorist threat perceptions are inevitably provoked. Therefore, to achieve preparedness for tackling matters that threaten national security or sovereignty, it becomes integral to strengthen information sharing between both the private and public sector. This would in turn assist States in developing effective emergency response capabilities. National implementation of MDA, as illustrated in Section IV, appears as an attempt in the same direction.

Sections II and III predominantly indicate that PCASP are to be employed as a last resort for protecting merchant vessels. They also demonstrate that the current regulations are not universal. They only satisfy flag States but not coastal States. However, the consequences of proliferating operations of FAs and PCASP on board merchant vessels do not only extend to the shipping industry and flag States, but also impact the States within whose maritime zones they transit. Considerably, such operations challenge the security of coastal nations in the absence of uniform international regulatory and policing mechanisms.

Section IV evidences that "military uses" within coastal maritime zones by themselves create a presumption of serving non-peaceful purposes, let alone the case of merchant vessels carrying PCASP during transits. Also, the PCASP practice of carrying arms on board merchant ships prompts speculations concerning their intent. Therefore, it is predictable that coastal States might employ precautionary measures such as a "prior notification" requirement to secure peace and stability. However, UNCLOS does not specifically incorporate a prior notification regime; but the lack of an express provision creates ambiguity and room for the possibility of imposing this requirement.

Observably, the requirement of prior notification is not unprecedented. As a duty, prior notification is not novel and is promoted among other instruments.[216] The development of SRS and VTS, as pointed in Section IV, reveals that prior notification is a facet of confidence against environmental concerns of coastal States. Analogically, its attributes can help settle coastal State security concerns. Besides, its usefulness is ushered by its capacity to not only mitigate presumptuous apprehensions but also to secure a course of action to combat coastal emergencies. For example, a prior notification could be a coastal State's tool to inform and prepare the fishermen and coastal community for non-interference in the prospective operation of FAs and vessels carrying PCASP through its TS and/or the EEZ; thereby, to ultimately avoid security incidents like the one encountered in the *Enrica Lexi* case.

Nonetheless, the analysis drawn under Section IV exhibits that the prior notification requirement is contentious and rests on three premises. Firstly, past experiences have created mistrust among States resulting in lack of confidence at the slightest presumption of threat. Owing to seek assurance against such presumptions, the coastal State requirement of prior notification emerged. This requirement demonstrates traits of confidence-building measures.

Secondly, there exists a jurisdictional conflict between flag and coastal States. The diminishing character of the coastal State jurisdiction from its TS to EEZ against third States' navigational freedom creates controversy. Though a coastal State must not "hamper" a third State's innocent passage, this obligation is to be construed in proportion of its competing interests and those of the general maritime community. On the contrary, it remains settled that the freedom of navigation has never been absolute. It is qualified in a coastal State's EEZ by "due regard" to its rights and duties which arise not only from UNCLOS but also from national laws and regulations.[217]

Thirdly, the controversy of applying the prior notification requirement is furthered by its contemporary unilateral character, which goes against the traditional importance given to the protection of navigational freedom. This exhibits that unilateral law enforcement measures of coastal States that surpass UNCLOS specifications will generally be open to challenge. Their sustenance would, consequently, depend on consistent or unified state practice. To procure such consistency, it becomes essential for a coastal State's unilateral measures to be founded on necessity and proportionality so that they are justifiably integrated in the maritime community.

Besides, safeguarding national security is integral against the claim for another State's freedom of navigation. In the process of avoiding encroachment of either claims and to establish a stable parity between Flag States and coastal States, the scope of freedom of navigation appears to be fading. This is reflected by evolving state practice that conditions freedom of navigation in the maritime zones of a coastal State to certain limitations as compared to their existence on the high seas. Moreover, Section IV reveals that law enforcement in the maritime domain appears to be no more zonal but rather functional.

In the contemporary maritime security context, the operation of FAs or ships carrying PCASP does not primarily serve the interests of coastal States—which may have to be in the constant fear of facing its potential adverse impacts. Understandably, it is fair to evaluate that the balance of convenience favors coastal State interests. Hence, in the interest of maintaining coastal security and to secure confidence of coastal States, there should be cooperation towards respecting measures that enhance MDA. This would be consistent with the UNCLOS desire to establish a legal order for the seas and oceans through international communication.[218]

Today, balancing navigational freedoms against national interests is *sine qua non*. Therefore, while industry self-regulation and flag State regulations may be useful in the interim, there is a necessity for firm demarcation of coastal State regulations pertaining to operation of FAs and PCASP on board merchant ships within their maritime zones. Also, given the IMO's role as substantiated in Section III, utilizing it as a forum for developing concrete coastal State regulations becomes indispensable. Ergo, until this is achieved, rectifying the ambiguity in UNCLOS and interpreting it to serve the coastal State cause is not only practicable and favorable but also equitable.

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150. in 2004, Canada's National Security Policy established Coastal Marine Security Operations Centers for identifying maritime activities that represent a potential threat to sovereignty, security and safety of Canada and Canadians. See Transport Canada, "Marine Security Operation Centres," *Government of Canada,* http://www.tc.gc.ca/eng/marinesecurity/operations-269.html, accessed December 18, 2018; "The Heart of the Maritime Domain Awareness program is accurate information, intelligence, surveillance, and reconnaissance of all vessels, cargo, and people extending well beyond our traditional maritime boundaries." See U.S. Department of Homeland Security, "National Plan to Achieve Maritime Domain Awareness for the National Strategy for Maritime Security," *U.S. Department of Homeland Security,* October 2005, https://www.dhs.gov/sites/default/files/publications/HSPD_MDAPlan_0.pdf, accessed December 18, 2018.

151. Vallabu, 2016.

152. Neeraj Chauhan, "India 3rd Largest Terror Target After Iraq and Afghanistan: U.S. Report," the *Times of India,* July 23, 2017, https://timesofindia.indiatimes.com/india/india-3rd-largest-terror-target-after-iraq-and-afghanistan-us-report/articleshow/59719216.cms, accessed May 2, 2018.

153. Abhijit Singh, "The Changing Face of Maritime Terrorism," the *Strategist,* March 3 2017, https://www.aspistrategist.org.au/changing-face-maritime-terrorism/, accessed December 18, 2018.

154. IMO, "Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships" submitted by India, http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Documents/PCASP/India.pdf, accessed December 18, 2018.

155. IMO, Work Programme: Proposal for the development of an International Regulatory framework for "'Floating Armories,' as a new output" submitted by India, MSC 97/19/11, August 19, 2016, para 26.

156. IMO, Piracy and Armed Robbery against Ships: Regulating "floating armories" submitted by India, MSC 94/14/2, August 19, 2014.

157. *Ibid.,* para 1.

158. *Ibid.,* para 4.

159. *Ibid.,* para 4.

160. *Ibid.,* para 2.

161. The 1991 attacks were caused by the huge consignment of arms and explosives brought from Dubai-Karachi to the Indian west coast, killing 257 people and injuring over 700. See *Ibid.,* para 3.

162. *Lashkar-e-Taiba* (Urdu: "Army of the Pure") also spelled *Lashkar-e-Tayyiba* or *Lashkar-e-Toiba* is an Islamist militant group which begun in Pakistan. See Mary Sissan. "Lashkar-e-Taiba: Islamist Militant Group," *Encyclopaedia Britannica* https://www.britannica.com/topic/Lashkar-e-Taiba, accessed December 18, 2018.

163. IMO, 2014, para 3.2.

164. *Ibid.,* para 8.

165. *Ibid.,* para 8.

166. IMO, Report of the Maritime Safety Committee on its Ninetieth Session, MSC 90/28, May 31, 2012, para 20.7.

167. IMO, 2016.

168. *Ibid.,* para 16, 19, 17, 21 and 25.

169. IMO, 2017.

170. *Ibid.,* Annex, para 1.

171. *Ibid.,* Annex, para 2

172. *Ibid.,* Annex, para 2.

173. *Ibid.,* Annex, para 11.
174. *Ibid.,* Annex, para 4 and 12.
175. *Ibid.,* Annex, para 6.
176. *Ibid.,* Annex, para 6.
177. *Ibid.,* Annex, para 6.
178. Yoshifumi Tanaka, the *International Law of the Sea* (2nd edn., Cambridge University Press 2015), p. 86.
179. UNCLOS, Art.19.
180. MH Nordquist et al. (eds), United Nations Convention on the Law of the Sea 1982: a commentary (Martinus Nijhoff, 1995) vol. II., p. 167.
181. Innocent passage may include stopping and anchoring as far as it is incidental to ordinary navigation or as rendered necessary by force majeure or by distress. See UNCLOS, Art.18 (2) and Art.19.
182. *Corfu Channel Case (Merits) (United Kingdom v. Albania)* [1969] ICJ Rep 4, 30; Tanaka, 2015, p. 88.
183. UNCLOS, Art.19 (2). the "non-exhaustive" character of Art 19 (2) is determined by the words "any other activity not having a direct bearing on passage." See UNCLOS, Art.19 (2) (l). See also Tanaka, 2015, p. 88.
184. Johnson, 2004, p. 69.
185. This is in respect of navigational safety, environmental protection and resource conservation in addition to preventing infringement of their customs, fiscal, immigration or sanitary laws and regulations. See UNCLOS, Art. 21 (1). "Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards." See UNCLOS, Art. 21(2).
186. UNCLOS, Art. 25 (1); Kari Hakapää, "Innocent Passage," *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2015), para 19.
187. UNCLOS, Art. 24 (1).
188. UNCLOS, Art. 25 (2); K. Hakapaa and E. J. Molenaar, "Innocent Passage—Past and Present," *Marine Policy* 23 (2) (1999), p. 131, https://doi.org/10.1016/S0308–597X(98)00032–3.
189. Hakapaa and Molenaar, 1999, p. 131.
190. *Corfu Channel Case,* 1969, 28, para 3.
191. Japan admits the right of innocent passage for foreign warships but the passage of foreign warships carrying nuclear weapons through its territorial sea as not innocent. See a Kanehara, "The Japanese Legal System Concerning Innocent Passage of Foreign Vessels 1990–1998," the *Japanese Annual of International Law* (1999), p. 105. See also Tanaka, 2015, p. 88. China and India insist on permitting passage of foreign warships through their territorial sea only after receiving a prior notification by such foreign State. India also includes submarines and other underwater vehicles within the ambit of warships. See Division for Ocean Affairs and Law of the Sea, "Declarations and Statements,"' the *United Nations,* October 29, 2013, https://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratificatio, accessed December 18, 2018. See also the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976, Art. 4 (1) and 4 (2). on the Contrary, United States of America and the then Union of Soviet Socialist Republics agreed in 1989 that "all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required." See "Uniform Interpretation of Rules on International Law Governing Innocent Passage" [23 September 1989] 28 ILM 1444. the UK deems it essential for ships "transiting Foreign Territorial Seas with Firearms Onboard" to respect and comply with coastal State laws and views "any activities which are classified in UNCLOS as prejudicial to the peace, good order or security of a State" to include "any exercise or practice with weapons." See Department of Transport, "Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances," para 6.9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480863/use-of-armed-guards-to-defend-against-piracy.pdf, accessed May 2 2019.
192. Hakapaa and Molenaar. 1999; Nordquist, 1995, p. 208.
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194. *Ibid.*
195. *Ibid.*
196. Anne Bardin, "Coastal State's Jurisdiction Over Foreign Vessels," *Pace International Law Review* 14(1) (2002), p. 27.
197. RP Anand, "Transit Passage and Overflight in International Waters" in J.M. Van Dyke, L.M. Alexander, and J.R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* (Honolulu, Law of the Sea Institute, 1988), p. 125.
198. UNCLOS, Art. 19 (2) (b).
199. *Ibid.*
200. UNCLOS, Art. 19 (2) (f).
201. the *State Rep. by the Inspector of Police, "Q" v. Mariya Anton Vijay* [2015] *9* SCC 294.
202. This is subject to relevant UNCLOS provisions. See UNCLOS, Art. 58 (1).
203. UNCLOS, Art. 58 (2).
204. Johnson, 2004, p. 97.
205. UNCLOS, Art. 56. However, this is subject to compliance with UNCLOS provisions. See UNCLOS, Art 56 (2).
206. UNCLOS, Art. 56 (2). Such States are to comply with the laws and regulations adopted by the coastal State "in accordance" with the provisions of UNCLOS and other compatible rules of international law. See UNCLOS, Art. 58 (3).
207. UNCLOS, Art. 73, Art. 73(1) and Art. 220; Wolfrum, 2009, p. 79.
208. D.P. O'Connell, the *International Law of the Sea* (Oxford University Press, 1984) vol. II, p. 578; Johnson, 2004, p. 119.
209. DJ Attard, the *Exclusive Economic Zone in International Law* (Oxford University Press, 1987), p. 179.
210. *Ibid.*
211. Division for Ocean Affairs and Law of the Sea, "Declarations and Statements," *United Nations,* October 29, 2013, https://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Bangladesh%20Upon%20ratification, accessed December 18, 2018.
212. Jon M. Van Dyke, "The Disappearing Right to Navigational Freedom in the EEZ," *Marine Policy* 29 (2005), p. 107, 121, https://doi.org/10.1016/j.marpol.2004.08.004.
213. ISMG, 2011, para 7.2, 7.3 and 7.5.4
214. *Massimilano Latorre v. Union of India,* 2012 SCC Online Ker 31944, para 37.
215. UNCLOS, Art. 59.
216. Basel convention requires the exporting state to give prior notice to transit state of any proposed movement of hazardous wastes. See Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, opened for signature on 22 Mar. 1989, entered into force on May 5, 1992) 1673 UNTS 126, Art. 6.
217. *M/V "*Saiga" *(No 2) (Saint Vincent and the Grenadines v. Guinea) (*Merits, Judgment of 1 July 1999) ITLOS Reports 1999, para 121.
218. UNCLOS, preamble.

Biographical Statement

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China's Indo-Pacific Strategy: The Problems of Success

David Scott

Structured Abstract

Article Type: Research Paper

Purpose—The article delineates, explains and evaluates China's Indo-Pacific strategy.

Design—Balance of threat theory and security dilemma theory are explained in the Introduction and re-invoked in the Conclusion. A geo-economics section considers energy security and the Maritime Silk Road initiative. The geopolitics section considers China's presence in the South China Sea, Pacific Ocean and Indian Ocean. A maritime strategy section moves from China's seapower drive into consideration of blue water navy, island chains, and two-ocean strategy.

Findings—There is a paradox. On the one hand, the article finds that China has been quite successful in seeking to establish control of much the South China Sea and of the East China Sea, and from there penetration into the Western Pacific and Indian Oceans. However, on the other hand, the article also finds that this very success is creating grounds for failure as a range of states across the region increasingly cooperate to constrain China.

Originality/Value—Firstly, new application of balance of threat theory and security dilemma theory, in this case onto China's Indo-Pacific strategy. Secondly, in most studies of China in the Indo-Pacific there is little treatment of the "paradox of success" found in this study.

Keywords: China, geo-economics, geopolitics, Indo-Pacific, Maritime Silk Road, seapower

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I. Introduction

The Indo-Pacific—the maritime area stretching from the Pacific and Indian Oceans, with the South China Sea as intervening waters—is increasingly important in China's "strategic calculus."[1] Within these waters, China is seeking to establish control of the South China Sea and of the East China Sea, and from there penetration into the Western Pacific and Indian Oceans—in effect a drive for a two-seas control followed by a strong two-oceans presence and consequent influence.

The article finds that China has been generally successful in achieving its aims in these seas and oceans, but that precisely because of this very success China is now paradoxically facing mounting problems. Helpful in explaining this paradox of success creating potential failure is *balance of threat* theory and *security dilemma* theory. The "balance of threat" theory was advanced by Stephen Walt, whereby states identify threats from other states by looking at their "aggregate [economic] power," "offensive [military] capabilities," "[perceived] offensive intentions" and "geographic proximity."[2] From that comes balancing responses of cooperation between similarly concerned countries. This balancing process feeds into "security dilemma" dynamics, in which actions taken by a state to increase its own security cause reactions from other states, which in turn lead to a decrease rather than an increase in the original state's security.[3] The problem for China is that the military actions which it takes are (1) indeed explained by Beijing as legitimate defensive security measures, but (2) potentially can also be interpreted as offensive in character, and (3) attract widespread characterization as offensive in nature and intention based on regional perceptions reflecting a "trust deficit" in operation, which thereby triggers "balance of threat" response dynamics.[4] In contrast, U.S. military actions in the region are not generally seen as threatening to most other countries, precisely because of the *balance of threat* grounds of "geographic proximity" and "(perceived) offensive intentions," which apply in the case of China do not apply in the case of the U.S.

Because this is a study on Chinese strategy and policy for the Indo-Pacific, the sources used in this analysis are those not only in but also around the Chinese government, with the Chinese media cited precisely because it is firmly under the control of the state, and with quantitative material similarly China-centered. The article delineates, explains and evaluates through three empirical sections that consider the geo-economics, geopolitics and maritime strategy being pursued by China in the Indo-Pacific. Theory is returned to in the conclusion.

II. Geo-Economics

China's geo-economic involvement in the Indo-Pacific revolves around energy security and the Maritime Silk Road (MSR) initiative.

2.1 Energy Security

China faces an ever growing "energy security" (*nengyuan anquan)* issue. Before 1995 China was an oil exporter, but since 1995 a modernizing industrializing China has become an increasingly large energy importer of oil and gas. The biggest external source of energy for China is the Middle East, from where energy imports flow across the Indian Ocean through the Strait of Malacca to the South China Sea and up to China. This generates important maritime imperative for China's energy security resolution. These energy imperatives lay behind the Pentagon-sponsored study in 2004 on *Energy Futures in Asia*, where the authors argued that "China is building strategic relationships along the sea lanes from the Middle East to the South China Sea in ways that suggest defensive and offensive positioning to protect China's energy interests but also serve its broader security objectives."[5]

China is faced with various energy challenges across the Indo-Pacific. This was typified in Dai Xu's warnings:

> Looking at the example of the Middle East, which supplies over half of China's oil imports, Chinese oil transport vessels travelling from that region must pass through the Persian Gulf, the Indian Ocean, the Strait of Malacca, and the South China Sea. Danger is everywhere in the Persian Gulf, pirates run amok on the Indian Ocean, and the navies of India and the United States eye our vessels jealously.[6]

Piracy threats have prompted ongoing anti-piracy deployments by China into the Gulf of Aden since 2009, and a clear sign of the Chinese navy's "broadened horizon" and "enhanced ability."[7] The reference to Indian and U.S. naval interruption of energy supplies primarily refers to the "Malacca dilemma" (*Maliujia kunju*), a term coined by the previous Chinese leader Hu Jintao with regard to China's energy supplies being blocked by U.S. or Indian naval interdiction of energy imports coming through the Strait of Malacca. Chinese analysts are well aware that within the Indo-Pacific maritime continuum, "energy security requires free passage from China's coastline to the Indian Ocean, with the Strait of Malacca playing a particularly central role."[8]

China's desire to avoid the maritime "Malacca Dilemma" constriction has also led it to develop two significant diversions away from the Strait of Malacca. One is the China-Myanmar Energy Corridor (CMEC), organized around the gas line and oil pipelines running up from the deepwater port of Kyaukpyu to Kunming in southwestern China. This was opened in April 2017, complete with a 70 percent stake in Kyaukpyu by the state-run conglomerate China International Trust Investment Corporation (CITIC) agreed in November 2017. Second, is the China-Pakistan Economic Corridor (CPEC) running from Gwadar on the Pakistan Coast up the Indus valley to Xinjiang, which links the Maritime Silk Road to the overland Eurasian Belt within the Belt and Road Initiative (BRI). It remains to be seen whether significant quantities of energy flow through these pipelines and infrastructure routes, as well as how secure they will be.

Within the Indo-Pacific, China's claims in the East China Sea and South China

Sea are partly to do with their energy potential. China's claims over energy fields in the East China Sea brings it up against Japan, while those in the South China Seas brings it up against not other rival littoral claimants, but also Indian attempts to operate in energy fields like Block-128 controlled by Vietnam, but also claimed by China. Finally, energy security is one driver in China's Maritime Silk Road initiative, since the extended Indian Ocean and South China Sea lanes are precisely those used for transporting energy back to China.

2.2 Maritime Silk Road

China's "Maritime Silk Road" (*haishang sichou zhi lu*) has become a frequently mooted theme in China's foreign policy, with the state media explaining the Maritime Silk Road (MSR) as a "geo-economics 'Indo-Pacific' plan" on the part of Beijing.[9] The Maritime Silk Road is the maritime Indo-Pacific part of the Belt and Road initiative, the "Belt" being the overland Eurasia route, with the China-Pakistan Economic Corridor (CPEC) running from Gwadar up to Xinjiang forming a link route between the MSR and Eurasia routes.

The rhetoric is soaring, with Chinese scholars calling the Maritime Silk Road (MSR) initiative "the fulfilment of 'the era of Indo-Pacific,'" and the MSR packaged benignly as "a maritime silk road to peaceful seas."[10] PRC scholars may argue that the "'Maritime Silk Road Initiative' indicates China's intention to create a peaceful and harmonious environment, for cooperating with other States," as does its attendant naval diplomacy.[11] However, it is precisely Chinese "intentions" and its naval presence which generate widespread apprehension outside China. Its assertiveness over pushing its wide-ranging claims over most of the South China Sea, and the dependency issues in its wider MSR infrastructure projects have not helped China's image across the region.

China's *Maritime Silk Road* concept was first unveiled in October 2013 by Xi Jinping at the Indonesia Parliament, where his call was to "vigorously develop maritime partnership in a joint effort to build the Maritime Silk Road of the 21st century."[12] In Southeast Asia, the MSR initiative serves to potentially soothe worries over assertive Chinese maritime claims in the South China Sea. The initiative was extended from Southeast Asia to take in the Indian Ocean, while a further spur has been extended into the Southern Pacific—fostering an image of economic cooperation, rather than unsettling naval expansionism. As the Chinese Ambassador to Singapore Chen Xiaodong explained, the MRS "will help mitigate the negative impact caused by the South China Sea dispute."[13] In short, the Maritime Silk Road (MSR) concept is an attempt to counterbalance the negative imagery caused in the Indo-Pacific over Chinese policies and actions, "deepening trust [*jiashen xinren*] and enhancing connectivity" is China's official mantra.[14]

Some clarification of what the MSR involves was given by *Xinhua* in April 2014 in its report, "China Accelerates Planning to Re-connect Maritime Silk Road." This announced that the MSR initiative would involve "infrastructure construction of countries along the route, including ports of Pakistan, Sri Lanka and Bangladesh,"

in which China would "coordinate customs, quality supervision, e-commerce and other agencies to facilitate the scheme, which is also likely to contain attempts to build free trade zones."[15] In December 2014, China set up the *Silk Road Fund*, with US$40 billion in funds to be provided by the State Administration of Foreign Exchange (65 percent), China Investment Corporation (15 percent), the Export-Import Bank of China (15 percent) and the China Development Bank (5 percent).[16] In June 2017, China unveiled a White Paper entitled *Vision for Maritime Cooperation Under the Belt and Road Initiative*. It emphasized win-win "pragmatic cooperation" involving "shelving differences and building consensus" and a "call for efforts to uphold the existing international ocean order."[17]

China's Maritime Silk Road (MSR) initiative has generally been well received across much of the Indo-Pacific. This was demonstrated at the Belt and Road Forum held in Beijing in May 2017, where the leaders of Kenya, Pakistan, Sri Lanka, Malaysia, Singapore, Indonesia, Cambodia, Vietnam, the Philippines, and Fiji joined other ministers from various other Indo-Pacific countries. At the last minute, Japan and the U.S. sent representatives, though at a junior level. At the 2017 Forum, Xi Jinping announced that an additional RMB100 billion (around US$15.9 billion) would be put into the Silk Road Fund.

China has faced rival Indo-Pacific infrastructure schemes. The Obama administration mooted the Indo-Pacific Economic Corridor (IPEC). Since 2014, India has sought to build up its own Indian Ocean schemes with *Mausam* and the *Cotton Route* on the cultural front, and the *Security and Growth for All in the Region* (SAGAR) on the economic front. With good reason, China saw the U.S. infrastructure initiative announced by Secretary of State Mike Pompeo in July 2018 as being counter to the BRI initiative.[18] The Australian Infrastructure Financing Facility for the Pacific (AIFFP) mechanism announced by Australia in November 2018 represented another counter to China's infrastructure penetration. India and Japan floated the *Africa-Asia Growth Corridor* (AAGC) initiative in 2016, which was immediately criticized in the Chinese state media.[19] In turn the *Trilateral Partnership for Infrastructure Investment in the Indo-Pacific* (TPIIIP) initiative from Australia, Japan and the U.S. was set up in November 2018. Such alternatives lessen the advantages China holds from its MSR initiative.

A second Belt and Road Forum was held in April 2019, with leaders and ministers from a swathe of countries in South-East Asia, the South Pacific and the Indian Ocean—though the U.S. and Sri Lanka boycotted this, unlike in 2017. It remained significant that India boycotted China's Belt and Road Forum both in 2017 and 2019. India's absence was officially on the grounds that the China-Pakistan Economic Corridor (CPEC) linking the overland Eurasian "Belt" route and the Indian Ocean "Maritime Silk Road" route crossed Kashmir, in dispute between India and Pakistan. In reality, India is averse to the MSR, because it views China's power projection in the Indian Ocean as counter to its own interests, and with widespread Indian perceptions of the MSR as being in effect a "string of pearls" geopolitical encirclement.

III. Geopolitics

China's Indo-Pacific geopolitics revolve around three maritime zones, namely the South China Sea, and the wider Indian and Pacific Oceans. China is an Indo-Pacific littoral state, with presence and interest throughout the wider Indo-Pacific waters, yet is geopolitically constrained and hampered by the arc of neighboring Indo-Pacific states and their particular Indo-Pacific strategies.

3.1 South China Sea

China's territorial claim to most of the South China Sea is increasingly treated as a "core interest" (*hexin liyi*) issue of China's territorial integrity. China claims sovereignty over the Paracel and Spratly scatterings of (so-called) islands, rocks, atolls and reefs, associated exclusive economic zones, and indeed most of the South China Sea under the (questionable) "nine dash/U-shaped line."[20] This brings China into maritime and territorial disputes with Brunei, Malaysia, Indonesia and most of all, the Philippines and Vietnam.

At the top of the South China Sea, Hainan Island gives China immediate geopolitical anchorage and power projection advantages. The submarine base at Yulin enables immediate Chinese deployment into the South China Sea, and then into the West Pacific or into the Indian Ocean. This is part of the growing significance of the South China Fleet for power projection further afield.[21] A related venture was the decision by the Hainan Commerce Department in March 2018 to set up new port facilities at Sanya for deep sea research vessels to operate in the South China Sea and the Indian Ocean, to be completed by 2019. Hainan is set to become a free trade zone by 2025, and forms the first starting point in the Maritime Silk Road network.[22]

With regard to the Paracels, Chinese forces evicted South Vietnamese forces in 1974. Woody Island (*Yongxing*) has been built up at the administrative level, redesigned as the Sansha city prefecture-level body in 2012, complete with jurisdiction over China's Paracel and Spratly holdings, and reflect bureaucratic "lawfare" being deployed by China in establishing maritime claims.[23] Woody Island has continued to be built up as a center for naval and air force power projection by China further down in the South China Sea, with H-6K advanced bombers landing on it in May 2018. With regard to the Spratly holdings, the 1980s saw conflicts with Vietnam, for example the Johnson South Reef skirmishes of 1988, while more clashes with the Philippines resulted in China moving onto the Mischief Reef in 1995 and Scarborough Shoal in 2012. Chinese strategy during 2015–2017 focused on the creation (dubbed the *Great Sandwall of China*) of artificial islands through massive concrete operations to provide China with a range of harbors and airfields deep in the south of the South China Sea, and now militarized with anti-ship missiles, electronic jammers and surface to air missiles (SAMs) which have been dubbed the *Great Wall of SAMs*.

Chinese strategy in the South China Sea has been to establish clear physical

military control of these waters, and avoid sovereignty talks at the regional, multilateral or international level. Beijing remains keen to localize the issue and avoid the involvement (what China calls "interference") of outside nations, which of course would enable it to operate from a position of strength against the smaller littoral nations.[24]

This rejection of outside legal involvement was most clearly seen in the Permanent Court of Arbitration (PCA) case of *The Republic of the Philippines v. The People's Republic of China* brought by the Aquino administration in January 2013 with regard to the Spratly area. The PCA arbitral tribunal in applying the United Nations Convention on the Law of the Sea (UNCLOS) found that: (1) China's claims to "historic rights" in the area enclosed by the nine-dash line gave it no EEZ rights; (2) none of the existing Spratly land outcrops were "islands" under UNCLOS 121.3 criteria of being able to "sustain human habitation or economic life of their own" leaving them as "rocks" with 12 mile territorial waters but no EEZ; and (3) artificial constructions onto partially submerged reefs and atolls did not generate territorial waters or EEZs (UNCLOS 60.5), but merely had a 500-meter "safety zone" around them (UNCLOS 60.8).[25] Not surprisingly, having rejected the PCA competency in the first place, China vehemently rejected the subsequent PCA findings, and set out to nullify any further outcome from them. In effect China brazened it out, with China's geopolitical power seeming to outweigh its weakness in international law.[26]

Despite the PCA ruling, the new Duterte administration in the Philippines pursued economic cooperation with China, as did ASEAN. Desultory discussions running since 2013 to agree to a "legally, binding" Code of Conduct (COC) on the South Sea between China and ASEAN remain to be concluded, though in August 2018 a 19-page Single Draft Negotiating Text (SDNT) surfaced in the COC discussions. Significantly, the SDNT had no provisions for the COC being "legally binding," and of course did not deal with matters of sovereignty or maritime disputes."[27]

Although the Philippines and ASEAN chose to drop the PCA ruling; other powers in the Indo-Pacific like the U.S., Japan, Australia, and India and France called on China to accept it, and with China in mind, such powers continue to issue varied joint statements on the need for the "rule of law" to be upheld in the South China Sea. It is significant that the U.S. has carried out increasing numbers of Freedom of Navigation (FON) deployments around these PRC holdings in 2018 as part of its Free and Open Indo-Pacific (FOIP) strategy, and has been joined by similar FON deployments by Australia, France and even the UK. Beijing continues to see such FON deployments as "a serious political and military provocation."[28] It is also noticeable that, to China's discomfort, the U.S. has reasserted their own ongoing military presence in the South China Sea, with growing U.S. military links with Vietnam a further concern to China.[29]

3.2 Pacific Ocean

China has also made its presence felt in the Pacific basin.[30] In part, this reflects China's maritime strategy of pushing past the first and second "island chains," on

which more is discussed in the later section on China's maritime strategy. In part, this reflects the push by the PRC to achieve recognition as the legitimate government of China, at the expense of rival claims by Taiwan, in part this is for China's access to the resources of those deep-sea waters and sea beds which hold fisheries and mineral resources, and in part it reflects of China's increasing geopolitical rivalry with the United States.

China has also so created its own multilateral platform to engage with the region in the 2006 with the China-Pacific Island Countries Economic Development and Cooperation Forum (CPICEDCF). This brings China together with the eight Pacific island states (Cook Islands, Federated States of Micronesia, Fiji, Niue, Papua New Guinea, Samoa, Tonga, and Vanuatu) that recognize Beijing. China has also reached out to the main regional mechanism, the Pacific Islands Forum (PIF), being a dialogue partner since 1989. A formal China–PIF Cooperation Fund was set up by China in 2000. Beijing has also developed close relationships with the sub-regional Melanesia Spearhead Group (MSG). Australia and the U.S. have looked on with increasing concern as China has established close links with Fiji, and involved itself in various infrastructure projects in Papua New Guinea signaled in June 2018 with a Memorandum of Understanding under the Belt and Road Initiative. The very success of China's economic appearance in Papua New Guinea generated immediate counteractions though in November 2018, with the U.S. and Australia announcing joint plans to develop naval base facilities at Lombrum to forestall possible Chinese moves there.

In terms of traditional maritime security, China has been a member of the Western Pacific Naval Symposium (WPNS) since its inauguration in 1988. More recently, in 2014 and 2016 China participated in the by-invitation only bi-annual Pacific Rim (RIMPAC) naval multilateral exercises hosted by the U.S. at Hawaii, though the invitation for July 2018 was withdrawn due to U.S. disapproval of Chinese actions in the South China Sea. Even as one Indo-Pacific maritime interaction was being curtailed, another was being opened up as August 2018 saw the Chinese navy invited and arrive to attend the *Kakadu* exercises in the waters off Darwin for the first time, alongside other participants from across the Indo-Pacific.

3.3 Indian Ocean

Although China is an external power in the Indian Ocean, it has sought closer involvement with Indian Ocean Regional Association (IORA), of which it is an observer. However, India has maintained a veto on China joining or having observer status with the Indian Ocean Naval Symposium (IONS).

China's economic presence in the Indian Ocean is being channeled through its Maritime Silk Road (MSR) initiative. Its military presence in the Indian Ocean is in part through "new pathways" of ongoing facilities or quasi-bases being established in the Indian Ocean.[31] Hence comments by PRC scholars that "China should also enhance its military and economic presence in the Indian Ocean," since "the Indian Ocean is a 'must enter' region for the Belt and Road initiative as well as the national strategy of building China into a maritime power."[32]

The question of Chinese presence was first propagated in the "string of pearls" hypothesis advanced in 2004 with the Pentagon-sponsored study on *Energy Futures in Asia*. Its accuracy has become engrained in Indian perceptions of China in the Indian Ocean, in which encirclement fears are palpable. China has always denied that it is operating a specific "string of pearls policy" of military bases and has denied any aims of India-encirclement.[33] Certainly some of these "string of pearl" facilities have proven still-born. The Kra canal project has not yet come to fruition, and fears of Chinese listening facilities on Great Coco Island seem to have been rumor rather than fact. China's hopes of building and operating a deepwater port at Sonadia were blocked when the Bangladeshi government canceled the project in 2016. Rumors of a Chinese submarine base at Marao atoll in the Maldives have proven illusory as well. However, there has been an emerging support network in the Indian Ocean, which are not full blown military bases but which are increasingly enabling China to deploy at regular intervals for dual purpose utilization. China's anti-piracy operations in the Gulf of Aden have led China to seek and gain friendly reprovisioning access at Salalah (Oman), Aden (Yemen), and most recently Djibouti. Three port facilities are of particular note for China, namely at Hambantota, Gwadar and Djibouti.

Hambantota is particularly striking as not only was it set up under Chinese financing, but problems of repaying Chinese loans incurred in developing the port led Sri Lanka in December 2017 to give a 99-year lease to the state-owned China Merchants Port Holdings (CMPH) company. This has led to the damaging regional image of "debt diplomacy" being pursued by Beijing.

Gwadar has already been mentioned in connection with the China-Pakistan Economic Corridor. Developed as a new deepwater port on the Makran coast of Pakistan, Gwadar has caused palpable Indian concerns as one of China's "string of pearls" in the Indo-Pacific. Gwadar's initial phase–I development was funded by Chinese investment, with the port opening in 2007. Initially, Gwadar was operated by a Singaporean company, but in late 2015 was given to the state-owned China Overseas Port Holding Company (COPHC) under a 40-year lease. Gwadar gives the Chinese navy another future berthing place in Pakistan, alongside its traditional use of Karachi.

Djibouti is of particular significance as being China's first explicit overseas military base. Initially China's deployments of anti-piracy patrols in the Gulf of Aden in 2009 were coupled with denials that it intended to set up any overseas base.[34] A decade later and "berthing facilities" opened up at Djibouti in September 2017, complete with the stationing of Chinese marines and live firepower drills being carried out by an ongoing Chinese garrison. China's Ministry of National Defense argued that "the meaning of the Djibouti base for China" was that "responsibilities today have gone beyond the scale of guarding the Chinese territories." and that "overseas military bases will provide cutting-edge support for China to guard its growing overseas interests," concluding that "Djibouti is just the first step."[35]

Such basing and support facilities in the India Ocean facilitate increasing Chinese naval deployments into the Indian Ocean, deployments which are part of China's maritime strategy, to now consider.

IV. Maritime Strategy

China's official military strategy, defined in 2015, was that "the traditional mentality that land outweighs sea must be abandoned, and great importance has to be attached to managing the seas and oceans and protecting maritime rights and interests."[36] China continues to officially stress cooperative peaceful nature of its maritime drive, the "harmonious ocean" (*hexie di haiyang*) being a recent catchphrase coined for the outcome of China's growing naval presence, and slotted alongside the other foreign policy catchphrase of "harmonious world" (*hexie shijie*).

China's maritime strategy is based on a simple premise, to develop its "sea/maritime power" (*haiquan*) capabilities.[37] China's hopes for establishing "maritime power" are designed to establish energy security flows in the Indian Ocean, underpin the maritime Silk Road initiative, and gain control in its (disputed) claims areas of the East and South China Seas. Hence Liu Zongyi's sense that "China's maritime power strategy" involves "maritime security, especially the protection of China's islands in East and South China Seas and China's energy and trade sea lanes."[38]

The 2013 *Defense White Paper* outlined a "strategy to exploit, utilize and protect the seas and oceans, and build China into a maritime power."[39] It is no surprise to find the maritime logic of Alfred Mahan—with his geopolitical emphasis on *seapower* applications in the Pacific and Indian Oceans and on the usefulness of basing/berthing facilities—gaining popularity in Chinese strategic thinking. Such "naval nationalism" has involved public sentiment as well as government utilization.[40] The 2015 *Military Strategy White Paper* argued that "the traditional mentality that land outweighs sea must be abandoned, and great importance has to be attached to managing the seas and oceans" and for China "building itself into a maritime power."[41] This maritime drive has been directed at the highest level from Xi Jinping. In 2013, he pinpointed the need to "'strategically manage the sea' [*jinglue haiyang*], and continually do more to promote China's efforts to become a maritime power."[42] Xi went on to argue in 2017 that "a strong navy […] is a pivot for building the nation into a 'great maritime power' [*haiyang qiangquo*]."[43]

China's maritime policy is based on a drive for a *blue water* navy, with forward projection into the South China Sea, penetration of the "island chains" in the Pacific, and development of a "two-ocean" navy operating not just in the Pacific Ocean, but also in the Indian Ocean.[44] This was encompassed in the 2013 PLA *Science of Military Strategy* sense of a Chinese "arc-shaped strategic zone that covers the Western Pacific Ocean and Northern Indian Ocean."[45]

4.1 Blue Water Navy

A blue water navy is one that operates on the oceans. Chinese expectations are high that "the Chinese navy must grow into a blue-water navy" since "China is growing into a global power and should have a navy that fits its status."[46] Consequently, Chinese naval strategy has moved from a "near-coast defense" (*jinan fangyu*) strategy prior to the mid–1980s to the "near-seas active defense" (*jinhai juju fangyu*) after

the mid–1980s, and then to the advancement of a "far-seas operations" (*yuanhai zuozhan*) strategy by the mid–2000s.[47] The far seas are in effect the Indo-Pacific stretches of the Western Pacific and the Indian Ocean, those two waters being the arena for "China's expanding maritime ambitions."[48] These are on top of China's naval drive to establish its "core interest" (*hexin liyi*) claims over the South China Sea.[49]

In terms of assets, China's maritime power projection is being driven through aircraft carrier acquisition and construction. China obtained the hulk of the former ex-Soviet period aircraft carrier the *Varyag* in 1998, before going on to re-commission it as the *Liaoning* in September 2012, with the carrier being judged as battle ready in November 2016. What is of significance is its deployment, accompanied by supporting warships and tanker ships, as a carrier battle group into the South China Sea and the West Pacific in 2017 and 2018.

Other assets are also coming on line for China's "far sea" deployments. Three (maybe four) indigenous aircraft carriers are being built, of increasing size. The first of the indigenous new Type 001A (*Shandong*) indigenous aircraft carrier conducted various sea trials through 2018, with induction envisaged for 2019. Construction of the Type 002 aircraft carrier (with rumors of a second one of this type) has already begun in 2017, with launch expected in 2020, and active service by 2023. Indeed, the first steel was cut for the Type 003 nuclear-powered aircraft carrier in December 2017. The new Type 055 guided missile class of destroyers, launched in 2017 and on display at China's Navy Review in April 2019, are earmarked for operation in the South China Sea and Indian Ocean, in their own right and as part of aircraft carrier battle groups. China's technology drive is evident in its successful testing at sea of the world's most powerful naval gun, an electromagnetic (rather than gunpowder) railgun with 124-mile range in January 2019, the first nation to achieve this.

Not only are China's maritime forces getting more sophisticated and more powerful, the successful and ever accelerating construction program during the 2010s has led to significant numeric advances.[50] Figures from 2018 spanned (a) the People's Liberation Army Navy (PLAN) with 300 surface ships; (b) the Chinese Coast Guard (CCG) with 225 offshore armed vessels including the *Zhaotou*-class cutters which are the world's largest coast guard vessels and displace more than most modern naval destroyers; and (c) the People's Armed Forces Maritime Militia (PAFMM). The PAFMM and CCG are able to help exert Chinese control in the South China Sea, leaving the Chinese navy able to deploy more widely into the Indian and Pacific Oceans (through the "island chains") under its "two-oceans" strategy. This is not a comparative exercise, but although the U.S. main fleet of 285 ships has been overtaken by China's 300, the U.S. maintains a significant lead in aircraft carriers, 11 at present, which generates the increasing tempo of Chinese aircraft carrier construction.

This growing depth was evident in the naval review held by Xi Jinping in the South China Sea waters off Hainan in April 2018, which featured 48 warships, 76 aircraft and more than 10,000 personnel—the biggest naval parade since the foundation of the People's Republic of China in 1949.[51] The naval review held in April 2019, again reviewed by Xi Jinping, featured 36 warships. It was judged by the Chinese

media as a "show of the PLA Navy's magnificent development over the past years," including the new Type 055 destroyer the Nanchang, the largest surface vessel other than an aircraft carrier ever built in Asia, as "a new icon" representing China's "high seas" capabilities.[52] The official state outlet *Xinhua* ran an article on April 23, 2019, titled "Strong Chinese navy a blessing for world peace," but such a development was as likely to worry China's maritime neighbors.

4.2 Island Chains

Chinese strategists are concerned with two island chains constricting China. One is the "first island chain" (*diyi daolian*) running from Japan through the Ryukyus, Taiwan and the Philippines. The "second island chain" (*di'er daolian*) runs down from Japan to the Northern Marianas and Guam.[53] The Chinese state media has been explicit on this maritime strategy, whereby "the Chinese navy has fulfilled its long-held dream of breaking through the 'first island chain blockade,' and its vessels have gained access to the Pacific Ocean through various waterways," leaving a situation in which "the Chinese navy has the capability to cut the first island chain into several pieces."[54] Benefits of this strategy are clear in China: "obviously, to break through 'the first chain' […] would mean that the effective security boundary of China really pushed to the deep-sea areas of the western Pacific."[55] Penetrating the first island chain means pushing past Taiwan or Japan.

Naval projection around Taiwan has become routine. The *Liaoning* aircraft carrier, accompanied by five other vessels, went through the Bashi Channel separating Taiwan and the Philippines in July 2017 to conduct training exercises east of Taiwan, and again in April 2018. Chinese airpower is also extending its area of operation. Aircraft exercises around both sides of Taiwan conducted in December 2017 and April 2018 were described in the Chinese media as "routine breaking [of] the 'first island chain.'"[56] PRC pressure on Taiwan continued to mount throughout 2018 and 2019, with Taiwan frantically trying to nestle under the U.S. Free and Open Indo-Pacific (FOIP) umbrella. Any Chinese reincorporation of Taiwan would bring Beijing immediate geopolitical advantages accruing from the deep waters along Taiwan's east coast.

Japan is also particularly concerned about China, where China's strategy includes regular naval deployments since 2013 through the Miyako Strait that cuts through the Ryukyu chain.[57] In such a vein, the *Liaoning* aircraft carrier, accompanied by five other vessels, went through the Miyako Strait in January 2017 to carry out training exercises in the Western Pacific. Similarly, China deployed six Xian H-6K long-range heavy bombers through the Miyako Strait in July 2017, telling Japan it should get used to this as an ongoing routine. The deployment of the *Liaoning* aircraft carrier battle group into the Western Pacific in April 2018 was made for specific "confrontation exercises" according to China's Ministry of Defense.[58] Confrontation against who was left unstated, but the implicit targets were U.S. and Japan.

It is worth noting that in 2003, for example, in their article published in *Guafang Bao*, Jiang Hong and Wei Yuejiang depicted the first island-chain (normally thought

of as stretching from Japan to Sumatra) as bending around all the way to Diego Garcia in the Indian Ocean.[59] This points to China's "two-ocean strategy."

4.3 Two-Oceans

The final development in Chinese military strategy has been its shift into a "two-ocean" (*liang ge haiyang*) strategy, of operating not just through the first and second "island chains" of the Pacific, but also of deploying into the Indian Ocean.[60] India is increasingly sensitive to this Chinese presence in what India considers to be its own strategic backyard and to a degree "India's Ocean."[61] For India, China's growing maritime presence in the Indian Ocean creates maritime encirclement to match land encirclement of India.

Such naval force posture brought Chinese naval operations into the eastern and then western quadrants of the Indian Ocean on an unprecedented scale in 2017. It was striking that in February 2017 there were 11 Chinese warships simultaneously operating in the Indian Ocean—in the shape of the earlier mentioned flotilla drilling in the East Indian Ocean, the newly arrived anti-piracy escort force of three warships patrolling the Gulf of Aden, and its preceding anti-piracy escort group being on port call to Cape Town on its way back to China.

In the eastern quadrant of the Indian Ocean, February 2017 witnessed the Chinese cruise missile destroyers *Haikou* and *Changsha* conducting live-fire anti-piracy and combat drills to test combat readiness. Rising numbers of sightings of Chinese surface ships and submarines in the eastern quadrant of the Indian Ocean were particularly picked up in India during summer 2017, a sensitive period of land confrontation at Doklam.[62] This Chinese presence included Chinese surveillance vessels dispatched to monitor the trilateral *Malabar* exercise being carried out in the Bay of Bengal between the Indian, Japanese and U.S. navies. In the western quadrant, another first for Chinese deployment capability was in August 2017 when a Chinese naval formation consisting of the destroyer *Changchun*, guided-missile frigate *Jingzhou* and the supply vessel *Chaohu* conducted a live-fire drill in the waters of the western Indian Ocean. The reason given for the unprecedented live-fire drill was to test carrying out strikes against "enemy" surface ships.[63] The enemy was not specified, but the obvious rival in China's sights was the Indian navy, which was why the *South China Morning Post* described the drill as "a warning shot to India."[64] By August 2018, a total of 14 Chinese navy ships were operating simultaneously in the Indian Ocean.

V. Conclusions

The article started by describing China's strategy as seeking to establish control of the South China Sea mostly enclosed within its 9-dash claims and of the East China Sea, and from there penetration into the Western Pacific and Indian Oceans. China has achieved substantive success in this drive for a two-seas control followed

by a strong two-ocean presence and consequent influence. However, there are some problems that China is now facing related to its Indo-Pacific drive.

Firstly, China's drive for seapower has been underpinned by its economic growth, but as its economy slows and is increasingly faced with an aging population, economic constraints loom large. Hence Erickson's warning that "the true long-term cost of sustaining top-tier sea power tends to eventually outpace economic growth by a substantial margin. For all its rapid rise at sea thus far, China is unlikely to avoid such challenge."[65]

Secondly, China's Maritime Silk Road (MSR) initiative has lost some of its initial shine, with a degree of disenchantment apparent around the Indo-Pacific where "debt distress" has become a rising issue in 2018. Cambodia, Sri Lanka, Pakistan, the Maldives and Djibouti fall into significant to high risk debt trap categories.[66] China risks being tarnished with the "debt diplomacy" label, already seen with Hambantota. A degree of local backlash has emerged over the MSR, with Malaysia canceling two Chinese-funded MSR infrastructure projects, a $20 billion East Coast Rail Link and two energy pipelines worth $2.3 billion, in August 2018, and Myanmar seeking to reduce the scale of a China-led special economic zone project in the western state of Rakhine.[67] Meanwhile domestic criticism of China over-extending itself (*dasabi* "throwing money around") in doubtful MSR projects has been rising in China.[68]

Thirdly, China's Indo-Pacific push has triggered widespread balancing against it. Since late 2016 and late 2017, Japan and the U.S., respectively, have led the way with their call for a Free and Open Indo-Pacific (FOIP), followed by the French call in 2018 for a "Indo-Pacific axis" (*l'axe Indo-Pacifique*) between China-concerned democracies in the region. China's state media has made a particular point of criticizing French, Indian, Japanese and U.S. espousal of the "Indo-Pacific" as being orchestrated against China.[69] Moreover U.S. deployments to both the South China Sea (as did Japan, France and the UK) and the Taiwan Straits (as did France) accelerated during 2018 and 2019.

This reflects security dilemma problems in which China's growing presence across the Indo-Pacific is triggering other Indo-Pacific actors to cooperate together to constrain China, and is alienating local opinion.[70] China's push into the Western Pacific generates security worries for Australia, Japan and, above all, for the U.S.[71] In turn, China's militarization program in the South China Sea is of growing concern to Australia, France, India, Japan and the U.S. Finally, China's push into and across the Indian Ocean raises security concerns for Australia, Japan and the U.S. and, above all, India. The strategic geometry has gone against China. Beijing hopes to peel Australia, Japan and especially India away from U.S.–led Indo-Pacific constrainment of China.[72] However, convergent simultaneous concerns have led to the re-emergence in late 2017 of the "Quad" format between the U.S., Japan, Australia and India, complete with Indo-Pacific rhetoric and specific calls for observance of the rule of law in the South China Sea. China has denounced such a quadrilateral development.[73] The Quad political formation is also complemented by growing military cooperation in the India–Japan–U.S. (IJUS) and Australia–Japan–U.S. (AJUS) trilaterals.

China's official view on the "Indo-Pacific strategy" being pursued by U.S., Japan, India and Australia has been that it was a "headline grabbing idea," but "like the sea foam in the Pacific or Indian Ocean […] soon will dissipate."[74] Unfortunately for China, general balancing dictates, along the lines outlined at the start of this article in Stephen Walt's *Balance of Threat* theory, are increasingly operating in the region to China's detriment. Here China's "aggregate [economic] power" and "offensive [military] capabilities" when combined with "[perceived] offensive intentions" and "geographic proximity" precisely explain the widespread balancing against China in the Indo-Pacific. It is a fact that China's aggregate economic power and military capabilities (particularly in terms of its naval program) continue to expand, reducing the U.S. relative economic and military advantage, overtaking Japan economically and militarily, and increasing China's military superiority over India. A rising China may of course continue to emphasize its benign intentions and the win-win nature of its growing presence.[75] However, a lack of transparency feeds the widespread perception that China has offensive intentions. This is particularly acute among China's immediate neighbors, where China's geographic proximity is all the more worrying. This was well illustrated during Spring 2019 in the South China Sea, when Chinese pressure on the Philippine holding of Pag-asa/Thitu in the Paracels backfired and brought a tilt by Manila toward closer security cooperation with the U.S.

China's success in power projection is consequently simultaneously the source of constrainment by concerned Indo-Pacific powers. David Kang argues that China's rise is likely to generate a return to older Sino-centric hierarchy, rather than Western balancing models.[76] However, empirically it is clear that the more China pushes out across the Indo-Pacific, the more it is faced with various balancing geo-economic and geopolitical counter responses from other neighboring Indo-Pacific powers. Mearsheimer's words were prophetic at the start of the decade, arguing in terms of IR realism logic, that "most of China's neighbors, to include India, Japan, Singapore, South Korea, […] Vietnam—and Australia—will join with the United States to contain China's power."[77] This was an Indo-Pacific listing.

Two qualifications are worth pointing out. Firstly, balancing operates on a spectrum, where strict overt explicit containment of China is applicable for understanding U.S. strategy, but where delicate implicit constrainment of China is better applicable for understanding Indian strategy. Moreover, balancing is to some degree combined with some degree of economic engagement (especially noticeable in Southeast Asia[78] with ASEAN and with Indonesia)—a combination which represents hedging, of hoping for the best through economic engagement but preparing for the worst through security balancing. Nevertheless, even those economic engagers with China are also taking prudent security precautions against China. Various Indo-Pacific countries remain reluctant to rely on China's statement of benign intentions, and remain ready to insure against a future Chinese power push in the future by developing various institutional and military constraints on China, and thereby not cede the direction of the region to China. In short, China's power projection success remains subject to security dilemma dynamics continuing to generate balance of threat calculations against China responses. From the calculation comes the

response, as fear and distrust of Chinese motives, particularly with regard to the South China Sea, lead to greater explicit and implicit counterbalancing moves around China in the Indo-Pacific.[79] In the Indo-Pacific, China will probably stay uncomfortably exposed by its very success.

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Biographical Statement

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Book Reviews

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Sovereignty and the Sea: How Indonesia Became an Archipelagic State

John G. Butcher and R.E Elson, 2017, 560 pages, hardcover, $58.00. ISBN: 978-981-4722-21-6; paperback ISBN: 978-981-3250-08-6, NUS Press.

As tension and dissent around South China Sea are entering a new phase after the Tribunal ruling in the case of *Philippines v. China*, discussions on the very concept of the archipelagic regime can by and large be seen as a prospective breakthrough. Stimulated by the ruling, questions on how an island or a group of islands may be given such a maritime delimitation are challenges of the utmost importance, not to mention the legal status of each individual insular feature. Public knowledge on how the archipelagic concept has been brought into international regimes and by what states consistently supporting may certainly be necessary to its understanding.

Here, the book written by John G. Butcher and R.E. Elson provides us with one of its best insights. Though it is not a career story of the archipelagic concept *per se*, the book tells us rich stories about how it found a strong footprint in Indonesia, which together with the Philippines were key promotors of its very basic concept. Indonesia is an indispensable name in the history of the modern archipelagic regime. Sixty-two years ago, she shocked the world by declaring her internal waters as an integral part of her national territory—a revolutionary unilateral move that triggered long discussions on the archipelagic principle afterward. Further, she was also among those who single-mindedly and hard-headedly fought for the recognition of the principle in international regimes. When the principle was finally adopted by the United Nations Convention on the Law of the Sea/UNCLOS, Indonesia's distinguished contribution was printed boldly therein.

Being a country consisting of more than 17,000 islands, Indonesia's strong interest in international recognition of the archipelagic principle is understandable. Yet, the importance of this book goes actually beyond this fact. As we already mentioned before, our better understanding of this concept is beneficial to further discussions on the South China Sea. In so doing, speaking about Indonesia's position in that broader context can be of interest. Indonesia is a traditional leader of ASEAN. Like many other countries in the region, she shares a direct border with the South China Sea. However, unlike them, she is not among of its claimants. Her unique position is appealing to and calling for further explorations, especially when we take into account her recent updates on maritime policy.

As we may gradually see, Indonesia's maritime policy is contemporarily undergoing fresh and interesting updates. From the idea of global maritime fulcrum, to the rebuild of Natuna Island, to boat-sinking policy, Indonesia is about to revive a sort of bolder—if not single-minded—stance on some fundamental issues. To find any historical sources that provide useful references for these bold or single-minded approaches is certainly a relevant task. Understanding how Indonesia conceptualized sovereignty over the sea, internalized the idea of archipelagic state and promoted its recognition internationally is also certainly of relevance. Hence, this eloquent book provides us a rich pool of insights.

Like many other accounts on the subject, Butcher and Elson begin their explorations by uncovering legacies provided by the Netherland Indies on maritime ordinance, and then go on into elaborations of the so-called *Djuanda Declaration*. It is through the latter that the newly independent Indonesia set a regulation that not only refused the limits set by the Dutch as her predecessor; but also started to pursue an aspiration to be an internationally recognized archipelagic state. However, unlike other accounts, Butcher and Elson focused more on excavating diplomatic measures which were exercised single-mindedly and hard-headedly by Indonesia during its long era of struggle.

It is by that approach we are able to enjoy valuable stories behind Indonesia's struggles for archipelagic statehood. It was a long struggle that involved many measures; starting from the development of legislation at home, negotiations with neighboring states, cooperation with fellow archipelagic states, campaign over the lengthy discussions of UNCLOS to a series of on-and-off negotiations with the United States, managed confrontations or hostilities toward the passages of foreign warships in the so-called "internal straits or waters." Despite their limitations in gaining useful access to Indonesian archives, Butcher and Elson compensated for this with explorations of archives provided by available Indonesian sources and foreign repositories, specifically those of Australia, the United Kingdom, the United States, and the Netherlands. The result is an impressively detailed and thorough account on the subject.

In the end, this book is a comprehensive study on the Indonesian struggle for archipelagic statehood. It not only provides readers with detailed and rich narration, but it actually presents an interesting argument which I may deliberately call *the single-mindedness/hard-headed thesis*. It is a reflection proposed by Butcher and Elson in highlighting the salient nature of Indonesian success in bringing archipelagic principle into international regime. This success is yet not a prevailing norm. Normally, developing countries are not key agenda setters of international regimes. It is the West or other advanced countries which often do so. Indonesian success in promoting the archipelagic principle is therefore one of the exceptions to this.

To reflect this, Butcher and Elson have highlighted of what they called a "conspicuous feature of single-minded approach." Though the negotiations took the long way around, Indonesia surprisingly managed a continuous focus on archipelago issues and a vision of Indonesia as a single unity. When Indonesia's administration transferred from Soekarno to Soeharto, this focus was harnessed instead of paused. In addition to that single-minded approach, Butcher and Elson also highlight the exercise of hard-headed mentality in assessing what she could and could not achieve. The combination of that single-minded approach, hard-headed mentality, and creative cultivations of geopolitical opportunities provided by the Cold-War situation, at the end provided the backbone for Butcher and Elson's reflections on Indonesia's notable achievements in promoting archipelagic principle.

Following developments of regional maritime dynamics that bring into relevance constructive discussions on the very concept of the archipelagic regime and of Indonesia's maritime gestures in dealing with increasing aspirations for bolder approaches on the issues of sovereignty over the sea, this book is for sure an indispensable companion for those who aware of those coming conditions and dreams to be the jewel of its forthcoming challenges.

—Joko Susanto

Building a Normative Order in the South China Sea: Evolving Disputes, Expanding Options

Truong T. Tran, John B. Weltman, and Thuy T. Le, eds. 2019, 304 pages, hardcover, $150.00. ISBN: 978–1-7864–3752–5, Edward Elgar Publishing.

This volume outlines an overview of the issues that currently affect the South China Sea (hereinafter, SCS), by adopting both a political and a legal approach. This large body of water in Southeast Asia stretches out from southwest to northeast in between the Karimata Strait

and the Strait of Taiwan and its western limit is covered by the Gulf of Thailand. Constituted by hundreds of reefs, low-tide elevations, islets, islands and five archipelagos, the SCS has been defined as a semi-enclosed sea, which attracts the interests of all of the countries with borders on it, i.e., Malaysia, Thailand, Cambodia, Vietnam, mainland China, Hong Kong, Taiwan, Philippines, Brunei and Malaysia. Nonetheless, its relevance transcends the physical and geographical borders and captures the attention of the international community, due to the preeminent role it plays in a series of political and legal contentions.

While kaleidoscopically identifying the criticalities that characterize this portion of the Pacific in Southeast Asia, the volume also aims at proposing different modes of action to limit, if not to cut off, the ever-increasing tensions between the major actors operating in the area, i.e., China, the U.S. and Japan, on the one hand, and the neighboring countries, on the other.

Edited by Truong T. Tran, John B. Welfield and Thuy T. Le, the volume focuses on three facets of the SCS issue and it deputizes to each of them a section (or a "Part") of the volume. Each Part is, then, divided into different chapters. Respectively, Part I, named "The South China Sea: Geo-Economic and Geopolitical Drivers of a Changing Landscape," is composed of four chapters, which are contributed by, in order: Andrew Scobell, Michael Yahuda, Wu Xiangning and You Ji, and Leszek Buszynski. Part II, entitled "International Law: Land, Sea Air and Claims," encompasses five chapters, which include the analyses of Vu Hai Dang, James Kraska, Nguyen Thi Lan Anh, Robert Beckman and Phan Duy Hao, and Jonathan G. Odom. Last, Part III diagnoses the issue of building a cooperative management framework in the South China Sea and it includes the works of Vu Thanh Ca, Raphael Lotilla, Dylan Mair and Rachel Calvert, and Jay Batongbacal. An overall conclusion of the three sections is ultimately drawn by Truong T. Tran under the title "Tempering the SCS Slow Boil: Expanding Options for Evolving Disputes."

First, Part I opens with an evocative metaphor by Andrew Scobell, where tensions in the SCS are being seen as in a condition of "slow boil": just like boiling waters, frictions in the area "simmer and fluctuate" over time. By saying so, Scobell maintains that, although the intensification of frictions seems less plausible than elsewhere, the potentially contributing factors to an escalation of tensions in the SCS should not be underestimated. In order to face the situation, Scobell proposes a four-step approach based on minimizing the tensions, appointing third party States mediators, managing the disputes, and solving the disputes.

After that, in Chapter 2, Professor Yahuda analyzes the strategic role played by China in Southeast Asia, by counter-balancing the Chinese military power with a currently "not-as-dominant" economic influence in the area. However, a new strategy is said to be promoted in the name of a "China dream," which sees China at the center of a new "gigantic web silk road" that would link China with other parts of Asia and Europe ("One Belt One Road" initiative) and that seems to "suit well" the cautious consultative approach so far adopted by the ASEAN countries.

Last, in its third and fourth chapters, Part I deals with the issue of the intervention of external third parties, which contributed to reconceiving the issue of rivalry in the SCS between China, on the one hand, and South Asian countries, on the other, as a new "grand geostrategic conflict." More specifically, Chapter 3 by Wu Xiangning and You Zi pinpoints the U.S. strategic attempt to counteract China's ambitions in Southeast Asia (what they call the "U.S. pivot to Asia") in the context of a "structural conflict of interests between the world's two leading powers." Chapter 4, instead, adopts a wider view over the role played by all the major external actors operating in the SCS area, including the U.S. and Japan, in order to resist China's maritime ambitions. By doing so, Professor Buszynski, the author of the chapter, recalls the perilous Chinese move not to accept the July 2016 ruling rendered by the Law of the Sea Arbitral Tribunal instituted under Annex VII of the UNCLOS in the case of *Philippines v. China*, thus boosting the possibility of conflict.

Moving on to the second section of the volume, Part II illustrates the international legal

framework within which the SCS disputes has evolved and highlights the legal options that, in the authors' views, constitute the turning points in readdressing the escalating tensions in the SCS.

As a preface, Chapter 5 deals with the matter of the Paracels islands (*Hoang Sa* in Vietnamese; *Xisha* in Chinese), which are disputed between Vietnam and China. While dealing with the issue, Professor Hai Dang tries to determine the entitlement of the Paracels Islands based on current state of the law of the sea, especially in light of the principles established by the 2016 South China Sea Award, that has been rendered in the context of the dispute over the Spratly islands.

In Chapter 6, James Kraska examines the norms on the exclusive economic zones (hereinafter, EEZ) in the United Nations Convention on the Law of the Sea (hereinafter, UNCLOS) and investigates the legislative history that stands behind such norms. The EEZ was established to protect coastal fishermen from distant water fishing fleets, by regulating the States' total allowable catch for each fish species and only allowing neighboring states access to the surplus fishery. At the time of the approval of the UNCLOS, in 1982, the norms on EEZ were principally supported by developing coastal States, including the ASEAN countries bordering the SCS. In light of that, what the author suggests is that "the rise of the New China is incomplete without commitment to a rules-based order of the oceans that respect the legacy of the EEZ for developing coastal States."

Chapter 7 deals with the issue of constructions in the SCS. As suggested by author Nguyen Thi Lan Anh, constructions "neither create any entitlement nor fortify the legal basis" for the State's claim over a submerged feature or a low-tide elevation and prior consultation and cooperation in constructions at sea should be promoted.

Then, Robert Beckman and Phan Duy Hao take into consideration the issue of air defense identification zones (hereinafter, ADIZ) in the area of the SCS and what they propose is to follow established "rules of road" and international practices in cases where some foreign aircraft will enter the ADIZ of other states without giving prior notification. By doing so, they propose to apply the rules of the road that already exist for the interception of civilian aircraft, enclosed in Article 3-bis of the Chicago Convention. Another way would be to formally adopt the ASEAN Guidelines for Air Military Encounters, which is a soft law set of rules aimed at coping with unintentional air military encounters. Both of the two solutions constitute a cautious approach that may contribute to loosening the existing tensions.

Rounding out Section II, in Chapter 9, Professor Jonathan G. Odom specifically deals with the issue of the freedom of navigation operations, or FONOPs, in the U.S. and other States' policies, in the context of the SCS and attempts to demonstrate the legality of such activities under international law.

Proceeding to the third and last section, Part III of the volume provides for possible cooperative management frameworks in the fields of environment and biological resources, constructions at sea, ADIZs and freedom of navigation.

First, according to Vu Thanh Ca, in Chapter 10, the SCS is one of the "major centers of shallow sea biodiversity in the world" and, since seas are interconnected, marine pollution can cause impacts on a wide scale across countries. Therefore, the SCS can be considered as a "Large Marine Ecosystem" and to protect its biodiversity it is necessary to consider it as a whole entity that involves many countries. In order to do so, the author proposes building a mechanism for coordinating the activities of all countries surrounding the SCS and establishing marine protected areas in the disputed waters. Besides, the 2016 South China Sea Award also plays a role in the formulation of a cooperative framework among the surrounding countries, insofar as it determines the extent to which it would generate a high sea in the middle of the SCS.

As to the 2016 South China Sea Award, Chapter 11 of the volume casts the attention to the inheritance left by the decision rendered by the arbitrators. There, the author displays the idea of implementing a movement of cooperation for the sustainable development in the

area on the basis of the definition of the rights and obligations of the States Parties to UNCLOS relative to each other and to the international community in the protection of the marine environment. However, China has still not accepted the results of the 2016 award and has publicly declared it "null and void," despite being a party to the Convention. Therefore, an action supported by the weaker countries needs to be clearly supported, but it may still not produce the desired effects. In fact, although calling for a cooperative sustainable approach seems to be the key point of solving the issue of protecting the marine environment, doubts could be cast on the willingness of the Chinese government to commit to such operations with the ASEAN countries.

Moving on to Chapter 12, Dylan Mair and Rachel Calvert explore the various reasons that make most Asian countries bordering the SCS interested in the hydrocarbon resources of the SCS. However, they point out, "any upstream cooperation that develops in the SCS is more likely to be the result of geopolitical drivers than energy drivers."

Last, in Chapter 13, Jay Batongbacal considers the effectiveness of the dispute-settlement mechanisms instituted under Part XV of the UNCLOS and their impact on the SCS disputes. He identifies the emerging consistency for most of the States involved in the SCS disputes to align their maritime zones in pursuance with the provisions of the UNCLOS. Nonetheless, the chapter leads to a reconsideration of the effectiveness of the dispute-settlement mechanisms related to the SCS, in light of the fact that Part XV still largely relies on non-binding dispute-solving mechanisms. The legal binding options available may still be used to address the currently most-critical civil manifestations of the dispute, however, fisheries are likely to remain intractable without innovative diplomacy on the part of all stakeholders. Only the alignment of smaller States may provide for an opportunity for coordinating diplomacy on the basis of legal rights and obligations.

To conclude, the idea of formulating a common cooperative framework constitutes a *fil rouge* that embroiders the pages of this legal and sociopolitical analysis in its entirety. By individually investigating single aspects of the SCS situation, the authors of the present volume contribute to elaborate different strategies that may help to simmer down, or at least not to exacerbate, the intensifying tensions in the area. In fact, the adoption of a three-lens perspective, namely political, legal and cooperative (or "diplomatic"), accurately helps to destructure an issue, the one of the SCS, which is by many considered an *impasse* that affects the countries that claim an interest on this portion of the ocean—and not only for geographical reasons. In the opinion of the author of this review, seeing the condition of the SCS as doubtlessly critical, the main achievement of the volume is that it ingeniously sheds light on a list of singular key factors that may enhance efforts to disentangle the intricate skein of the SCS. All in all, although a more comprehensive approach may be somewhat missing, readers will still benefit from the given overview of the SCS, the provided legal frameworks underpinning the situation in the SCS, and from the initial ideas for the path to a solution laid out in this volume.

—Gaia Gamberale

Call for Papers

JTMS Summer/Fall 2019 Issue

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Style Guide

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Title Page: Title page must include 1.) the title of the paper, 2.) author's contact information including name, affiliation, address, phone number, fax number, email address 3.) A structured abstract (see samples below) and few key words of the paper.

Biography: Author's biographical statement (75 words or less)must be underneath his/her contact information. This will be edited and published in the *Journal of Territorial and Maritime Studies*.

Headings: *JTMS* uses three levels of headings. Major headings (heading level 1) is left justified in bold with the first sentence following the heading indented. Secondary heading (heading level 2) is left justified in italic with the first sentence after the heading indented. Tertiary heading (heading level 3) is left justified in italic with the first sentence after the heading beginning on the same line.

Tables & Figures: Insert each table or figure on a separate page at the end of the text. Indicate the position of the table or figure in the text (e.g. Insert Table 2 here). The page containing the table or figure should be placed after the page that first references the table/figure in the text. Authors have the responsibility of providing high quality figures and other kinds of illustrative materials. Supporting materials may be submitted as hard copies for scanning or through e-mail submission. Please forward all materials to the editor.

Endnotes: Use full citation endnotes with no bibliography or reference list. Endnotes should be brief, used sparingly, and consecutively numbered with subscript Arabic numbers. Please convert all footnotes to endnotes.

Book

1. Robert Jervis, *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Nuclear Armageddon* (Ithaca, NY: Cornell University Press, 1989), p. 167.

2ND ENDNOTE

2. Jervis 1989, p. 160.

CONSECUTIVE ENDNOTE

3. Ibid. p. 50.

Journal

2. David Karl, "Proliferation Pessimism and Emerging Nuclear Powers," *International Security* 21(3) (1996–97), p. 89.

Website

3. Sangwon Yoon and David Lerman, "Hagel Calls on North Korea to Tone Down Rhetoric," *Bloomberg News*, April 11, 2013, http://www.bloomberg.com/news/2013–04–10/south-korea-braces-for-possible-missile-test-from-north-today.html, accessed January 21, 2014.

Newspaper Article

4. Andrei Lankov, "Stay Cool. Call North Korea's Bluff," *New York Times*, April 9, 2013.

Footnote

5. The classic optimist-pessimist debate can be found in Scott Sagan and Kenneth Waltz, *The Spread of Nuclear Weapons: An Enduring Debate*, 3d. ed. (New York: W. W. Norton & Company, 2013). For detailed surveys of the literature more generally, see Peter Lavoy, "The Strategic Consequences of Nuclear Proliferation: A Review Essay," *Security Studies* 4(4) (1995), pp. 695–753; and Francis Gavin, "Politics, History and the Ivory Tower-Policy Gap in the Nuclear Proliferation Debate," *The Journal of Strategic Studies* 35(4) (2012), pp. 573–600.

One File: Submit the paper as one file in the following order: Title, Structured Abstract, Text, Endnotes, Tables and Figures, and Biographical Statement.

Structured Abstract

Article Classification: JTMS categorizes articles into 6 of the following classifications: Research Paper, Viewpoint, Technical Paper, Conceptual Paper, Case Study, and General Review. Please write *one* of the categories in which your paper belongs on the article title page.

The article title page must include a structured abstract with 4–5 of the following subheadings: 1.) Purpose, 2.) Design/Methodology/Approach, 3.) Findings, 4.) Prac-

tical Implications, 5.) Originality/Value. The structured abstract, including keywords and article classification, must be 200 words or less.

Structured Abstract Samples

Sample 1

Article Type: Research Paper

Purpose—Some scholars imprint an academic discipline by their contribution to the manner in which people think and research, namely, by putting forward novel concepts and insights. The purpose of this paper is to examine the impact of Sumantra Ghoshal's work on the study of subsidiaries and multinational enterprises and organizational formats for foreign operations.

Design, Methodology, Approach—A bibliometric study on Bartlett and Ghoshal's well-known book *Managing Across Borders: The Translational Solution* is performed to assess its impact in international business (IB) research. The entire record of publications in the top leading IB journal, Journal of International Business Studies (JIBS), is examined.

Findings—Theoretically supported, Ghoshal's work was keenly influenced by his corporate experiences and his constant questioning of the dominant theories and assumptions. The analyses in this paper show the impact of the work on the "transnational solution," namely, on the understanding of multinationals and subsidiaries, thus being one of the most notable contributions for IB research over the past 20 years.

Practical Implications—Useful for graduate students and in writing a literature review, this paper presents an interesting manner to examine a scholar's and a theory's impact on a discipline.

Originality, Value—This paper presents an extensive bibliometric analysis of research published over a time-span of 22 years in international business studies.

Sample 2

Article Type: Research Paper

Purpose—While many studies on institutional environment have primarily focused on the influence of the host country environment, limited insights have been offered on how the different dimensions of home institutions affect firm internationalization. This paper aims to fill this gap by investigating the effects of regulatory institutions at home.

Design, Methodology, *Approach*—Using country governance quality to proxy quality of regulatory institutions, this study attempts to reveal how regulatory institutions at home facilitate a multinational enterprise's (MNE's) international expansion and why the influence differs in different country clusters. Using hierarchical linear modeling and cluster analysis, proposed hypotheses were tested with a three-year panel 511 firms from 38 countries.

Findings—The results provide substantial support for authors' hypotheses that

MNEs with high governance quality at home are more engaged in internationalization than those with low governance quality at home. Moreover, differences in institutional effect do exist between country clusters.

Practical Implications—This study provides evidence that while country difference exists, governance quality at home can facilitate MNE's expansion into foreign markets. This finding will help managers of any MNEs to consider country-level factors and evaluate the governance quality at home before committing resources into foreign operations.

Originality, Value—Building on the institutional environment literature, this theory and results make original contributions by underscoring how the consideration of regulatory institutions at home can significantly improve understanding of institutional influence on MNEs. The findings have important implications for both international business researchers and managers of MNEs.