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## ILLEGAL, UNREPORTED, AND UNREGULATED FISHING: A MARITIME SECURITY THREAT IN THE WESTERN PACIFIC

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# ILLEGAL, UNREPORTED, AND UNREGULATED FISHING: A MARITIME SECURITY THREAT IN THE WESTERN PACIFIC

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“Fishing is much more than fish. It is the great occasion when we may return to the fine simplicity of our forefathers.”

—Herbert Hoover

## INTRODUCTION

Fishing is one of the oldest forms of sustaining human life, dating back to prehistoric times. Yet current fishing practices threaten the very existence of a majority of global fish stocks, which are critical to the long-term sustainability of fishing as a source of income and food. Of particular concern is the set of illegal fishing practices that has come to be called Illegal, Unreported, and Unregulated (“IUU”) fishing.<sup>1</sup> The control and regulation of global fishing practices requires multi-lateral cooperation amongst three critical players—costal States, flag States, and port States—typically through the formation of international agreements and Regional Fisheries Management Organizations (RFMOs). However, the current state of international cooperation is simply insufficient to combat IUU fishing and the resulting degradation of global fish stocks. The state of the world’s fisheries continues to decline and pose serious consequences for global food security and the livelihoods of millions. These consequences, dire in their own right, also contribute to geo-political instability in many areas of the

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<sup>1</sup> IUU fishing includes any fishing that violates fisheries laws or occurs outside the scope of fisheries laws and regulations. “Illegal” fishing is fishing without a license, in a prohibited area, not abiding by fishing quotas, fishing for protected species, or misrepresenting the fish caught. “Unreported” fishing includes not reporting at all or under reporting. Finally, “Unregulated” fishing occurs on the high seas. The main focus of this Article will be the many practices encompassed by the “illegal” aspect of IUU fishing. *See Illegal, Unreported and Unregulated Fishing: Frequently Asked Questions*, PEW Charitable Trusts (Feb. 25, 2013), <https://www.pewtrusts.org/en/research-and-analysis/articles/2013/02/25/illegal-unreported-and-unregulated-fishing-frequently-asked-questions#:~:text=%22IUU%22%20stands%20for%20illegal%2C,of%20fisheries%20laws%20and%20regulations.>

world.

IUU fishing is especially problematic in the South China Sea, where a number of bordering countries fail to combat IUU fishing. The Global Initiative Against Transnational Organized Crime has developed an IUU Fishing Index, which ranks countries on indicators measuring vulnerability to IUU fishing, the prevalence of IUU fishing, and the country's response to IUU fishing.<sup>2</sup> Of the top five worst-scoring countries according to this metric, four are countries bordering the South China Sea.<sup>3</sup> While Vietnam, Cambodia, and Taiwan are all ranked as among the worst scoring countries, China is far above any other nation as the worst performer when it comes to this Index.<sup>4</sup> Additionally, aside from its high prevalence of IUU fishing, the South China Sea is important to study because it has been an area of increasing geo-political tension for a number of years.<sup>5</sup> Under the Trump administration, the United States has increased its focus on protecting U.S. interests in the region—including the commitments made to states bordering the South China Sea—in the face of China's growing claims in the area.<sup>6</sup> This has been primarily through the use of Freedom of Navigation Operations.<sup>7</sup> While this is an important aspect of overall U.S. maritime strategy, this Article will not examine the use or legal basis for Freedom of Navigation Operations, and will instead focus on IUU-specific measures.

IUU fishing has been a priority subject for the United States in the latter half of 2020. The United States Coast Guard, in September of 2020,

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<sup>2</sup> *IUU Fishing Index*, Global Initiative Against Transnational Organized Crime (Feb. 7, 2019), <https://globalinitiative.net/analysis/iuu-fishing-index/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The area's history of conflict spans centuries, but the current issue of territorial claims in the South China Sea has much to do with China's claim of the "nine-dash" line. This idea has also been around for centuries but gained recent relevance in 2009 through a map submitted by China to the Commission on the Limits of the Continental Shelf. The exact import of this line has been far from clear, but it is clear that China intends to make sweeping claims in the area, which often conflict with the claims of the other countries bordering the South China Sea. See Sean Mirski, *The South China Sea Dispute: A Brief History*, Lawfare (June 8, 2015), <https://www.lawfareblog.com/south-china-sea-dispute-brief-history>.

<sup>6</sup> China has increased the size of its territorial claims in the South China Sea through increasing the physical size of islands or piling sand onto underwater reefs to create new islands altogether. See *Territorial Disputes in the South China Sea: Recent Developments*, Council on Foreign Relations (Dec. 2, 2020), <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea>.

<sup>7</sup> The Trump administration by mid-2019 had already conducted more operations in the South China Sea than the entirely conducted under the Obama administration. By the end of 2019, it had conducted nine total operations in the area. See Harsh V. Pant & Kashish Parpiani, *US Engagement in the Indo-Pacific: An Assessment of the Trump Era*, ORF Occasional Paper No. 279, 6 (2020), [https://www.orfonline.org/wp-content/uploads/2020/10/ORF\\_OccasionalPaper\\_279\\_US-IndoPacific.pdf](https://www.orfonline.org/wp-content/uploads/2020/10/ORF_OccasionalPaper_279_US-IndoPacific.pdf).

published the service's Strategic Outlook on Illegal, Unreported and Unregulated Fishing.<sup>8</sup> This report set forth three specific features of the Coast Guard's enhanced strategy for combatting IUU fishing: 1) Targeted enforcement operations in the exclusive economic zones (EEZs) of partner nations; 2) Prioritizing holding accountable flag states for predatory or irresponsible state behavior through U.S. partnerships with at-risk coastal States; and 3) Expanding multilateral fisheries enforcement cooperation with international partners.

While the Coast Guard's Strategic Outlook focuses on the problem of IUU fishing as a whole, it specifically mentions concerns over China's fishing practices.<sup>9</sup> These concerns are based on findings drawn from a 2019 report by the National Oceanic and Atmospheric Administration (NOAA), and include "a troubling expanse of alleged violations by Chinese-flagged fishing vessels" illegally fishing in the EEZs of coastal states around the globe.<sup>10</sup> Further, the Strategic Outlook also cites the NOAA's concern over "stateless fishing vessels in the Northern Pacific displaying characteristics of Chinese registration," and the People's Armed Forces Maritime Militia's aggressive behavior on the high seas.<sup>11</sup> In light of these concerns, the Strategic Outlook calls on China to "exercise more responsible flag state control over its vessels... and demonstrate that it is taking the necessary steps to ensure compliance with international norms and governance structures."<sup>12</sup> As for the U.S. Coast Guard's own role in combatting IUU fishing, the Strategic Outlook describes the Coast Guard as "the only agency with the infrastructure and authority to project a law enforcement presence throughout the 3.36 million square mile U.S. EEZ and in key areas of the high seas."<sup>13</sup> Importantly, this description focuses on the Coast Guard's law enforcement powers and provides a relatively specific territorial focus.

A month after publication of the Strategic Outlook, on October 23, 2020, Robert O'Brien, the U.S. National Security Advisor, published a statement that reiterated these concerns and built upon the U.S. strategy to address the problem of IUU fishing by China. The statement cites China's "illegal, unreported, and unregulated fishing and harassment of vessels operating in the exclusive economic zones of other countries in the Indo-Pacific," as a threat to U.S. sovereignty, a threat to the sovereignty of states in the Pacific, and an action endangering regional stability.<sup>14</sup> As a response

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<sup>8</sup> United States Coast Guard, Illegal, Unreported, and Unregulated Fishing Strategic Outlook, (2020).

<sup>9</sup> *Id.* at 14.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 19.

<sup>14</sup> United States National Security Council, Statement from National Security Advisor

to this threatening action, instead of calling for more flag State responsibility like the Strategic Outlook, O'Brien's statement explains how the U.S. will take a more active role in combatting IUU fishing—the Coast Guard will homeport enhanced Fast Response Cutters in the Western Pacific.<sup>15</sup> O'Brien explains that these Fast Response Cutters will be used to “conduct maritime security missions, such as fisheries patrols, enhance maritime domain awareness and enforcement efforts in collaboration with regional partners..., and ensure freedom of navigation.”

This Article will focus on this new U.S. strategy with regards to using MSOs conducted by the Coast Guard to combat the People's Republic of China's IUU fishing in the Indo-Pacific, particularly the South China Sea. The strategy announced in this statement raises a number of significant questions. How serious is the problem of IUU fishing? What is the current legal regime applicable to IUU fishing? What is the difference between maritime law enforcement and maritime security operations? Does international law allow the U.S. to engage in maritime security operations to combat IUU fishing? In addressing these questions, this Article will first provide a brief overview of the major consequences of IUU fishing, including major consequences for the environment and economies around the globe, as well as some of the reasons IUU fishing is so difficult to combat. Second, this Article will examine the current international legal regime providing jurisdiction for addressing IUU fishing through maritime law enforcement. Third, this Article will distinguish between maritime law enforcement and maritime security operations, including where each can be conducted based on jurisdiction under international law. Finally, this Article will present an argument for why IUU fishing is a serious threat to maritime security, particularly in light of U.S. interests in the Western Pacific and the highly aggressive behavior of the Chinese fishing fleet. As such, IUU fishing is properly addressed through maritime security operations.

#### I. THE ISSUE OF IUU FISHING—SIGNIFICANT HARMS AND ENFORCEMENT DIFFICULTIES

It is generally accepted that IUU fishing is a serious problem, and the harms have become well-understood in recent years. As such, this Article will only briefly discuss the major harms posed, focusing on the environmental and the economic harm posed by IUU fishing, as well as the broader consequences for geo-political stability. First, IUU fishing represents a significant environmental issue. The Food and Agriculture Organization (FAO) of the United Nations has found that close to one-third of the world's

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Robert C. O'Brien, (October 23, 2020).

<sup>15</sup> *Id.*

fisheries are currently being fished beyond biological limits.<sup>16</sup> A further 60% of the world's fisheries are fished at max capacity.<sup>17</sup> The exact meaning of being fished beyond biological capacity will have varying definitions depending on the data and formulas used to make the determination. A helpful definition can be borrowed from the FAO's definition of the term "maximum sustainable yield" (MSY): the "highest theoretical equilibrium yield that can be continuously taken (on average) from a stock under existing (average) environmental conditions without significantly affecting the reproduction process."<sup>18</sup> Thus, the FAO's findings would indicate that a majority of the world's oceans are fished to the extent that no more fishing can occur there without affecting future yield, or that this limit has already been surpassed. It is an understatement to say that this does not bode well for the future of fishing—continuing fishing at this rate could result in the effective extinction of many species relied on commercially.

Aside from threatening the sustainability of commercially fished species, IUU fishing also poses a significant threat to protected and endangered species. A recent, concrete example of this threat was an incident in August of 2020 when more than 300 Chinese-flagged fishing vessels were spotted fishing near Marchena Island, part of the diverse marine ecosystems of the Galápagos Islands.<sup>19</sup> These fishing vessels were part of what is commonly referred to as China's "distant water fishing fleet" or DWF fleet. In this case, the fleet included a tanker for refueling other ships and a processing ship, where fishing vessels could dump their catch and then continue fishing.<sup>20</sup> This meant that the fleet was able to stay longer, and bring in more fish, than if they did not have a source of fuel or fish processing. Conservation and sustainable practices have been critical for aiding a return in marine biodiversity in threatened ecosystems like the Galápagos, and the Galápagos in particular are the unique home of a number of marine species, but IUU fishing poses a dire threat to the future of these important environmental wonders.

Second, IUU fishing is a serious economic issue, which has important consequences for geo-political stability. The impacts of overfishing are felt globally, due to the migratory nature of fishing stocks, and as such, overfishing poses a threat to global food security and the fishing industries of

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<sup>16</sup> *The State of World Fisheries and Aquaculture 2020*, United Nations Food and Agriculture Organization (2020), 45, <https://doi.org/10.4060/ca9229en>.

<sup>17</sup> *Id.*

<sup>18</sup> *Glossary*, United Nations Food and Agriculture Organization, <http://www.fao.org/3/y3427e/y3427e0c.htm>.

<sup>19</sup> Susanne Rust, *Crisis in the Galapagos: Chinese fishing fleets and COVID-19 threaten a natural wonder*, *Phys.Org* (Oct. 23, 2020), <https://phys.org/news/2020-10-crisis-galapagos-chinese-fishing-fleets.html>.

<sup>20</sup> *Id.*

all nations. For context, more than three billion people worldwide rely on fishing for work or food.<sup>21</sup> In Southeast Asia alone, more than 250 million people rely on fish for at least 20 percent of their average per capita intake of animal protein, and more than 200 million people rely on fishing for their livelihoods.<sup>22</sup> The Coast guard has described some of the economic and broader consequences of lackadaisical fisheries enforcement: “Predatory and irresponsible nations that turn a blind eye to IUU fishing distort markets with aggressive economic policies, undermine free and open democracies, challenge security and prosperity, and destabilize at-risk nations around the globe.”<sup>23</sup> Further, the illegal practices of IUU fishing are understood to have an effect on other illegal and highly exploitative industries. IUU fishing significantly depletes fishing stock in an area, leading to low catch yields as less and less fish are available. In turn, “[l]eft without alternatives, these conditions entice more and more fishers to seek alternative sources of income, such as piracy, drug trafficking, and human trafficking, creating a dangerous downward cycle furthering regional instability.”<sup>24</sup> The Coast Guard Strategic Outlook summarizes the broader threat posed— “Today, the fight against IUU fishing is not just an economic or conservation mission, but one of strategic national importance. IUU fishing fundamentally erodes port and maritime security and exacerbates existing gaps in maritime governance.”<sup>25</sup>

Despite this awareness of the significant harms posed by IUU fishing, IUU fishing has yet to be effectively controlled due to a number of difficulties in enforcing conservation regulations and sustainable fishing practice laws. While some of the enforcement difficulties are those to be expected with combatting any large-scale illegal activity, there are aspects of fishing that make maritime law enforcement particularly difficult. A Smithsonian Magazine article detailing the hunt and eventual capture of an illegal fishing ship— requiring pursuit over more than 1,000 nautical miles and significant cooperation from a number of coastal States—provides an insight into many

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<sup>21</sup> Bureau of Global Public Affairs, U.S. Dep’t. of St., *U.S. launches new strategy to combat illegal fishing* (Sept. 24, 2020), <https://share.america.gov/u-s-launches-new-strategy-to-combat-illegal-fishing/>.

<sup>22</sup> Robert S. Pomeroy, John E. Parks, & Gina Green, *Fisheries Partnerships*, Indo-Pacific Defense Forum (Jan. 27, 2020), <https://ipdefenseforum.com/2020/01/fisheries-partnerships/>.

<sup>23</sup> Bureau of Global Public Affairs, *supra* note 21.

<sup>24</sup> Illegal, Unreported, and Unregulated Fishing Strategic Outlook, *supra* note 8; *See also* Teale N. Phelps Bondaroff, Wieste van der Werf, & Tuesday Rietano, *The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime*, The Global Initiative Against Transnational Organized Crime and The Black Fish (2015), <https://globalinitiative.net/wp-content/uploads/2015/04/the-illegal-fishing-and-organised-crime-nexus-1.pdf>.

<sup>25</sup> Illegal, Unreported, and Unregulated Fishing Strategic Outlook, *supra* note 8.

of these uniquely complicating factors:

1. Some of the fish most at-risk of IUU fishing live outside the domain of any country.
2. Foreign boats finishing in other countries' waters happens most often off the coasts of poor countries that cannot afford to patrol their own territories.
3. When a coastal State cooperates to arrest a vessel in its waters, the illegal act may not have happened in the State's territorial waters, so the coastal State cannot charge a violation of its conservation laws.
4. IUU fishing is a low investment and low financial risk operating scheme that is highly profitable, enticing more individuals to get involved in the illicit trade.<sup>26</sup>

Additionally, an important practice used in legal fishing operations is also one that makes it harder to catch IUU fishing. This is the practice of transshipment, where the catch from one fishing vessel is transferred onto refrigerated cargo vessels at sea.<sup>27</sup> While critical to the production capability and product quality of legal fishing operations, this transfer practice is also an effective means for illegal fishers to obfuscate the source of the fish by enabling them to keep fish cool and fresh while sailing to faraway ports. The combination of both significant harms and significant obstacles to enforcement makes IUU fishing a persistent problem that has yet to be dealt with effectively.

## II. JURISDICTION TO COMBAT IUU FISHING UNDER INTERNATIONAL LAW

Understanding international law with regard to States' powers at sea is vital to understanding the means by which coastal States are able to combat IUU fishing. This section will briefly discuss international law with regards to five distinct maritime zones: internal waters, the territorial sea, the contiguous zone, the exclusive economic zone (EEZ), and the high seas.<sup>28</sup>

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<sup>26</sup> See Tristram Korten, *The Hunt for the Modern-Day Pirates Who Steal Millions of Tons of Fish from the Seas*, Smithsonian Magazine (Sept. 2020), <https://www.smithsonianmag.com/science-nature/modern-day-pirates-steal-millions-tons-fish-seas-180975496/>.

<sup>27</sup> Illegal, Unreported, and Unregulated Fishing Strategic Outlook, *supra* note 8.

<sup>28</sup> An additional maritime zone under the LOSC is the continental shelf, which relates to the ability to conduct economic activities on the seas. The economic rights within the continental shelf provide exclusivity only with regards to non-living resources and sedentary living resources like shellfish, and as such this zone is less important to this Article's discussion of IUU fishing. See John Burgess, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen Murray, & Jack Whitacre, *Maritime Zones*, in *Law of the Sea: A Policy Primer*, The Fletcher School of Law and Diplomacy, Tufts University, 13 (2017).



International law is based on the concept of respecting State sovereignty over its territory and population.<sup>29</sup> Of particular importance for this Article is the 1982 United Nations Convention on the Law of the Sea (LOSC)—the primary source of positive law covering naval activities at sea.<sup>30</sup> This treaty established jurisdiction, rights, and duties for three different categories of maritime actors: costal States, flag States, and port States.<sup>31</sup> Jurisdictional and enforcement rights vary according to both the maritime actor and the maritime zone.

The first maritime zone is internal waters, defined as waters landward of the baseline from which the territorial sea is measured.<sup>32</sup> Under the LOSC, costal States, with minor exceptions, have full control over their internal waters because these are considered by international law to be part of the land over which the State exercises sovereignty.<sup>33</sup> One of the most important categories of internal waters in the IUU fishing context is ports. While States enjoy very broad powers over ports—including over both their own nationals and foreign vessels—most port States use these powers with respect to foreign vessels in their ports cautiously.<sup>34</sup> This is because States have significant economic interests in limiting interference with foreign merchant vessels in their ports, in the hopes that their own merchant vessels will be afforded the same treatment in other States' ports.<sup>35</sup> However, control over

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<sup>29</sup> Natalino Ronzitti, *Respect for Sovereignty, Use of Force and the Principle of Non-intervention in the Internal Affairs of Other States*, European Leadership Network (2015).

<sup>30</sup> Two other international treaties compliment the LOSC: the 1993 FAO Agreement to Promote Compliance with international Conservation and management Measures by Vessels Fishing on the High Seas (1993 FAO Compliance Agreement) and the 1995 Agreement for the Implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995 New York Agreement). These two treaties define and gives substance to the responsibilities of the flag States of fishing vessels on the high seas. The 1995 New York Agreement in particular aims to reinforce the obligations of States to co-operate in conservation and fisheries management on the high seas. See Gabriela A. Oanta, ed. Papastavridis, Efthymios D. & Trapp, Kimberly N., *Illegal Fishing as a Criminal Act at Sea, in Crimes at Sea*, The Centre for Studies and Research in International law and International relations, Vol. 2012, 149–197, 160 (2014).

<sup>31</sup> James Kraska, eds. Donald Rothwell, Alex Oude Elferink, Karen Scoot, & Tim Stephens, *Military Operations*, in *The Oxford Handbook of the law of the Sea*, 866–887, 867 (2016).

<sup>32</sup> William Edeson, *Tools to Address IUU Fishing: The Current Legal Situation*, United Nations Food and Agriculture Organization (2000), <http://www.fao.org/3/Y3274E/y3274e0a.htm>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (noting that there are bilateral and multilateral treaties between states that guarantee these rights of access, although there may not be the same level of interest in reciprocity when it comes to fishing vessels).

ports has been recognized as an important part of combatting IUU fishing in international fisheries agreements, including in the 1995 U.N. Fish Stocks Agreement. The 1995 Agreement required port States to take steps to promote the effectiveness of global conservation measures in accordance with international law.<sup>36</sup> Control over ports is not the final solution to IUU fishing however, as the source of a catch can be obfuscated. Additionally, port control may make IUU fishing more difficult, but it does not fully address perhaps the more serious of the harms posed. Unless there is close to perfect port control globally, even if actors are unable to bring illegally caught fish to some port for sale, overfishing itself will still result in serious environmental and economic harm.

The next two important maritime zones are the territorial sea and the contiguous zone. Similar to internal waters, the coastal State has sovereignty over its territorial sea and enjoys complete authority to control fishing.<sup>37</sup> The coastal State's power over the territorial sea has one significant limitation in the right of innocent passage.<sup>38</sup> The right of innocent passage imposes limitations on what can be done by the coastal State to foreign vessels when they are merely passing through the territorial sea. However, Article 19 of the LOSC provides that one of the *non-innocent* activities in the territorial sea is to engage in "any fishing activities."<sup>39</sup> Therefore, this limitation is not as significant a hurdle with respect to coastal State action to combat IUU fishing. The contiguous zone is discussed in relation to the territorial sea because this zone may be established by States as a maximum of 24 nautical miles from the outer edge of the territorial zone.<sup>40</sup> Within this zone, the coastal State has the right to punish infringement of its domestic law, including fisheries laws.<sup>41</sup> This zone exists to enable a state to prevent criminals from fleeing the territorial sea and thereby effectively handicapping the coastal State's enforcement powers for violations of domestic laws.<sup>42</sup> However, this distinction is less important for IUU fishing, since unauthorized exploitation of living marine resources (fish) by foreign vessels is theoretically punishable by the coastal State whether it is in the territorial seas, the contiguous zone, or

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<sup>36</sup> *Id.*

<sup>37</sup> Practically, unauthorized fishing in the territorial seas is often dealt with under the law applicable to fishing in a coastal State's EEZ, although the powers of the coastal State with regards to what can be done in response to illegal fishing is greater in the State's territorial sea. See William Edeson (Senior Legal officer) *Tools to Address IUU Fishing: The Current Legal Situation*, FAO (2000) <http://www.fao.org/3/Y3274E/y3274e0a.htm>.

<sup>38</sup> *Id.*

<sup>39</sup> United Nations Convention on the Law of the Seas, art. 19, para. 2(i), Dec. 10, 1982. U.N.T.S. 1833.

<sup>40</sup> Burgess, "Maritime Zones" (2017), <https://sites.tufts.edu/lawofthesea/chapter-two/>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

the EEZ.

The next maritime zone, and perhaps the most critical zone for the purposes of this Article's analysis of IUU fishing in the South China Sea, is a coastal State's EEZ. While the existence of other maritime zones comes from prior international law, the EEZ was created by the LOSC.<sup>43</sup> Article 73.1 provides:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding and inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.<sup>44</sup>

A State's EEZ extends 200 nautical miles from its territorial baseline.<sup>45</sup> Within this zone, the coastal State may exercise law enforcement capabilities to enforce its exclusive rights.<sup>46</sup> Pursuant to the coastal States' authority under the LOSC, many countries have enacted laws to control fishing in their EEZs.<sup>47</sup> As such, for the most part, it is not a lack of law or regulation authority that contributes to IUU fishing in EEZs. Rather, IUU fishing in EEZs is fostered by the inability of many countries to enforce their fishing laws.<sup>48</sup> This can be due to a lack of surveillance capability or lack of sufficient maritime forces to enforce fisheries laws. This is especially a problem in the South China Sea, due to conflicting claims over what maritime territory is controlled by China and because few other nations have close to sufficient maritime capacity to attempt to enforce their rights in their EEZs in the South China Sea.

Finally, the remainder of ocean waters that fall outside any State's EEZ are considered the high seas.<sup>49</sup> The high seas do not fall within the national jurisdiction of any one State, and States are allowed to engage in a broad array of activities on the high seas, so long as they are for peaceful purposes.<sup>50</sup> Flag States enjoy relatively exclusive jurisdiction over vessels flying its flag while on the high seas, whereas States other than the flag State enjoy relatively limited authority on the high seas.<sup>51</sup> The LOSC provides for

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<sup>43</sup> *Id.* at 12.

<sup>44</sup> Art. 73.1, United Nations Convention on the Law of the Sea, 1982.

<sup>45</sup> Edeson, *supra* note 40.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Burgess, *Maritime Zones* at 14.

<sup>50</sup> *Id.*

<sup>51</sup> Edeson, *supra* note 40.

the right of visit for foreign vessels under Article 110 in a few limited circumstances: where there are reasonable grounds for suspecting that a ship is engaged in piracy, the slave trade, or other crimes of universal jurisdiction; where the ship is without nationality; or where the vessel is flying a foreign flag or refusing to show its flag, when it is in reality the same nationality as the warship.<sup>52</sup> Notably, these powers of right of visit do not extend to vessels engaged in fishing on the high seas, unless otherwise provided by the flag State in treaty agreements.<sup>53</sup> The LOSC allows living resources to be exploited by any vessel from any State in the high seas, and does not impose any explicit limitations on fishing in the high seas.<sup>54</sup> However, the LOSC does encourage regional cooperation in conservation efforts on the high seas, typically accomplished through Regional Fisheries Management Organizations (RFMOs) and bilateral or regional agreements.<sup>55</sup>

### III. NAVAL ACTIVITIES AT SEA—DISTINGUISHING BETWEEN MARITIME LAW ENFORCEMENT AND MARITIME SECURITY OPERATIONS (MSOs)

Having discussed the jurisdictional scheme under international law, it is also important to discuss the constraints on forcible action at sea. At the outset of this discussion, Article 2(4) of the U.N. Charter provides:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. .”<sup>56</sup>

This provision establishes that the use of force by one State against another is presumptively illegal.<sup>57</sup> However, the prohibition on the use of force at sea

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* However, the author notes coastal States may exercise jurisdiction on the high seas by asserting a vessel has “constructive presence” in the State’s EEZ. This may be invoked if the ship on the high seas were a support ship providing support to other fishing vessels actually within the coastal State’s EEZ.

<sup>54</sup> Burgess, “Maritime Zones” (2017), <https://sites.tufts.edu/lawofthesea/chapter-two/>.

<sup>55</sup> The United States is a member of nine RFMOs and three bilateral/regional agreements. See Office of Marine Conservation, U.S. Dep’t. of St., *International Fisheries Management* (accessed November 25, 2020), <https://www.state.gov/key-topics-office-of-marine-conservation/international-fisheries-management/>. Additional international soft laws provide relevant standards for flag states and combatting IUU fishing, but these are not legally binding on parties to the agreements.

<sup>56</sup> U.N. Charter, art. 2, para. 4.

<sup>57</sup> The ICJ in the *Nicaragua* case affirmed that this provision creates a preemptory norm as to “the illegality of the threat or use of armed force against another state for the purpose of coercing it.” See Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of*

does not eliminate States' police powers exercised in maritime law enforcement. In exercising jurisdiction over foreign vessels, most States are primarily exercising their police powers within their adjacent maritime zones.<sup>58</sup> Naval forces are frequently relied on for this, since most States have limited capabilities at sea outside of naval forces.<sup>59</sup> Thus, the use of military forces does not by itself render State action a use of force at sea.

Law enforcement powers at sea requires that the State, acting within its own territory, have applicable domestic laws and regulations to be enforced.<sup>60</sup> States are not allowed to exercise these powers in the territory of another State, unless enabled to do so through permissive rules, treaties, or other agreements.<sup>61</sup> Even when enforcing their own domestic laws, States are to use force in maritime law enforcement against foreign vessels only as a last resort, and are required to use no more force than what is reasonable and necessary in the circumstances.<sup>62</sup> These requirements were pronounced by the International Tribunal for the Law of the Sea in the judgement in *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, reaffirming prior judgments from the Tribunal as to the requirement of necessity and reasonableness.<sup>63</sup> In summary, when a coastal State is acting within its internal waters or its territorial sea, the State may exercise its police powers against a foreign vessel in enforcing the coastal State's domestic laws. This is a legitimate exercise of maritime law enforcement if the force used meets the requirements of necessity and reasonableness. Within the EEZ, the coastal State only has enforcement powers with respect to its exclusive right

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*Force: Reflections on the Categorisation of Forcible Action at Sea in Light of the Guyana/Suriname Award*, 13 J. of Conflict & Security L. 1, 49-91, 58 (2008).

<sup>58</sup> Kwast, *Maritime Law Enforcement* at 53.

<sup>59</sup> *Id.* at 53-54.

<sup>60</sup> *Id.* at 54.

<sup>61</sup> *Id.* at 55.

<sup>62</sup> *Id.* at 57. (citing *The M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the law of the Sea, Judgment (Merits), paras 153-159 (1999).

<sup>63</sup> This case involved a dispute between the governments of Guinea and St. Vincent and the Grenadines over whether Guinea had used excessive force in firing at the ship *Saiga* in order to stop it for arrest. The judgment from the Tribunal in this case affirmed prior articulations of customary international law as set forth in the judgements pertaining to *S.S. 'I'm Alone'* and *'The Red Crusader.'* See *The M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Int'l. Trib. for the L. of the Sea, Judgment (Merits) (1999); *S.S. 'I'm Alone' case (Canada/United States)*, 7 ILR 203 (1935) (finding that, while the U.S. was entitled to use necessary and reasonable force in boarding, searching, and seizing a vessel suspected of illegal rum-running, the U.S. had not met these standards when it pursued the vessel, fired warning shots, and eventually sunk it.); *The Red Crusader (Denmark/United Kingdom)*, 35 ILR 485 (1962) (finding that Denmark had exceeded legitimate use of force while attempting to detain the *Red Crusader* after firing solid gun-shot that endangered human life on board the fleeing vessel).

to exploit living resources.

However, there is an additional category of action at sea, and one that is particularly important for this Article because it enables States to act outside of its own territory and within another State's EEZ—maritime security operations (MSOs). MSOs are more than simple law enforcement because they are for military ends, but they are still peacetime tasks not rising to the level of a use of force constituting naval warfare.<sup>64</sup> International law allows all states to conduct peaceful military activities anywhere beyond the territorial sea of another nation.<sup>65</sup> As a reminder, the EEZ provided in international law only establishes a coastal State's exclusive right to exploit living resources. Other States are free to act within this zone consistent with this exclusive right. This view was supported by most States participating in the LOSC negotiations, agreeing that “[m]ilitary operations, exercises and activities have always been regarded as internationally lawful uses of the sea.”<sup>66</sup>

The basis for a State's power to conduct MSOs in international law, as relevant to this discussion, is premised on the notion of the universality of crime.<sup>67</sup> This principle—not to be confused with crimes of universal jurisdiction—is the understanding that illicit activity conducted on the seas outside of any nation's jurisdiction is contrary to good order and the innate freedom of the seas.<sup>68</sup> The U.S. Navy defines maritime security operations as those “conducted to protect U.S. sovereignty and maritime resources, support free and open seaborne commerce, and to counter maritime-related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction and illegal seaborne immigration.”<sup>69</sup> The U.N. has not acknowledged a settled definition of maritime security or those operations conducted in furtherance of such.<sup>70</sup> However, an indication of what the U.N. considers justified maritime security operations comes from the threats to maritime security identified in U.N. reports. In the 2015 *Oceans and Law of the Sea*

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<sup>64</sup> Kraska, *Military Operations* at 873.

<sup>65</sup> Raul Pedrozo, *Military Activities in the Exclusive Economic Zone: East Asia Focus*, 90 Int'l L. Stud. 514, 515 (2014).

<sup>66</sup> *Id.* (citing 17 Third U.N. Conference on the Law of the Sea, Plenary meetings, Official records, U.N. Doc. A/CONF.62/WS/37 and ADD.1–2, 244 (1973–1982)). However, it is important to note that even with this understanding during the negotiations over the LOSC, there is still disagreement over the right to military activities in the EEZ.

<sup>67</sup> John Burgess, Lucia Foulkes, Philip Jones, Matt Merighi, Stephen Murray, Jack Whitacre, *Maritime Security and the Convention on the Law of the Sea*, in *Law of the Sea: A Policy Primer*, The Fletcher School of Law and Diplomacy, Tufts University (2017), <https://sites.tufts.edu/lawofthesea/chapter-six/>.

<sup>68</sup> *Id.*

<sup>69</sup> James T Conway GEN, Gary Roughead ADM, & Thad W Allen ADM, *Naval Operations Concept 2010*, 35 (2010), <https://fas.org/irp/doddir/navy/noc2010.pdf>.

<sup>70</sup> Burgess, *Maritime Security and the Convention on the Law of the Sea* (2017).

report, distributed annually by the U.N. Secretary-General, threats to maritime security included piracy<sup>71</sup> and armed robbery at sea, illicit trafficking in narcotics, illicit trafficking of firearms, and smuggling and trafficking of persons.<sup>72</sup> These activities, posing a threat to maritime security, can thus be addressed by maritime security operations even within the EEZ of another state.

#### IV. IUU FISHING IS A MARITIME SECURITY THREAT ADDRESSABLE THROUGH MSOs

In light of the preceding discussion of the severe consequences of IUU fishing, and the applicable international law, the final question remains whether the United States is justified in claiming that IUU fishing in the South China Sea poses a viable threat to maritime security to justify MSOs.<sup>73</sup> It is unquestionable that millions of people facing food insecurity can threaten a nation's security by causing instability through civil unrest. This is a very direct threat to many of the States bordering the South China Sea, and the U.S. National Security Advisor O'Brien does cite this threat to "the sovereignty of our Pacific neighbors" as one of the reasons for conducting MSOs in the South China Sea. However, it is the final threat he cites, that China's IUU fishing "endangers regional stability," that is the more important maritime security threat posed to the United States. IUU fishing is a means for China to exert maritime dominance. The highly aggressive and predatory nature of China's fishing fleet is indicative of China's larger geopolitical aspirations in the Western Pacific. The United States has a direct security interest in playing a significant role in combatting IUU fishing in the South China Sea because this is vital to maintaining U.S. power in the Western

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<sup>71</sup> The activities identified as threats to maritime security overlap with some of the enumerated activities in Article 110 of the LOSC discussed in the section focusing on maritime enforcement jurisdiction, but these are distinct legal rights. Article 110 sets forth the right of visit on the high seas, a maritime law enforcement power. Although not explicitly applicable to the EEZ, the right of visit set forth in Article 110 is also available in the EEZ pursuant to Article 58(2), which provides that "Articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with this Part." However, the right to conduct maritime security operations in the EEZ is pursuant to Article 58's recognition that within the EEZ all states enjoy "other lawful uses of the seas."

<sup>72</sup> U.N. Secretary-General, *Oceans and the Law of the Sea in the general Assembly of the United Nations*, ¶¶ 43–55, U.N. Doc. A/70/74/Add.1 (Sep. 1, 2015).

<sup>73</sup> Interestingly, illegal IUU fishing activity has been described as "fish piracy," likely because of the illegal and highly profitable nature of the activity. See *Making Sure Fish Piracy Doesn't Pay*, OECD Observer, Organisation for Economic Co-Operation and Development (2006). There is a viable argument that IUU fishing should fall under the existing LOSC definition of piracy, but this is an argument to be explored in future academic research.

Pacific.

American power in the Western Pacific region has historically been largely defined by sea power, and this continues to be the case.<sup>74</sup> In an effort to challenge U.S. dominance as the main sea power, China has expanded its naval forces in an effort to back its territorial claims and extend its influence.<sup>75</sup> However, the People's Liberation Army Navy is not the only Chinese fleet that has been expanding. Estimates of China's total fishing fleet place the number of boats at anywhere from 200,000 to 800,000 fishing boats, accounting for nearly half of the world's fishing activity.<sup>76</sup> Within this, China also has the largest distant water fishing (DWF) fleet in the world.<sup>77</sup> Current estimations of the size of the DWF fleet place numbers at roughly 1,600 to 3,4000 ships, but experts believe the fleet could be five to eight times larger than these estimates.<sup>78</sup> These DWF vessels are so large, they can catch as many fish in one week as local boats from the coastal States they are poaching from catch in a year.<sup>79</sup> Not only is China's fleet of DWF fishing boats the largest in the world, they are particularly predatory, both in the South China Sea and globally.<sup>80</sup> The report of hundreds of Chinese fishing vessels fishing near the Galápagos mentioned earlier in this Article is only one of a number of recent incidents of Chinese DWF vessels fishing in the EEZs of other nations. There have been reports of Chinese fishing off the Galápagos alone since 2016.<sup>81</sup> In early October, Chinese fishing vessels were caught in squid and crab fishing grounds off of Ishikawa Prefecture, and area squarely within Japan's EEZ.<sup>82</sup> In 2016, the Argentine Coast guard sank three Chinese fishing vessels caught illegally fishing within its EEZ in the South Atlantic, but not before one of the vessels attempted to ram one of the Argentine ships.<sup>83</sup> The expansion of China's DWF fleet, which continues to engage in highly

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<sup>74</sup> David C. Gompert, *Sea Power and American Interests in the Western Pacific*, Nat'l. Def. Res. Institute (2013), xi.

<sup>75</sup> *Id.*

<sup>76</sup> Ian Urbina, *How China's Expanding Fishing Fleet is Depleting the World's Oceans*, Yale Environment 360 (Aug. 17, 2020), <https://e360.yale.edu/features/how-chinas-expanding-fishing-fleet-is-depleting-worlds-oceans>.

<sup>77</sup> Mervyn Piesse, *The Chinese Distant Water Fishing Fleet and Illegal, Unreported, and Unregulated Fishing*, Future Directions International (Oct. 13, 2020), <https://www.futuredirections.org.au/publication/the-chinese-distant-water-fishing-fleet-and-illegal-unreported-and-unregulated-fishing/>.

<sup>78</sup> *Id.*

<sup>79</sup> Urbina, *How China's Expanding Fishing Fleet is Depleting the World's Oceans*.

<sup>80</sup> Scott Foster, *US Coast Guard to net wayward Chinese fishing fleets*, Asia Times (Oct. 26, 2020), <https://asiatimes.com/2020/10/us-coast-guard-to-net-wayward-chinese-fishing-fleets/>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



predatory behavior both in the South China Sea and globally, is a serious threat to U.S. interests in the Western Pacific, and is rightfully the subject of military operations.

Chinese fishing forces aggressive tactics against other States may also be more than a simple desire to avoid legal consequences. Aside from the attempted ramming of Argentinian Coast Guard vessels, there have been other incidents of Chinese fishing vessels attempting to or actively hitting other States' patrol boats, which has exacerbated the tensions produce by the IUU fishing in the first place.<sup>84</sup> The commercial fishing vessels engaging in this aggressive behavior are often shadowed by armed Chinese Coast Guard vessels.<sup>85</sup> Some have described these commercial fishing vessels as serving as "de-factor paramilitary personnel whose activities the Chinese government can frame as private actions."<sup>86</sup> Portraying aggressive maritime maneuvers as private conduct allows China to operate in a gray zone, avoiding obvious State use of force while maintaining physical control over the area. These aggressive fishing fleets have been critical to maintaining and expanding China's territorial claims by swarming close to areas claimed by other States, all under the justification of China's traditional claim to the non-dash line.<sup>87</sup> The growth of the Chinese fishing fleet has been heavily subsidized by the Chinese government, to the tune of billions of yuan in support annually.<sup>88</sup> It is unquestionable that the fleet helps assert control over China's territorial claims, pushing back foreign fishermen and even the governmental forces that challenge Chinese sovereignty on the South China Sea.<sup>89</sup> The potential consequence of this highly aggressive and brazen conduct is not just the potential usurpation of U.S. power in the Western pacific—increasing tensions between powers like China and Japan have the potential to escalate into serious military conflicts.

Even though there has been much political and scholarly criticism of this aggressive and legally questionable conduct, China ignores all of this criticism. This may be due in part to the fact that this aggressive fleet of

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<sup>84</sup> *Id.*

<sup>85</sup> Urbina, *How China's Expanding Fishing Fleet is Depleting the World's Oceans*.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* This article notes that the Chinese government has taken recent steps to reverse this trend, going so far as to release a five-year plan in 2017 that restricts the total number of DWF vessels to under 3,000 by 2021. Some experts believe that while the Chinese government is serious about restricting the DWF fleet, the efficacy of implementing these restrictions is questionable. The Chinese government has also taken efforts to destroy some illegal fishing vessels found guilty of fishing without a license or without a vessel name or proof of being on a port registry

<sup>89</sup> *Id.*

nominally civilian fishing vessels is effectively a form of “lawfare”.<sup>90</sup> Purposely keeping aggression below the level of an armed attack by a military force complicates the responses of targeted parties, who do not want to be the ones accused of launching an armed attack. And yet there are many signs supporting the observation that this civilian fleet may in fact be more than simple commercial vessels, leading some to describe it as China’s “hidden navy.”<sup>91</sup> Observers have reported that the behaviors of some of China’s fishing fleet, especially in contested areas like the Spratly Islands off the coast of the Philippines, cannot adequately be explained as that of normal commercial fishing vessels.<sup>92</sup> The vessels spend nearly all of their time anchored in large clusters, and many of the vessels rarely have their fishing gear deployed.<sup>93</sup> These are unusual behaviors for commercial vessels, since remaining anchored and not actively engaged in fishing is the antithesis of profitable behavior. As this unofficial militia increases, more and more conflicts with other States are likely to arise from it, rather than the People’s Liberation Army Navy, further complicating the international response. As such, American MSOs are an appropriate counter to the lawfare tactics being employed by the Chinese government with this questionably commercial fishing fleet.

#### CONCLUSION

The Statement by National Security Advisor Robert O’Brien, announcing the plan to use the U.S. Coast Guard to combat China’s IUU fishing with maritime security operations in the Western Pacific, at first seems inconsistent with coastal States’ powers to enforce fishing regulations through maritime law enforcement. However, analysis of the serious threats posed by IUU fishing—including dire environmental, economic, and larger geo-political consequences—supports the argument that the practices of IUU fishing pose a threat to U.S. maritime security. This is particularly true in the South China Sea for a number of reasons. The first being many nations, and millions of people within those nations, rely on the fishing industry from the South China Sea for their food and livelihoods. Eradication of the fishing

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<sup>90</sup> Lawfare refers to the use of law as a weapon of conflict, a term which was vaulted into the popular vernacular of the National Security sphere by Maj Gen Charles Dunlap, Jr., USAF (Ret.).

<sup>91</sup> Gregory Poling, *China’s Hidden Navy*, ForeignPolicy.Com (Apr. 23, 2019), <https://foreignpolicy.com/2019/06/25/chinas-secret-navy-spratlys-southchinasea-chinesenavy-maritimemilitia/>.

<sup>92</sup> *Id.* The author provides an in-depth explanation of all of the discrepancies in behavior of these vessels as compared to normal commercial fishing vessels, much of which is more detailed than required for the purposes of this Article.

<sup>93</sup> *Id.*

stocks in this area would result in significant instability in an area where the U.S. maintains a significant maritime presence. Second, China has invested in an ever-increasing fleet known to engage in highly predatory and aggressive behaviors. Third, these vessels direct their aggression not only towards fishing vessels of other nationalities, but also towards the Coast Guard vessels of a number of nations attempting to enforce their exclusive rights to natural resources within their EEZs. This fleet has effectively become a paramilitary force and is reasonably characterized as a form of lawfare. As a result, these actions pose a significant threat to U.S. maritime security and are best combatted through peacetime military actions. The use of the U.S. Coast Guard for these maritime security options is within the traditional understanding of lawful uses of the sea, and thus satisfies legal constraints under international law.