THE SHIFT IN POWER DISTRIBUTION AND ITS INFLUENCE ON THE LAW OF THE SEA

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ABSTRACT

Power and its distribution have always been the central themes of international law, yet international lawyers have paid limited attention to the correlation between power shifts and legal change. Notably, international law effectively operates when balance of power is sustained. With this qualification, this paper examines the relationship of international law with the change in power distribution, arguing that international law should proactively attend to power in order to contribute to the peaceful reconfiguration of the international system. Furthermore, this paper explores the mechanism of power shift being transmitted to law shift and specifically adduces the process and effectiveness of hegemonic international law change centered on UNCLOS.

Keywords: Power and International Law, International Law and International Relations, UNCLOS, Hegemonic International Law, The Rise of China and its Legal Implication

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INTRODUCTION

In international society, power lies in almost every element at any given time. [1] The history of world politics has been "characterized by successive rises of powerful States that have governed the system and have determined the patterns of international interactions and established the rules of the system."[2] Not surprisingly, history teaches that changes in the international system have critical consequences for the nature and efficacy of international law.[3]

Power and its distribution have always been the central themes of international law (while lawyers see power as inherently injustice); [4] however, international lawyers seem to have rarely systematically studied the influence of power disparity on international law.[5] As politics cannot exist without the law, law cannot exist without politics.[6] As such, politics provides law with its "rough content" and a certain degree of a "driving force" upon which law develops its final form in a specific normative manner.

The structural rivalry between China and the United States, which is becoming more pronounced and profound, is visible not only to political scientists but also to international lawyers. Most international relations scholars agree that the international system is shifting, and that China in particular is seeking to become the dominant or preponderant power in the Indo-Pacific region. [7]

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[1] MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 220 (2003).

[2] ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS 42-43 (1981).

[3] John Yoo, *Embracing the Machines: Rationalist War and New Weapons Technologies*, 105 CALIF. L. REV. 101, 130-31 (2017) (explaining the importance of change in shift in the distribution of power for effectiveness of international law).

[4] *See* M. Sornarajah, *Power and Justice in International Law*, 1 SING. J. INT'L & COMPAR. L. 28, 37 (1997) (discussing international lawyers of developing States that regard power in international law as a way for developed States to justify dominance).

[5] Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L 369, 372 (2005).

[6] Miro Cerar, *The Relationship Between Law and Politics*, 15 ANN. SURV. INT'L & COMPAR. L. 19, 21-23 (2009) (noting that in politics' view "the legal system can be viewed as part of the political system, which means that the legislatures and courts are political institutions, the rule of law is a political ideal, and adjudication and legal reasoning are practices and techniques which are part of the political culture of the society in which they flourish").

[7] *See* AARON L. FRIEDBERG, A CONTEST FOR SUPREMACY: CHINA, AMERICA, AND THE STRUGGLE FOR MASTERY IN ASIA 157, 163 (2011) (stating China's rulers seem to

Moreover, many U.S. commentators suggest that China harbors revisionist aspirations toward a regional order that would push the United States out of Asia.[8]

In this regard, how China's rise and the resulting power shift inform the international structure and stability has received much attention from policymakers and political analysts.[9] Similarly, international lawyers are urged to consider the dynamic between international law and politics in the development of the international legal system for international lawyers.[10] International law is thought to be constitutive of power in the sense that power operates in and through international law.[11] If this is the case, understanding the correlation between power shifts and their impact on the legal arena will help international lawyers provide timely legal advice. Undoubtedly, China's approach to international law and the rise of China will have a major impact on the future development of international law to a greater or lesser extent.[12]

In more general terms, the effectiveness of international law is inextricably tied up with power—normative, cognitive, or physical.[13] That is, international law effectively operates when the

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want their country to become the dominant or preponderant power in East Asia and possibly Asia writ large).

[8] *See* Robert J. Art, *The United States and the Rise of China: Implications for the Long Haul*, 125 POL. SCI. Q. 359, 379-81 (2010) (considering the interests of the United States in East Asia that may differ from China's territorial goals); *see also* Dean Cheng, *Seapower and the Chinese State: China's Maritime Ambitions*, BACKGROUNDER, Jul. 11, 2011, at 1 (discussing that China's dependence on the seas is growing in spite of America's capabilities in the region).

[9] *See generally* ROBERT S. ROSS & ZHU FENG, CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS (Robert S. Ross & Zhu Feng eds., 2008) (discussing how China's rise has led to political and strategic confrontation); PETER SHARMAN, POWER TRANSITION AND INTERNATIONAL ORDER IN ASIA (Peter Sharman ed., 2015) (evaluating the contestation of territories in Asia and China's tensions with its neighbors); ROBERT F. ASH ET AL., POWER SHIFT: CHINA AND ASIA'S NEW DYNAMICS (David Shambaugh ed., 2005) (explaining the evolution of China's approach to foreign policy throughout its political development).

[10] *See* ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW A GLOBAL INTELLECTUAL HISTORY 1842–1933 21 (2014) (arguing that understanding international politics matters in understanding international law).

[11] DENNIS R. SCHMIDT, GLOBAL POWER SHIFTS AND INTERNATIONAL LAW 189 (Tonny Brems Knudsen & Cornelia Navari eds., 2022).

[12] *See* Anlei Zuo, *China's Approaches to the Western-dominated International Law: A Historical Perspective from the Opium War to the South China Sea Arbitration Case*, 6 U. BALT. J. INT'L L. 21, 54-55 (2018) (arguing that China's rise can impact structural biases in international law with more interests being taken into consideration).

[13] Cerar, *supra* note 6, at 28.

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balance of power is sustained. International law tends to see itself as a bulwark against disturbances to balance of power, thereby often labeling those actions that undermine the balance as international wrongs.[14] Meanwhile, law is less adaptable than politics, even when change is desirable for the benefit of the international community in times of power shifts. Nevertheless, once international law is adapted to power distribution, peace and stability are enhanced by the predictability and reliability of the law.[15]

With this in mind, this paper examines the relationship between international law and the changing distribution of power, arguing that international law should proactively address power in order to contribute to the peaceful reconfiguration of the international system. Part I examines the role of power in international law and the role of international law in times of power shifts. Part I also discusses the influence of legal positivism on legal scholarship, which has sidelined the consideration of power in legal thought. Part II demonstrates how balance of power has laid the foundation for the development, maintenance, and change of international law. Part II also attempts to answer the question of how power shifts are translated into law shifts by presenting the process and effectiveness of hegemonic change in international law and the mechanism of changes in normative structure. Part III examines how a power shift in international relations generates reconfiguration in the law of the sea regimes by examining the conditions and procedural characteristics of change in the UN Convention on the Law of the Sea (UNCLOS).

I. POWER IN INTERNATIONAL LAW

In political parlance, power can be defined as the "capacity to do things and in social situations to affect others to get the outcomes we want."[16] From this definition, one may reasonably infer that more

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[14] *See* Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. INT'L L. 555 (1979) (discussing how international law may obligate a balance of power label international wrongs as those that undermine that balance); *see also* Krisch, *supra* note 5, at 373 (emphasizing this aspect of international law as "stabilization"—preserving an "order that reflects the hegemon's preferences").

[15] *See* Cerar, *supra* note 6, at 33 (discussing that politics is less predictable and reliable than law).

[16] JOSEPH S. NYE, JR., THE FUTURE OF POWER 5-6 (2011). *Cf.* GEORG SCHWARZENBERGER, POWER POLITICS, 14 (3rd ed. 1964) (discussing another definition

powerful States apply power to have some effect on the development, maintenance, and modification of the rules of international law, or at least that "great" powers may have more opportunities to more easily "behave in ways which will significantly influence the development, maintenance or change of customary rules" than do weak States.[17]

International lawyers worry that to recognize power inequalities in law is to deny the equality of States. That is, the proposition that hegemons contribute significantly to and participate disproportionately in the life of international law compared to less powerful States has long been seen as inconsistent with the principle of sovereign equality, the backbone of the international legal system, as provided for in Article 2(1) of the UN Charter.[18] International lawyers also assume that (objective) international law has nothing to do with power because of sovereign equality.[19]

Powerful States, however, have disdained the concept of sovereign equality and thus disliked the principles that flow from it, such as one-State, one-vote.[20] History suggests that the hegemons, to varying degrees, have conveniently utilized international law to their advantage when it has been suitably adapted.[21] In *The Epochs of International Law*, Wilhelm Grewe argues that successive hegemons—through the periods of the dominance of Spain (1494-1648), France (1648-1815), and Britain (1815-1919)—have shaped the foundations of the international legal system.[22] Assuming that power is the overriding consideration in international society, the primary function of law can be understood as assisting "in

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of power as the "capacity to impose one's will on others by reliance on effective sanctions in case of non-compliance").

17 *See* BYERS, *supra* note 1, at 35, 37.

18 *See* U.N. Charter art. 2, ¶ 1 (stating that the "[UN] is based on the principle of the sovereign equality of all its Members").

19 *See* Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 845 (2001) (discussing the international law aspect that is based on the idea of equality of the States); *see also* BYERS, *supra* note 1, at 35 (suggesting that the conception of sovereign equality results in a lack of focus on power).

20 NICO KRISCH, UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 136 (Michael Byers & Georg Nolte eds., 2003); Krisch, *supra* note 5, at 388.

21 Vagts, *supra* note 19, at 845, 848.

22 *See* WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 697 (Michael Byers ed., 2000) (discussing different powers that have been predominant have determined the character of international legal order).

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maintaining the supremacy of force and the hierarchies established on the basis of power."[23]

Most international legal scholars understand that balance of power was the foothold in the Peace of Westphalia in 1648.[24] Rainer Grote parses that balance of power was a "necessary and indispensable corollary to the functioning of the international system inaugurated by the Westphalian system."[25] In 1713, "equilibrium of power" was inscribed in the Peace of Utrecht, which ended the War of the Spanish Succession and stated its aim as "establishing and stabilizing the peace and tranquility of the Christian world by a just equilibrium of power."[26]

The first jurist to mention power in relation to international law was Alberico Gentili (1550-1608): "the balance of power should be maintained among the princes of Italy."[27] Although some early international lawyers, including Hugo Grotius (1583-1645), seem to criticize or negatively approach the inclusion of the concept of balance of power in legal reasoning,[28] the theory that balance of power constitutes a core concept or a determinant of international law was widely shared among early international scholars, such as Christian Wolff (1679-1754) and Emmerich de Vattel (1714-1767).[29]

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[23] SCHWARZENBERGER, *supra* note 16, at 199; *see also* WILLIAM E. SCHEUERMAN, THE END OF LAW: CARL SCHMITT IN THE TWENTY-FIRST CENTURY 165 (2020) (asserting that "[i]nternational law remains one of the least developed areas of modern law" and "employment [of law] . . . subject to the opportunistic whims of great powers").

[24] Vagts & Vagts, *supra* note 14, at 560.

[25] RAINER GROTE, THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 871 (Rüdiger Wolfrum ed., 2012). *But see* XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE, AND INTERNATIONAL LAW 34 (2012) (stating how the rules symbolized under Westphalian system could be considered as devoid of civilization and cultural discrimination).

[26] Vagts & Vagts, *supra* note 14, at 560.

[27] *Id.* at 559.

[28] *Id.* at 560 (Hugo Grotius negatively assesses a contemporary argument that "according to the law of nations it is right to take up arms in order to weaken a growing power which, if it becomes too great, may be a source of danger."); *see also id.* at 566-67 (Additionally, Johann Ludwig Klueber (1762-1837) observes balance as "a mere idea of diplomats or politicians, very vague, simply founded upon a feeling of convenience which consequently lacks the essential character of a source of international law.").

[29] *Id.* at 562 (acknowledging a special role of balance of power for international society and Wolff notes that "equilibrium is especially useful to protect the common security"); *id.* (claiming that in the face of manifest attacks of other [S]tate, nations "have the right for the purpose of preserving the equilibrium, to overthrow the growing power by armed force"); *id.* (Vattel perceived equilibrium as crucial to Europe's order and liberty); *id.* at 561 (suggesting that a ruler is entitled to draw his sword provided that other party "is on the increase or stepping out of

Thus, natural law scholars kept the balance of power concept within the legal universe by blending power relations with other views in the interest of a better world community.[30] In line with this understanding, Léonce Donnadieu perceived balance as having a legal character: "the political equilibrium . . . is the expression of a law in the life of nations."[31]

With the advent of legal positivism, the above legal tradition underwent a fundamental change. John Austin (1790-1859), the founding father of legal positivism,[32] divided laws into three groups: "positive law," "natural law," and "international law." First, "positive law" or "law existing by position" are laws made by men (often political superiors) for men (political inferiors), with sanctions or enforcement of obedience applied when a duty is violated. Second, "natural law" (the law of nature, the divine law, or the law of God) are laws established by God for men. Divine laws are also called "religious duties." Therefore, violations of these duties are called "sins" and are subject to religious sanctions. Third, "international law" (the law of honor, positive morality, positive international morality, or practical international law) is law established and enforced by "mere opinion" as morality. Austin explains that "[t]he name morality severs them from positive law, while the epithet positive disjoins them from the law of God."[33] In this view, international law cannot be called "law" because it is not sanctioned by political superiors.[34]

With the rise of positivism's denigration of international law, international lawyers have sought to conceptualize international law as something other than morality or mere opinion.[35] Hans

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the balance"); *id.* at 566 (regarding the idea of the balance of power an essential support of international law).

30 *Id.* at 579.

31 *Id.* at 572.

32 ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 8 (1994). Johann Jacob Moser (1701-1785) is also mentioned as a founder of modern positivism in international law. *See* Vagts & Vagts, *supra* note 14, at 562-63; *see also* ROBERTO AGO, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 385 (Rudolf Bernhardt ed., 1984) (discussing positivism in international law).

33 JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 20 (2001).

34 HIGGINS, *supra* note 32, at 13.

35 RADHIKA WITHANA, POWER, POLITICS, LAW: INTERNATIONAL LAW AND STATE BEHAVIOUR DURING INTERNATIONAL CRISES 20 (2008). Similar to the influence of positivism on international law but from a different perspective, "Classical legal thought" contends that international law is a neutral and apolitical venue. Classical legal thought (legal orthodoxy) dominated the thinking of American lawyers from roughly 1880 to 1973, assuming that "only law that was objective . . . could be

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Kelsen developed the pure theory of law to answer the question of "what and how the law is, not how it ought to be" as a science of law, not as a political exposition.[36] Radhika Withana assesses that "[t]he main project of positivist thinkers in international law has been to determine a body of legal rules that are truly juridic in nature and not tainted by non-legal considerations such as morality or ethics."[37]

Admittedly, positivism is the most prevalent legal philosophy among international lawyers. This paradigm assumes that legal issues or positions are distinct from non-legal issues or positions (e.g., policy or political issues). In addition, positivist international lawyers believe that "law exists prior to policy and that the process of legal analysis should be undertaken prior to the determination of policy."[38] On this basis, positivists argue that international law *sua sponte* is sufficient to determine State behavior but negate the relationship between international law and State behavior or power relations.[39]

In fact, positivist international law brushes aside the reality of world society and thereby hinders the evolution of international rules.[40] More specifically, positivism completely ignores the role of "shared understanding" in international society; certainly, shared understanding of legal relevance counts for much in the transformation of State practice into customary international rules.[41] Higgins points out that the assumption that law is concerned not

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legitimate in a democratic republic." *See generally* 2 CLASSICAL LEGAL THEORY, THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (2009); Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 67 (2006).

36 *See* HANS KELSEN, PURE THEORY OF LAW 1 (Max Knight ed., 1967); *see also* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 113 (Anders Wedberg ed., 1949) (proposing the existence of some higher norm that has authorities: "Norm creating power is delegated from one authority to another authority; the former is the higher, the latter the lower authority. The basic norm of a dynamic system is the fundamental rule according to which the norms of the system are to be created.").

37 WITHANA, *supra* note 35, at 21.

38 *Id*. at 27.

39 *See id.* at 19-27 (discussing the positivist analyses between international law and State behavior).

40 Monica Garcia-Salmones Rovira, *The Project of Positivism in International Law*, 25 EUR. J. INT'L L. 601, 603 (2014); *see also* Zuo, *supra* note 12, at 50 (citing a Chinese scholar's argument that "[t]he seemingly productive, systematization of international law and enhanced legitimacy of the Western-dominated international law reinforces international law to be a tool for international exploitation and dominance by some countries").

41 BYERS, *supra* note 1, at 205.

with power, but only with the concept of authority is a fantasy because "[a]uthority cannot exist in the total absence of control."[42]

The pendulum of legal philosophy has swung back again in favor of recognizing the role of power in legal reasoning. This is due in large part to the development of the New Haven School and Critical Legal Studies. First, the New Haven School, promoted by Harold Lasswell and M.S. McDougal, among others, adopted a purely sociological approach to legal scholarship (a "policy science"), taking into account the authority and control exercised by decision-makers. From this perspective, law is a product of the decision-making process in which authority and control are exercised,[43] and power is seen as an essential part of international law as a whole.[44]

Next, Critical Legal Studies, promoted by, *inter alia*, David Kennedy and Martti Koskenniemi, among others, argues that there is no clear distinction between law and politics; thus, the international legal system is neither self-contained nor apolitical.[45] Scholars of this school of thought affirm that "political considerations influencing the development of a legal rule should be acknowledged to expose bias and show how law is not living up to its image of political neutrality."[46]

Both the New Haven School and Critical Legal Studies examine law through the lens of social theory, placing legal processes in a social context, and bringing values to the fore. As is often argued by lawyers, international law is an embodiment of values, not just a

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42 HIGGINS, *supra* note 32, at 3-4.

43 BYERS, *supra* note 1, at 207.

44 Oscar Schachter, *The Role of Power in International Law*, 93 AM. SOC'Y INT'L L. PROC. 201 (1999) (Hoof fulminates against the New Haven School's approach to international law in that this approach "can lead to international law being used by States as a device for post facto justifying decisions without really taking international law into account." On this criticism, Higgins contends that there is no real international law that all men of good faith can recognize regardless of circumstance and context); *see* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 7 (1994).

45 David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L. J. 1, 1-49 (1988); *see* BYERS, *supra* note 1, at 45, 210 (adding that Critical Legal Studies try to "expose the myths of objectivity, of value-freedom and of determinacy in international law and . . . law creation by deconstructing legal texts").

46 WITHANA, *supra* note 35, at 54; *see also* Martii Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 9 (1990) (arguing that political components of international law are concerned with the dependence of law on political power and with the utopian political aspirations).

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system of rules.[47] As such, lawful or legitimate international law has nothing to do with ignoring everything that is not "rules." Rather, the consideration of shared values and community interests in the making of international law would provide additional support for making international law "legal."[48] This is not to argue that the balance of power or the principle of equilibrium is a judicial rule.[49]

It would seem incongruous to assume that power relations do not play a role in the process of international law, as if an international legal process were a completely neutral and procedurally objective mechanism. In reality, international rules are the result of an interactive and evolving social process involving States with varying degrees of power. Recognizing a social process in the life of international law comports more with a world society in which international law exists.[50]

Regardless of whether lawyers and legal publicists use the word "balance" or "power" in their writings (in most cases, they do not), balance of power (equilibrium theory) functions as a determinant or indispensable precondition of international law as a bulwark against war.[51] The need to consider power relations in the process of international law is bolstered by the practice of States in the formation of customary international law. It may well be the case that powerful States, collectively or individually, can contribute excessively to the formation of customary law through their capacity to act, react, and to publish reports containing legal analyses that support their practice.[52]

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47 MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 17 (1961).

48 HIGGINS, *supra* note 32, at 9.

49 *See* Vagts &Vagts, *supra* note 14, at 574-75 (citing Charles Dupuis' distinction that a judicial rule is to "supply clear, precise and identical solutions in all identical cases," while balance of power is "vague, uncertain and changeable").

50 BYERS, *supra* note 1, at 216.

51 *See* Vagts & Vagts, *supra* note 14, at 574, 578-79 (noting that Russian scholar, Alexander de Stieglitz, regarded balance as a necessary precondition to the establishment of an international order); *see also* BYERS, *supra* note 1, at 46 (In fact, most "[w]riters from the non-industrialized world have long recognized that non-legal power plays a role in the international legal system," thereby creating a system serving the interests of industrialized States).

52 STEPHEN TOOPE, POWERFUL BUT UNPERSUASIVE? THE ROLE OF THE UNITED STATES IN THE EVOLUTION OF CUSTOMARY INTERNATIONAL LAW 316 (Michael Byers & Georg Nolte eds., 2003); ANTHONY D'AMATO, THE CONCEPT OF CUSTOM 96-97 (1971); *see* BYERS, *supra* note 1, at 35-40 (emphasizing that powerful States' military, economic, and political strength has a bearing on enforcing jurisdiction claims, imposing sections, and diverting criticism).

In fact, the dominant actors have more leeway in interpreting and applying the mostly customary and vague rules. Such a power advantage over the weak still remains in the creation of customary rules inasmuch as the process of forming and identifying custom is inextricably tied up with a weighing of supporting and opposing State practices (no formal customary international law-making procedures exist).[53] In other words, the behaviors and pronouncements of hegemons on particular issues are more likely to be considered and thus measured in the making of customary rules due to the frequency and severity of the involvement of powerful States in the international legal system.[54] Charles De Visscher observes:

> Every international custom is the work of power . . . . [The role of the great Powers], which was always decisive in the formation of customary international law, is to confer upon usages that degree of effectiveness without which the legal conviction . . . would find no sufficient basis in social reality. Many customs owe their origin wholly to decisions or acts of great Powers which by their repetition or sequence, and above all by the idea of order that finally grows out of them, have little by little lost their personal, contingent, in a word political character and taken on that of a custom in process of formation.[55]

Echoing this perspective, Oscar Schachter points out that "[a]s a historical fact, [customary rules were] made by remarkably few States . . . . [Powerful States'] views and positions are noticed and usually respected. Their official legal opinions and digests of State practice are available along with international law treatises that influence professional opinion and practical outcomes."[56]

Following this logic, it is even argued that custom cannot develop customary international law in the absence of hegemonic participation, since such custom is disqualified from satisfying the "general practice" requirement for customary international law

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53 BYERS, *supra* note 1, at 5, 151-57; Krisch, *supra* note 5, at 387.

54 BYERS, *supra* note 1, at 19.

55 CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 149-50 (P.E. Corbett trans., 1957).

56 OSCAR SCHACHTER, NEW CUSTOM: POWER, OPINIO JURIS AND CONTRARY PRACTICE 536-37 (Jerzy Makarczyk ed., 1996).

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under Article 38 of the ICJ Statute.[57] Similarly, it is believed that, in most cases, great powers should be regarded as "States whose interests [are] specially affected,"[58] as the ICJ held in the 1969 *North Sea Continental Shelf* Cases.[59] The dissenting opinion in the *Paquete Habana* case categorically shows the understanding of the great power presence in rule-making: "It is difficult to conceive of a law of the sea of universal obligation to which Great Britain has not acceded." [60] Nevertheless, nothing stated thus far invites the conclusion that all the bodies of international law are entirely dependent on the will of the great powers.[61]

II. POWER SHIFT ENTAILING LAW SHIFT

One observation that follows from the previous Part is that changes in the distribution of power affect, to varying degrees, the process and substance of international law.[62] This Part examines some examples of how balance of power has influenced the development, maintenance, and change of international law and international organizations. It also explores the mechanism and causal relationship of power shift and law shift by using the hegemonic discourse of international law to demonstrate the

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57 Vagts, *supra* note 19, at 847.

58 *See* ICJ, NORTH SEA CONTINENTAL SHELF CASES 42 (1969) (noting that "it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected").

59 For a criticism on this suggestion, see GENNADY DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 96 (1993) (criticizing that "[i]n the absence of a clear definition, the notion of 'specially affected' States may be used as a respectable disguise for 'important' or 'powerful' States which are always supposed to be 'specially affected' by all or almost all political-legal developments within the international community").

60 The Paquete Habana, 175 U.S. 677 (1900) (Fuller, J., dissenting) (Harlan, J. and McKenna, J. joined), https://supreme.justia.com/cases/federal/us/175/677/ [https://perma.cc/CD5C-4XAW].

61 E.g., new institutions, such as EEZ up to 200 nautical miles and 12 nautical miles of territorial seas, found their positions in the law of the sea, despite great powers' aversion to accept. *See also* Schachter, *supra* note 44, at 43, 203.

62 *See generally* William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L. J. 3 (2015) (describing substantive changes in international law resulting from power shifts); KAPLAN & KATZENBACH, *supra* note 47, at 3.

process of (de)legitimization and the need to consider the aspect of social adaptation in law.

a. Political Power in the Form of Law

The refusal to recognize the social and political elements in law does not render law neutral, nor does it lead to infallible legal consequences.[63] In fact, political power is generally expressed and conserved in the form of law; thus, the existing (or changing) distribution of power inevitably influences the content of international law; in return, law contributes to sustaining the balance by reflecting values and needs.[64]

There are some noteworthy examples of how balance of power has laid the groundwork for the development, maintenance, and modification of international law. To begin with, the most paramount example is the 1951 San Francisco Peace Treaty, which is considered as a product of the Cold War. The geopolitical and ideological conflicts between the United States and the Soviet Union dominated world politics for decades. The power aspect of this treaty is underscored by the dramatic change in the U.S. position toward Japan, from prewar isolationism to the signing of the 1951 U.S.-Japan Security Treaty, which was simultaneously signed along with this Treaty.[65] Simply put, the San Francisco Peace Treaty was "nothing but a byproduct of the regional Cold War in the Asia-Pacific."[66]

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63 *See* HIGGINS, *supra* note 32, at 5. (noting that such a refusal *per se* is a political choice, causing political consequences).

64 NIKLAS LUHMANN, TRUST AND POWER 170 (1979); Schachter, *supra* note 44, at 205.

65 Thomas Schwartz & John Yoo, *Asian Territorial Disputes and the 1951 San Francisco Peace Treaty: The Case of Dokdo*, 18 CHINESE J. INT'L L. 503, 511 (2019).

66 KIMIE HARA, COLD WAR FRONTIERS IN THE ASIA-PACIFIC: DIVIDED TERRITORIES IN THE SAN FRANCISCO SYSTEM 49, 69, 140, 157 (2007) (noting that in the Yalta Blueprint—US, the British, and Soviet Union leaders met at Yalta, Crimea in February 1945 to design the port-war international order—the post-war settlement with Japan was planned in a harsh and severe manner. In the course of the Cold War, however, American policy toward Japan did an about face; furthermore, the advent of communism in China in 1949, and North Korea's invasion of South Korea in 1950 caused the United States to strive to secure Japan for the Western bloc. As a result, the final product became far too lenient with Japan to avoid a situation that benefits a communist-dominated China for territorial disposition.).

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UNCLOS is no exception. The Cold War rivalry was the immediate background to the negotiation of a new law of the sea treaty in the 1970s.[67] Hence, UNCLOS was not designed to address the "severity of contemporary realities"; as a corollary, the need to adapt the law of the sea system to a new circumstance has been pronounced ever since.[68] China also participated in the UNCLOS III negotiations (1973-1982), but it did not have enough power compared to the great powers of the time (the United States, the Soviet Union, Japan, and the United Kingdom) to formulate a regional maritime order conducive to its interests.[69]

As such, changes in power relations affect international agreements. States may enter into a treaty agreeing on certain agendas; if the relative power advantage between the parties changes dramatically, the shift in balance of power may lead to the treaty's collapse.[70] The distribution of power may affect bilateral treaties more than on multilateral ones.[71] Moreover, when States

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67 *See* DONALD ROTHWEL, ALEX OUDE ELFERINK, KAREN SCOTT & TIM STEPHENS, CHARTING THE FUTURE FOR THE LAW OF THE SEA 899-900 (Donald Rothwell, Alex Oude Elferink, Karen Scott & Time Stephens eds., 2015) (noting that "the text was negotiated and concluded against the backdrop of the Cold War").

68 *See* Katherine Morton, *China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?* 92 INT'L AFF. 909, 913 (2016); *see also* BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 112 (2014) (noting that "[t]he UNCLOS talks became a venue for Cold War arguments between capitalists and Communists but also between [S]tates that favored freedom of the seas and those who wanted to keep others out—and away from 'their' resources").

69 *See* Anisa Heritage & Pak K. Lee, *The Sino-American confrontation in the South China Sea: insights from an international order perspective*, 33 CAMBRIDGE REV. INT'L AFF. 134, 142 (2020).

70 *See* Yoo, *supra* note 3, at 129.

71 One example of a bilateral treaty being more vulnerable to changes in balance of power is the Sino-British Joint Declaration in 1997 concerning a handover of the exercise of sovereignty over Hong Kong. This treaty acknowledges "one country, two systems" as the governing framework codified in the Basic Law of the Hong Kong Special Administrative Region. Hong Kong was granted a "high degree of autonomy" for 50 years following the handover. In recent years, however, China has changed its legal position arguing that "the Joint Declaration expired in 1997 with the handover and the adoption of the Basic Law." One commentator examines that the Chinese proposition finds no basis in the international law applicable to treaties. *See* ROBERT D. WILLIAMS, INTERNATIONAL LAW WITH CHINESE CHARACTERISTICS: BEIJING AND THE "RULES-BASED" GLOBAL ORDER 6 (2020). Meanwhile, North Korea's withdrawal from the Nuclear Nonproliferation Treaty demonstrates that States go through hardship when they try to change their multilateral treaty obligations. *See* Frederic L. Kirgis, *North Korea's Withdrawal from the Nuclear Nonproliferation Treaty*, 8 AM. SOC'Y INT'L L. INSIGHTS (Jan. 24, 2003), https://www.asil.org/insights/volume/8/issue/2/north-koreas-withdrawal-nuclear-nonproliferation-treaty [https://perma.cc/AG3M-2JHC].

perceive international agreements as being inconsistent with or even harmful to their interest, they often deny or attack the consent of the treaty.[72] Not surprisingly, when a powerful State emerges as the dominant actor in international relations, it will not passively follow the old rules that are at odds with its national interests.[73]

Balance of power also has a decisive influence on the creation of international organizations. An attempt to create the Permanent Court of Arbitral Justice failed because the great powers rejected the Latin American countries' firm insistence on formal equality of all members was refused by the great powers; the court never came into being. By contrast, a kind of power imbalance was tacitly agreed upon not only in the creation of the League of Nations in 1919, but also in the establishment of the United Nations in 1945 (especially in the controlling role of the Security Council).[74]

b. How Power Shift Informs Law Shift

The question that arises is how this shift in power translates into a shift in law. To explore this question, we must examine a peculiar feature of international law that domestic law does not share: "violation of law can lead to the formation of new law."[75] If a body of norms undergoes substantial non-compliance over a period of time, the societal expectation that the behavior is required as a legal obligation fades out, and the normative character of the norm is subsequently lost.[76] From the opposite direction, when a potential hegemon promotes a new law, the growing power should build the legitimacy of the rules in the first place. If legitimation is secured (legitimized dominance), "authority" follows. In the end, members of the international community will perceive that the new law as the law to be obeyed.[77]

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72 *See* MICO A GALANG, NDCP POLICY BRIEF 1 (2016).

73 *See* STEPHEN M. WALT, RISING POWERS AND THE RISKS OF WAR: A REALIST VIEW OF SINO-AMERICAN RELATIONS 15 (Asle Toje ed., 2018).

74 *See* Krisch, *supra* note 5, at 397-98.

75 HIGGINS, *supra* note 32, at 19; Su Jinyuan, *The East China Sea Air Defense Identification Zone and International Law*, 14 CHINESE J. INT'L L. 271, 295 (2015) (noting that States are not only subjects but also rule-makers of international law, holding the rights to develop international practice).

76 *See* HIGGINS, *supra* note 32, at 19.

77 *See* Krisch, supra note 5, at 374.

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On the other hand, once the rising State challenging the existing hegemon finds itself in a position strong enough to change the rules advocated by the predominant power, the challenger seeks to delegitimize the existing rules while promoting new rules as legitimate.[78] The rising State should gain authority by promoting (seemingly) legitimate legal institutions of governance. On one side, if the challenger relies only on power, illegitimacy (or unlawfulness) may haunt the new legal system proposed by the emerging hegemon (the former challenger). On another side, if the challenger's new law successfully gains legal authority, other actors in the system will adhere to the new legal institutions as law out of conviction; in such a case, the new hegemon will pay little to enforce the rules.[79] Table 1 shows how hegemonic international law changes and how it functions.

Table 1 How Hegemonic International Law (HIL) Changes and Functions

Stable	Unstable (Legal Order)			Stable
Old Rules →	Delegitimizing Old Rules →	Legitimizing New Rules →	Authority →	Convicted Dominance
The Reasons Why States Comply with HIL				
By internalization of norms	By Calculus			By internalization of norms
HIL Enforcement Cost				
Low	High			Low

Source: author with reference to Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order," *European Journal of International Law*, Vol. 16, No.3 (2005), p. 374.

In terms of the shift mechanism, the delegitimization phase holds importance. This phase includes two components: a

78 Until the challenger reaches the point in which it could execute delegitimizing current rules, the challenger "partially and temporarily accept the legitimacy of the hegemon" taking advantage of "opportunities and authorized channels within the order to make relative gains and to contest particular behaviors of the hegemon." Of course, the challenger may overcome the order when such an option becomes viable. *See* Randall L. Schweller & Xiaoyu Pu, *After Unipolarity: China's Visions of International Order in an Era of US Decline*, 36 INT'L L. SEC. 41, 50 (2011).

79 *See* Krisch *supra* note 5, at 374; *see also* CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY 19 (2019) (noting that "the pursuit of the universality of international law demonstrates that international law has paid little regard to factual divergences among [S]tates").

"delegitimizing analysis" (the discourse of resistance) and a "cost-imposing strategy" (the practice of resistance).[80] Over time, delegitimizing the legal authority of a particular rule causes other State in the system to go through a complicated calculation process. If new (interpretations of) rules satisfy the various interests of other actors, their conviction of the legality or legitimacy of old (interpretations of) rules may be blurred and eroded.[81] On some occasions, a "revisionist counterhegemonic coalition" is formed among those whose legal interests are more aligned with the challenger's legal positions. This newly formed legal coalition, led by the emerging hegemon, will provide the basis for a demand for a new international legal system.[82] The delegitimization phase may be accelerated as the challenger gains a dominant share of the global market.[83]

Put another way, in the hegemonic normative structure, when a potential hegemon disagrees with the meaning of certain existing rules, assertive actions and legal justifications are followed, which subsequently triggers "lawfare" between the hegemon and a potential hegemon. The two sides are forced to engage in legal battles (by presenting opposing legal analyses, often based on analogies with previous cases) over long periods of time, which may be accompanied by the use of force. Once the challenger has the upper hand, the existing rules are modified; and in the end, the modified norms set the new framework for subsequent actions, discourses, and disputes.[84] Table 2 schematizes such a mechanism of change in the hegemonic normative structure.

Table 2 Mechanism of Changes in Normative Structure Caused by the Challenger

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80 *See* Schweller & Pu, *supra* note 78, at 44.

81 *See* FRIEDBERG, *supra* note 7, at 175.

82 For an account of a cyclical pattern of political order change, see George Modelski, *The Long Cycle of Global Politics and the Nation-State*, 20 COMP. STUD. SOC'Y & HIST. 214, 224 (1978) (expounding that "[t]he long cycle of global politics is the product of two conditions: the urge to make a global order; and the special properties and the necessary weaknesses of the global systems the world has experienced to date").

83 *See* MICHAEL J. MAZARR, TIMOTHY R. HEATH & ASTRID STUTH CEVALLOS, CHINA AND THE INTERNATIONAL ORDER 118 (2018).

84 *See* WAYNE SANDHOLTZ & ALEC STONE SWEET, LAW, POLITICS, AND INTERNATIONAL GOVERNANCE 257-58 (Christian Reus-Smit ed., 2004).

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Disagreements over the Meaning of the Rules → Actions → Disputes → Arguments with legal analysis → A. (If others agree with the challenger's analysis) Modification of the Rules *Changed Normative Structure*
→ B. (If others disagree with the challenger's analysis) Continuance of the Rules *Unchanged Normative Structure*

Source: author with reference to Wayne Sandholtz and Alec Stone Sweet, Law, politics, and international governance, in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), pp. 257-58.

As a consequence of the above mechanism, applications of power and State practice are legitimately transformed into a legal obligation and customary rules, thereby justifying "legalized hegemony" or "legislative inequality."[85] Under the pressure of the hegemonic legal system, weak States usually follow the legal positions of powerful States; the weak do not have enough power to challenge the universality of hegemonic international law, or they receive hegemonic rewards for following such rules, or in some cases they are simply forced to accept such rules.[86]

c. Striking a Balance Between Social Stability and Social Adaptation

It is worth noting that international law, as is often the case with the law in general, has a dual function: as an instrument of "social stability" and "social adaptation."[87] It is true that, for the most part, the law tends to be suspicious of change and to require "stares decisis special justification for departure from the past."[88] The

[85] *See* BYERS, *supra* note 1, at 6; *see also* GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES 73 (2004); *see also* Krisch, *supra* note 5, at 378 (stating that hegemonic international law offers hegemons "an excellent tool for international regulation and for the pacification and stabilization of their dominance, especially because of the high degree of legitimacy that action through legal forms and procedures enjoys").

[86] *See* CAI, *supra* note 79, at 19; *see also* Krisch, *supra* note 5, at 373.

[87] Newton Edwards, *Stability and Change in Basic Concepts of Law Governing American Education*, 65 SCH. REV. 161, 161-62 (1957) (noting that law is the "guardian of the intrinsic values that have stood the test of human experience," which characteristics are preservative and conservative).

[88] Robert B. McKay, *Stability and Change in Constitutional Law*, 17 VAND. L. REV. 203, 203 (1963). "In common law systems, legal stability and predictability are bolstered by judicial adherence to precedent and the informal norm of *stare decisis*." STEFANIE A. LINDQUIST & FRANK C. CROSS, STABILITY, PREDICTABILITY AND THE RULE OF LAW: STARE DECISIS AS RECIPROCITY NORM 1 (2010).

proclivity for stability, if not a standstill, lies at the core of international law.[89] But if international law continues to refuse to adapt to other elements of society (such as balance of power), the international legal system will become dysfunctional, unable to contribute to a changing political world.[90] In other words, by clinging to the rules of the past, international law will lose its ability to deal with today's problems; as a result, the international legal system may decay and suffer from substantial noncompliance and disobedience.[91] To address this problem, international law must strike a balance between the conflicting demands of stability and adaptation.[92]

On this basis, the existing dominant power is urged to perceive that it has more duties than the challenger to maintain global or regional stability.[93] Krisch puts the danger of legal anachronism as the following:

> By focusing on the past, international law allows previous generations to rule over present ones, and this makes it difficult for powerful actors to remake the international legal order according to their own vision. In international law, this problem is especially acute because changes in international law require widespread consent and are usually slow and incremental.[94]

Certainly, it is difficult for the dominant power to draw the line between enforcing current rules and negotiating new arrangements.[95] Therefore, decision-makers of the relatively declining power cautiously approach the request for legal change of

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[89] McKay, *supra* note 88, at 203 (explaining that "[l]aw must be stable, and yet it cannot stand still") (citing NATHAN ROSCOE POUND, INTERPRETATION OF LEGAL HISTORY 1 (1923)); *see generally* Jutta Brunnée & Stephen J. Toope, *International Law and the Practice of Legality: Stability and Change*, 49 VICT. UNIV. WELLINGTON L. REV. 429, (2018) (discussing the role of stability and change in the legality and the rule of international law).

[90] *See* HIGGINS, *supra* note 32, at 3.

[91] *Id*.

[92] *See* McKay, *supra* note 88, at 203 (highlighting Justice Cardozo's emphasis that "some path of compromise" will offer promise of growth).

[93] *See* MICHAEL MASTANDUNO, REALISM AND ASIA 41 (Saadia M. Pekkanen et al. eds., 2014) (emphasizing that East Asian regional security is subject to how the United States reacts to the rise of China).

[94] Krisch, *supra* note 5, at 377.

[95] *See* Theodore McLauchlin, *Great Power Accommodation and the Processes of International Politics*, *in* ACCOMMODATING RISING POWERS: PAST, PRESENT, AND FUTURE 307, 312 (T.V. Paul ed., 2016).

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a rising challenger with caution, lest they see it as a cover for an enemy.[96] Indeed, "different understandings of international law . . . are to be seen as normal or expected."[97] In this respect, Miro Cerar provides valuable insights:

> [E]ach era must write its legal science anew, the fiction of a "correct law" is only temporary in nature . . . . [In terms of] determination, interpretation and application of the law, we see that the law is, on one hand, determined (static), but on the other hand determinable (dynamic) . . . . [T]here must exist a general equilibrium because excessive dominance of the [static] aspect would mean that the law would be . . . completely rigid and socially nonfunctional, while excessive use of the [dynamic] aspect would lead to the complete relativization and dissipation of the legal substance [legitimizing legal arbitrariness].[98]

More importantly, war or peace is a function of the social stability and social adaptation aspects of law. John Yoo points out that peace or war can occur on the basis of how the parties handle the situation (by amending treaties or refusing overtures) of allocating the resources or territory when balance of power has shifted between them.[99] Yoo illustrates that in a hypothetical world consisting of two States (one weak and one strong) that share the benefits of cooperation in proportion to their relative power, the law governing the exploitation of resources will divide the resources in proportion to relative power strength between the two. When power changes, the previously weak State that has gained relative power will demand a shift in the law to gain more control over the resources than exists in the status quo. The previously predominant State must then decide whether to give in or go to war.[100]

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96 *Id.* at 305.

97 Lu Zhu, *Anthea Roberts' Is International Law International?*, 18 CHINESE J. INT'L L. 1009, 1010-11 (2019) (reviewing ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017) and adding that "it is a natural outgrowth for non-Western States, such as China, to have greater ability to promote their normative agendas as global power shifts").

98 Cerar, *supra* note 6, at 30.

99 *See* John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 CORNELL L. REV. 1, 23-24 (2011).

100 *See* Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 8 (2006).

Nevertheless, it is true that international law is vulnerable to sudden shifts in power relation.[101] Therefore, changes in international law should be a gradual process in which the entire legal system adapts to the political realities of a new era.[102] In short, the international community should recognize that the process takes some time. Kaplan and Katzenbach accurately note that "[i]n the absence of developed supranational legislative institutions, rules are prescribed, amended, adjusted, and applied by a time-consuming process of agreement . . . . [International rules] are often quite fluid until formalized in treaties, [subjecting to] political strain in their interpretation and application."[103] Therefore, both the challenger and the existing powerful State(s) are admonished to refrain from misinterpreting each other's intentions in their decision-making.

A valuable overture to the emerging power is to develop patience by seeking gradual normative adjustments.[104] On the flip side, the existing dominant power is invited to consider that a rational settlement should reflect the balance of power, taking into account its objective chances of prevailing in a conflict with the other side.[105] Otherwise, the international legal system will ineluctably fall into a state of disequilibrium, resulting serious international crises, not to mention security dilemmas.[106] Crises may arise from the negligence of both sides; in such a case, the legitimacy of the entire existing legal system will be seriously suspected by other States, for better or for worse.[107]

Despite the harsh blow of a change in the distribution of power, the fact that the international legal system has evolved significantly over the past century will provide a "focal point of debate with respect to the rise of China among policymakers in China, the U.S., and the rest of the world."[108] International law can support a

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101 *See* ROBERT O. KEOHANE, AFTER HEGEMONY 85-109 (1984).

102 *See* Michael Byers, *The Complexities of Foundational Change*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 1, 1-2 (Michael Byers & Georg Nolte eds., 2003); *see also* Morton, *supra* note 68, at 913.

103 KAPLAN & KATZENBACH, *supra* note 47, at 8.

104 *See* T.V. PAUL, THE ACCOMMODATION OF RISING POWERS IN WORLD POLITICS 20 (T.V. Paul ed., 2016).

105 *See* Yoo, *supra* note 3, at 149.

106 *See* Schweller & Pu, *supra* note 78, at 43.

107 *See* DANIEL W. DREZNER, PERCEPTION, MISPERCEPTION, AND SENSITIVITY 75 (Robert S. Ross & Øystein Tunsjø eds., 2017) (discussing the 2008 global market failure where after the financial crisis, the international community fulminated against the "intellectual edifice of neoliberalism and the Washington Consensus").

108 CAI, *supra* note 79, at 4.

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peaceful power shift associated with the rise of China inasmuch as the international community has never experienced a power shift that is systemically supported and underpinned by a robust system of international law.[109]

III. THE INFLUENCE OF POWER SHIFT ON THE LAW OF THE SEA

In the previous Parts, we have examined the correlation between power and international law, and how political power influences changes in the legal system during periods of power transition. We have also examined the need to balance social stability and social adaptation in order to avoid war. In this Part, this paper shows how the Law of the Sea system (i.e., the UNCLOS regime) is affected by the tectonic shift in the distribution of power.

a. UNCLOS: International Norms Reflecting the Underlying Balance of Power

Balance of power means the distribution of power (military and economic) among States, which inextricably affects the States' foreign policy. [110] In the anarchic structure of the international system, where there is no central authority above them, States aim to prevent any one State from becoming so powerful to the extent that it poses a threat to others.[111] Nonetheless, power transitions are

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[109] In other words, international lawyers can assume that international law can play a significant role in attending to the rise of China. However, it is also true that there is a limit to constraining powers as States do not agree on meaning and role of international law. *See id.* (mentioning that "[a]s an international lawyer, I am obliged to stress a major difference between present battles between China and the U.S. and those that happened among great powers before. That is, international law, which has greatly developed in the last century and especially over the past two decades, has become a focal point of debate with respect to the rise of China.").

[110] *See* Joseph S. Nye, *Is the American Century Over?*, 130 POL. SCI. Q. 393, 394-95 (2015) (defining that "[p]ower is the ability to affect others to get the outcomes one wants").

[111] *See* JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 12, 17-18, 30, 33, 44 (2014) (arguing that power calculation (power distribution) dictates State thinking, which entails endless power competition and results in States to be obsessed with how power is distributed among them while pursuing maximizing their share of world power); *see* Jack S. Levy, *Power Transition Theory and the Rise of China, in* CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 17, 3 (Robert S. Ross & Zhu Feng eds., 2008) (noting that "[a]narchy leads

a common phenomenon in international relations. UNCLOS lawyers seem to have spent considerably limited time in peering into the global redistribution of power. That is to say, the influence of power shifts on the regime of the law of the sea has not been investigated in depth, even though UNCLOS has become a serious point of contention in the shifting structural power relations.[112]

Indeed, the struggle between power and justice has always been the buzzword of the whole field of international law, including the rules of the sea.[113] On the one hand, the recognition of normative justice functions as the basis for the conduct of international relations.[114] In this view, developing States challenge "present power-driven command structures called 'law' in the name of rights derived from the notions of justice."[115] On the other hand, since power tends to dominate the political system, the law is seen as a "process for justification of power," thereby upholding "what has been achieved through the exercise of power."[116]

UNCLOS can be seen in the same context. The existing maritime status quo reflects the distribution of power immediately after World War II and reflects the interests of the United States and the West.[117] This has led China to believe that the four 1958 Law of the

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[S]tates to focus on other [S]tates' capabilities . . . [creating] the security dilemma"); *see also* Avery Goldstein, *Power Transition Theory and the Rise of China, in* CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 17, 56 (Robert S. Ross & Zhu Feng eds., 2008) (stressing that anarchy "provides strong incentives for them to monitor one another's capabilities and intentions").

112 *See* SCHMIDT, *supra* note 11, at 194.

113 *See* Sornarajah, *supra* note 4, at 39.

114 *Id.* at 34.

115 *Id.*

116 *Id.* at 30.

117 After World War II, the United Nations convened diplomatic conferences on the ocean in 1958 (UNCLOS I), 1960 (UNCLOS II), and 1973-1982 (UNCLOS III) to codify an international treaty on the law of the sea. The People's Republic of China, which joined the United Nations in 1971, was absent from UNCLOS I and II. During the UNCLOS III (1973-1982) negotiations, the United States, as a norm entrepreneur and major maritime power, actively participated. For example, the 1974 session saw participation from approximately 150 accredited members of the US delegation, who attended every meeting to ensure that the core principles of the law of the sea (specifically, freedom of the seas) were upheld. MYRON H. NORDQUIST & WILLIAM G. PHALEN, *Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award*, *in* INTERNATIONAL MARINE ECONOMY: LAW AND POLICY 3, 10-11 (Myron H. Nordquist, John N. Moore & Ronán Long eds., 2017); JAMES HARRISON, MAKING THE LAW OF THE SEA 31-40 (2011); WALT, *supra* note 73, at 15. The UNCLOS regime and the East Asian maritime order also reflected Western interests in the 1970s. Third World States often regarded UNCLOS as "the temporary victory of a contested position," not a

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Sea Conventions[118] did not adequately account for the interests of many developing countries, including China.[119] Moreover, it is true that the text of UNCLOS was negotiated and concluded in the context of the Cold War.[120] However, with the redistribution of power, some countries, such as an emergent China, are challenging the current maritime legal structure. UNCLOS, as an international norm, is being challenged to reflect the underlying balance of power in one way or another. More specifically, the power shift underway now around the BRICs and the West (the United States) may seek maritime institutions that reflect the growing interests of emerging States in proportion to their power.

At this juncture, it is instructive to review the "international status" discussion. The paramount example of the interpretation gap between China and the West on international legal principles is UNCLOS against, *inter alia*, the South China Sea. Political scientists argue that States seek status as an important national goal.[121] Status theorists explain that status "refers to higher-order beliefs about a State's relative ranking – beliefs about what others believe."[122] A rising power hopes to be convinced that privileges will be granted commensurate with the power it has achieved.[123] China will derive status (in the Indo-Pacific) from its position in the law of the sea, including a leadership role in developing new ocean-related norms

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permanent one. *See also* Surabhi Ranganathan, *Decolonization and International Law: Putting the Ocean on the Map*, 23 J. HIST. INT'L REV. 1, 19 (2020).

118 On April 29, 1958, as recorded in the Final Act (A/CONF.13/L.58, 1958, UNCLOS, Off. Rec. vol. 2, 146), the United Nations Conference on the Law of the Sea opened for signature four conventions and an optional protocol: the Convention on the Territorial Sea and the Contiguous Zone (CTS); the Convention on the High Seas (CHS); the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR); the Convention on the Continental Shelf (CCS); and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (OPSD).

119 Zhiguo Gao, *China and the Law of the Sea*, *in* FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 265, 267-270 (Myron H. Nordquist, Tommy K.B. Koh & John Norton Moore eds., 2009).

120 *See* DONALD ROTHWELL ET AL., CHARTING THE FUTURE FOR THE LAW OF THE SEA 899-900 (Donald Rothwell et al. eds., 2015).

121 *See* JONATHAN RENSHON, FIGHTING FOR STATUS: HIERARCHY AND CONFLICT IN WORLD Politics 1 (2017) (arguing that "status is more even than the 'everyday currency of international relations,' because status is also the end goal for political leaders, many of whom are plainly obsessed with investing in, seizing, and defending it").

122 DEBORAH WELCH LARSON ET AL., STATUS AND WORLD ORDER 8 (T.V. Paul et al. eds., 2014).

123 *See* MCLAUCHLIN, *supra* note 95, at 308.

and in amending the current UNCLOS system.[124] Some scholars even argue that status deficits are a strong predictor of conflict.[125] By extension, war avoidance in Asia, particularly in the South China Sea, will remain possible "through status concessions before the escalation to violent conflict occurs" by adjusting UNCLOS to reflect the underlying balance of power.[126]

b. UNCLOS: Political Compromises and Legal Uncertainty

UNCLOS is the result of political compromises between various groups with competing interests in the context of the Cold War, when full discussion of some complex issues was difficult to achieve.[127] As a result, UNCLOS lacks a clear definition of some core regimes, with vague and ambiguous language subject to various interpretations.[128] Consequently, after the adoption of UNCLOS, weak coastal States gradually began to interpret maritime institutions with the territorialized concept of the ocean in mind;[129] they further developed the exclusive concept of "not in [my]

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124 Renshon points out that international status includes "leading the development of international norms." *See* RENSHON, *supra* note 121, at 35. Chinese international lawyers suggest that the law of the sea system should reflect the developments that have occurred since the adoption of UNCLOS. *See, e.g.*, Gao, *supra* note 119, at 293. Recently, China has sought to play a leading role in interpreting the norms of the outlying archipelago regime under the Law of the Sea. *See* Youngmin Seo, *Are the Spratly Islands an Outlying Archipelago of China? Politico-Legal Implication of Proclaiming the Spratly Islands as a China's Outlying Archipelago that International Lawyers Should Know*, 37 EMORY L. REV. 319, 327-331 (2023).

125 *Id.* at 21, 33, 258.

126 *Id.* at 270.

127 *See* Ren Xiaofeng & Cheng Xizhong, *A Chinese Perspective*, 29 MARINE POL'Y 139, 145 (2005).

128 *See* Paul C. Yuan, *The United Nations Convention on the Law of the Sea from a Chinese Perspective*, 19 TEX. INT'L L. J. 415, 417-18 (1984). Not long after the adoption of UNCLOS, international lawyers worried about the vagueness of maritime institutions, such as the status of EEZ and the scope and scale of MSR.

129 For an account of a trend in expanding territorialized notion of the ocean by coastal States, see Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 4 AM. J. INT'L ARB. 830, 830-51 (2006).

https://scholarship.law.upenn.edu/jil/vol45/iss1/2
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backyard,"[130] sounding the death knell of *mare liberum*. Logue describes this process as the "revenge of John Selden."[131]

At the heart of this interpretive furor is the EEZ (a "zone of tension").[132] Allegedly, the negotiators of UNCLOS III (1973-1982) intended some of the UNCLOS institutions to allow for different interpretations.[133] That is, the maritime powers and coastal States strategically reached a consensus on silence on controversial issues, leaving ample room for disagreement on UNCLOS among international lawyers.[134]

As an outcome of the "package deal"[135] through the consensus approach, selective application of UNCLOS provisions is not allowed.[136] It seems that the framers of UNCLOS regarded these compromises as strengths.[137] That being said, political compromises

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130 *See* JO INGE BEKKEVOLD AND GEOFFREY TILL, CONCLUSION: INTERNATIONAL ORDER AT SEA IN THE TWENTY-FIRST CENTURY 313 (Jo Inge Bekkevold & Geoffrey Till eds., 2016).

131 John Logue, *The Revenge of John Selden: The Draft Convention on the Law of the Sea in Light of Hugo Grotius's Mare Liberum*, 3 GROTIANA 27, (1982).

132 *See* Xiaofeng & Xizhong, *supra* note 127, at 139; *see also* George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainly and Defusing Conflict*, 32 CA. W. INT'L L. J. 253, 257 (2002); *see also* Sam Bateman, *Hydrographic Surveying in Exclusive Economic Zones – Is it Marine Scientific Research?*, *in* FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 105, 117 (Myron H. Nordquist, Tommy K.B. Koh & John Norton Moore eds., 2009); *see also* Manjula R. Shyam, *The U.N. Convention on the Law of the Sea and Military Interests in the Indian Ocean*, 15 OCEAN DEV. & INT'L L. 147, 167 (1985).

133 *See* NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 44 (2011).

134 *See* Shyam, *supra* note 132, at 149.

135 In this approach, all the main parts of UNCLOS should be dealt with as an entity, as a single negotiated package, where the laws of give and take presumably had struck a reasonable balance between participating States considered as a whole. *See* HARRISON, *supra* note 17, at 45 n. 96 (citing Jens Evensen, *Keynote Address*, *in* THE 1982 CONVENTION ON THE LAW OF THE SEA xxvii (Bernard Oxman & Albert W. Koers eds., 1983).

136 "[B]efore signing [UNCLOS], many delegates shared the view that although not all their aspirations were satisfied, they would accept the package in a spirit of compromise." Xuexia Liao, *The LOSC as a Package Deal and Its Implications for Determination of Customary International Law,* 35 INT'L J. MARINE & COASTAL L. 704, 714 (2020) (detailing that States with different views would frequently compromise even the most conflicting positions). Article 309 of UNCLOS stipulates that "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." United Nations Convention on the Law of the Sea art. 309, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

137 Tommy Koh assessed that "these compromises are the strengths, not weaknesses, of the Convention." Tommy T.B. Koh, A Constitution for the Oceans: Remarks by President of the Third U.N. Conference on the Law of the Sea (Dec. 1982),

do not necessarily prohibit the meaning of institutions from being discovered. In principle, UNCLOS as a treaty is to be interpreted in accordance with "ordinary meaning" in the light of its "context" and "object and purpose."[138] International lawyers can take advantage of this standard as a point of departure to discover the intended meaning and scope of the UNCLOS regimes.

It is not surprising that UNCLOS has a tinge of uncertainty in the interpretation and consequent application of some of the important maritime regimes, given that it was adopted by package-deal consensus after long political-legal negotiations. In addition, there have been changes over time in the balance of power and in military and marine science technology. A further complication lies in climate change and sea level rise. As a corollary, there is a growing need to determine the meaning of some regimes that focus on the concept of freedom of the seas. Namely, China and the West have different views on the legality of innocent passage of warships through territorial seas, military activities in exclusive economic zones (EEZs), and military surveying as distinct from marine scientific research (MSR) in EEZs.

Coastal States are sensitive to the passage of foreign warships through their territorial sea because warships by their very nature represent the military power of the flag State. Indeed, the mere passage of warships through the territorial sea makes an impression of a "benign show of force" even in the absence of tension or conflict between the States concerned.[139]

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https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf [https://perma.cc/25C6-8WSR] (emphasizing the importance of using the group system to maintain flexible negotiations rather than paralyzing it with rigid rules).

138 Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

139 KLEIN, *supra* note 133, at 43. As of 2012, 43 States were reported to restrict foreign warships' innocent passage through their territorial sea. *See* ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 239-62 (3rd ed. 2012) (detailing the list of States restricting innocent passage in their maritime laws); Anh Duc Ton, *Innocent Passage of Warships International Law and the Practice of East Asian Littoral States*, 1 ASIA PAC. J. OCEAN L. & POL'Y 210, 216-36 (2016) (focusing on discussion of some Asian countries' approaches to their territorial sea, including Japan, North Korea, and China). Having said that, ICJ, in the 1949 *Corfu Channel* case, insinuates that warships' innocent passage through territorial seas is lawful. *See* The Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, at 27-28 (April 9) (opining that it was "generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent").

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Also, it is not easy to determine the legality of military activities in foreign EEZs. The EEZ is "sui generis" or "*tertium genus*" area in the sense of being neither part of the high seas nor territorial waters.[140] In fact, the topic of military activities in EEZs was not duly discussed at UNCLOS III;[141] thus, relevant State practice and scholarly interpretation thereupon were divergent even right after the adoption of and before the entry into force of UNCLOS.[142]

For example, China defines "freedom of navigation" in a narrow manner to pertain to commercial vessels' navigation only.[143] China perceives "peaceful uses of the seas" under Articles 88[144] and 301[145] of UNCLOS as banning military activities in foreign EEZs.[146] In other words, China understands UNCLOS giving coastal States the right to regulate foreign economic and military activities in their EEZs, regarding EEZ an "area beyond and adjacent to the territorial waters of the coastal State, where the coastal State enjoys sovereign rights and exclusive jurisdiction for specific matters."[147]

In contrast, for the US, the freedom of the seas means that its navy can operate in about 30.4 percent of the world's oceans (which is the size of EEZs).[148] This position is repeatedly confirmed by US

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140 MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 66 (2007); F.V. García Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68 AM. J. INT'L L. 33, 33-50 (1974); Gemma Andreone & Giuseppe Cataldi, *Sui Generis Zones*, *in* 1 THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW (THE LAW OF THE SEA) 217-38 (Malgosia Fitzmaurice and Norman A Martinez Gutierrez eds., 2014).

141 Shyam, *supra* note 134, at 162.

142 Bateman, *supra* note 132, at 117-18; Shyam, *supra* note 132, at 149.

143 Mark J. Valencia, *The US-China Maritime Surveillance Debate*, THE DIPLOMAT (Aug. 4, 2017), https://thediplomat.com/2017/08/the-us-china-maritime-surveillance-debate/ [https://perma.cc/5ULA-MX9X]; RONALD O'ROURKE, CONG. RSCH. SERV., R42784, MARITIME TERRITORIAL AND EXCLUSIVE ECONOMIC ZONE (EEZ) DISPUTES INVOLVING CHINA: ISSUES FOR CONGRESS 33 (2018).

144 UNCLOS, *supra* note 136, art. 88 ("The high seas shall be reserved for peaceful purposes.").

145 *Id.* art. 301 ("In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the UN.").

146 Zhang Haiwen, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the US? – Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, 9 CHINESE J. INT'L L. 31, 44-45 (2010).

147 *See* Xiaofeng & Xizhong, *supra* note 127, at 140.

148 For a comparative size of the various maritime zones, see *Maritime Zones and Boundaries*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

officials. For instance, in December 2018, then President Trump signed into law the Asia Reassurance Initiative Act, which authorized the spending of US$1.5 billion a year for 2019–2023 to enhance the US presence in the Indo-Pacific, including the enforcement of Freedom of Navigation (FON).[149]

It is true that coastal States often perceive foreign naval operations in their EEZs as threatening or intrusive.[150] For this reason, many coastal States (including China, India, and Brazil) object to foreign military activities in their EEZs.[151] Opponents of military activities in EEZs argue that such activities are not covered by the general rights of navigation, and thus impede coastal States' exploitation of resource in the form of naval or military surveys.[152] For better or worse, a growing number of States, along with some Western lawyers, appear to agree with this approach.[153]

On the other hand, the United States, in its most extreme interpretation of UNCLOS, assertively maintains a *mare liberum* approach.[154] During UNCLOS III, the maritime powers defended

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https://www.noaa.gov/maritime-zones-and-boundaries [https://perma.cc/UH37-RW2S] (last visited Nov. 19, 2023).

149 Reuters Staff, *U.S. Destroyer Sails in Disputed South China Sea Amid Trade Talks*, REUTERS (Jan. 7, 2019), https://www.reuters.com/article/us-usa-trade-china-southchinasea/u-s-navyship-sails-in-disputed-south-china-sea-amid-trade-talks-with-beijing-idUSKCN1P10DS [https://perma.cc/2S4B-7HZR] (noting that the first FONOP after the signing of ARIA was conducted by USS McCampbell in January 2019 when it transited under innocent passage within 12nm of the Paracels).

150 Shyam, *supra* note 132, at 164.

151 ROACH & SMITH, *supra* note 139, at 379-86 (The Brazilian position is at 379-380 and the Indian position is at footnote 8 at 380); Katherine Morton, *China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?*, 92 INT'L AFF. 909, 926 (2016). For their respective statements, see U.N., Div. for Ocean Aff. and the Law of the Sea, Off. of Legal Aff., Law of the Sea: National Legislation on the Exclusive Economic Zone, at 38, 135, (1993) (outlining the disapproval of many coastal States regarding foreign military activity or other exploitations within their marine territory); *see also* Zou Keyuan, *Law of the Sea Issues Between the United States and East Asian States*, 39 Ocean DEV. & INT'L. L. 69, 76 (2008).

152 Shyam, *supra* note 132, at 163.

153 John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 137 (1997); E.D. BROWN, 1 INTERNATIONAL LAW OF THE SEA 242 (1994); Bernard H. Oxman, *The Regime of Warships under the United Nations Convention on the Law of the Sea*, 24 VA. J. OF INT'L L. 809, 838 (1984); Boleslaw A. Boczek, *The Peaceful Purposes Clauses: A Reappraisal after the Entry into Effect of the Law of the Sea Convention*, 13 OCEAN Y.B. 404, 412-13 (1998); George V. Galdorisi & Alan G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainly and Defusing Conflict*, 32 CA. W. INT'L L. J. 253, 282 (2002).

154 On January 18, 2007, the US responded to China regarding the Bowditch incidents in March 2000 and September 2002, "customary international law requires

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the freedom of military activities in EEZs and conceded the right to economic activities to coastal States.[155] It would seem correct to assume that if UNCLOS had provided for the denial of naval activities in foreign EEZs, the maritime powers (e.g., United States, U.S.S.R., U.K.) would not have agreed to the EEZ regime without careful negotiation and detail.[156]

Western international lawyers support military activities in foreign EEZs as permissible as freedom of the high seas, arguing that some proposals to restrict military activities in EEZs were refuted in UNCLOS III; thus, "other internationally lawful uses of sea" of all the States (Article 58(1)) should include military activities in EEZs,[157] whereas Chinese writers adopt restrictive interpretations.[158] In this respect, one observation may help States deal with this long-standing issue. The rapidly changing technology and its impact on the military weapon system (such as artificial intelligence, machine learning, and robotic technology) may have a significant impact on military activities in foreign EEZs.[159] This would arguably lead to

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coastal States to exercise their limited, resource-related rights in their EEZs with 'due regard' for the rights of other States . . . . [UNCLOS] does not purport in any manner to restrict the military activities of a State in the EEZ [beyond the territorial sea]." *See* ROACH & SMITH, *supra* note 139, at 384-85.

155 D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 3 (1975) (cited in Sienho Yee, *Sketching the Debate on Military Activities in the EEZ: An Editorial Comment*, 9 CHINESE J. INT'L L. 1, 5 n. 10 (2010).

156 Oxman, *supra* note 153, at 831-32.

157 *See* Yann-Huei Song, *The PRC's Peacetime Military Activities in Taiwan's EEZ – A Question of Legality*, 16 INT'L J. MARINE AND COASTAL L. 625, 635-37 (2001) (adding that military activities are permissible to the extent that those activities do not affect the economic rights and interests of foreign nations in their EEZs); *see also* Boleslaw A. Boczek, *Peaceful Purposes Provisions of the United Nations Convention of the Law of the Sea*, 20 OCEAN DEV. AND INT'L L. 359, 367 (1989) (elaborating that customary international allows warship navigation near foreign coasts as part of freedom to navigate so long as a reasonable regard is taken for other State interests).

158 Under the UNCLOS system, the resolution of the lawfulness of military activities in foreign EEZs would revolve around three elements**:** (1) the meaning of "other internationally lawful uses of the sea related to [high seas] freedoms" (Article 58(1)); (2) the scope of obligation under "due regard" to the rights and duties of the coastal State (Article 58(3)); and (3) the applicability of "residual rights" for military activities in EEZs in light of "equity," "all the relevant circumstances" and "the interests involved to the parties and the international community" (Article 59).

159 For instance, "unmanned naval systems" (the drones of the sea) are being adopted by maritime powers for naval activities, and "unmanned naval vessels" could be used in armed or unarmed missions, including surveillance, intelligence, and reconnaissance, in foreign EEZs. *See* Yoo, *supra* note 3, at 142; U.S. NAVY, THE NAVY UNMANNED SURFACE VEHICLE (USV) MASTER PLAN (2007), https://www.hsdl.org/?view&did=479083 [https://perma.cc/5HAA-YLTG].

the conclusion that "the interests involved to the parties and the international community" in light of "equity" and "all the relevant circumstances" (Article 59) will likely permit coastal States to restrict military activities in their EEZs to some extent.[160]

MSR is also a serious point of contention within the UNCLOS regime. The UNCLOS negotiators did not pay much attention to the definition of MSR, nor did they reach an agreement.[161] Although UNCLOS contains the concepts of MSR, hydrographic surveying, and surveying, this does not mean that these activities are different institutions.[162] A further complication lies in the way the institutions were drafted, combined, and agreed in UNCLOS III.[163] There are three approaches to view hydrographic surveying: (1) as an internationally lawful use of the sea under Article 58(1) (United

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160 FLORIAN H. TH. WEGELEIN, MARINE SCIENTIFIC RESEARCH: THE OPERATION AND STATUS OF RESEARCH VESSELS AND OTHER PLATFORMS IN INTERNATIONAL LAW 98 (2005). *See also* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 98 (2002) (noting that "[c]ommon sense, rather than textual literalism, is often the best guide to the interpretation of international legal norms").

161 GAVOUNELI, *supra* note 140, at 64. In the 1976 Informal Single Negotiating Text defined MSR as "'marine scientific research' means any study or related experimental work designed to increase mankind's knowledge of the marine environment." *See* U.N. Marine Scientific Research, *A Revised Guide to the Implementation of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, U.N. Doc. E.10.V.12, at 6 (2010). Meanwhile, the US understands MSR as "those activities undertaken in the ocean and coastal waters to expand scientific knowledge of the marine environment and its processes." *See* ROACH & SMITH, *supra* note 139, at 487.

162 Bateman, *supra* note 132, at 110. In contrast, some scholars (mostly from the United States) argue that the term "MSR" was intentionally chosen to differentiate it from hydrographic surveys, marine surveys, and operational oceanography. *See* JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA: EXPEDITIONARY OPERATIONS IN WORLD POLITICS 272-77 (2011) ("MSR may be used to describe activities undertaken . . . to expand scientific knowledge of the marine environment and its processes.").

163 The negotiations in UNCLOS III encompassed three main committees that dealt with the seabed regime, the general law of the sea, and the marine environment and scientific research. Their purpose was to create the Informal Single Negotiating Texts (ISNT). These were individually produced in 1977, and then consolidated into a single document called the 'Informal Composite Negotiating Text' (ICNT). Eventually, the United Nations Convention on the Law of the Sea was adopted as a package deal through a consensus approach, prohibiting selective application of its provisions. *See* HARRISON, *supra* note 117, at 44-46; *see also* Nordquist & Phalen, *supra* note 117, at 8-9 (explaining that separate "informal working groups" with limited delegate participants presented, and later combined and adopted by consensus through the package deal approach).

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States and U.K.); (2) requiring prior authorization (Australia and Canada);[164] and (3) as MSR (China).[165]

In practice, however, hydrographers generally view their surveying activities to be part of MSR because non-hydrographic data are also collected during operations; [166] similarly, the International Hydrographic Organization (IHO) regards hydrographic surveying as part of MSR.[167] This is why coastal States have trouble discerning survey ships from MSR vessels.[168] Further, it is true that some scientific information (e.g., hydrographic data) on foreign EEZs influences the economic aspects (commercial exploitation and national development) of the coastal State.[169]

If hydrographic surveying qualifies as a non-MSR activity, the international community will need a legal regime to govern it.[170] Otherwise, the interpretation of the UNCLOS regime for MSR will have to comport with the practice of most States, which consider hydrographic surveying to be part of MSR.[171]

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164 Sam Bateman, *Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research*, 29 MAR. POL'Y 163, 170 (2005).

165 Gao, *supra* note 119, at 293-94; Zhang Haiwen, *The Conflict Between Jurisdiction of Coastal States on MSR in EEZ and Military Survey*, *in* RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 317-31 (Myron H. Nordquist, John Norton Moore & Kuen-chen Fu eds., 2006); KEYUAN ZOU, CHINA'S MARINE LEGAL SYSTEM AND THE LAW OF THE SEA 280-83 (2005).

166 Bateman, s*upra* note 132, at 112. For an account of how contemporary hydrographic surveying is undertaken and in what process, see generally *id.* (discussing the reasons for hydrographic surveying, such as exploration, increasing the State's awareness, and determining features of the surrounding sea and coastal bed).

167 INTERNATIONAL HYDROGRAPHIC ORGANIZATION, THE NEED FOR A HYDROGRAPHIC SERVICE 17 (7th ed. 2018).

168 KLEIN, *supra* note 133, at 216-17.

169 INTERNATIONAL HYDROGRAPHIC ORGANIZATION, *supra* note 167, at 17; Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MAR. POL'Y 123, 131 (2005); Sam Bateman, *Hydrographic Surveying in Exclusive Economic Zones: Jurisdictional Issues*, 5 INT'L HYDROGRAPHIC REV. 79 (2004).

170 ZOU, *supra* note 165, at 174.

171 Bateman argues that (military) hydrographic surveying should be subject to coastal State consent as part of MSR on the grounds of the growth of State practice, developments in technology, and increasingly converging opinions among expert bodies. *See* Bateman, *supra* note 132, at 119-24 (advocating that hydrographic surveying ought to be done with consent of the State whose territory the zone belongs). Meanwhile, a U.N. survey indicates that national legislations do not normally distinguish MSR from hydrographic surveying. *See* U.N. Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas Under*

Of course, there are times when the utility of UNCLOS is demonstrated, but there are also times when the futility of UNCLOS is inevitably highlighted. In this sense, it should come as no surprise that a growing number of States and international lawyers are calling for the process of interpreting and applying UNCLOS to reflect the increasing practice of States purporting to demand the reinstatement of the legitimate security interests of the coastal State over the hitherto automatic overriding naval supremacy of maritime powers.[172]

c. The Condition and Process of the Law of the Sea Shift

Indeed, international lawyers in different regions indeed interpret rules and principles differently according to their own (local) perspectives. The same generally holds true for UNCLOS. Many UNCLOS principles and institutions (e.g., freedom of navigation) are often subject to various interpretations: "international lawyers are not . . . uprooted from the local context they inhabit." [173] More significantly, the Sino-American interpretative "lawfare" over UNCLOS is compounded with "radical indeterminacy" or the "semantically ambiguous, open-ended legal standards" (terms borrowed from Carl Schmitt) of some provisions, in Schmitt's view, making the problem at the very core of international law.[174]

For a long time, Western or American interpretations of the law of the sea institutions have largely influenced the views of the majority of the actors in the international community.[175] With the greater military, economic, and political strength, the United States,

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National Jurisdiction, at 143-154 (1989) (noting that according to Japan's policies, hydrographic surveying is akin to MSR).

172 Shyam, supra note 132, at 148-49.

173 LORCA, *supra* note 10, at 26.

174 *See* SCHEUERMAN, *supra* note 23, at 171 (noting that "[a]ll forms of liberal law are necessarily plagued by the problem of radical indeterminacy").

175 Paulus argues that even the concept of the "international community" would not be constructed without regard to US views on it. *See* Andreas Paulus, *The Influence of the United States on the Concept of the "International Community," in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 57, 89 (Michael Byers & Georg Nolte eds., 2003) (detailing the significant role of the United States in international relations, from NATO to implementation of concepts from political theory).

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posing as the champion of universal interpretation of the law of the sea, has enforced its "jurisdictional claims" over others through the imposition of sanctions.[176] It was not easy for China to legitimize its legal position or set a "rhetorical trap" against the United States.[177] In other words, the large, well-financed American lawyering and diplomatic corps have prevailed over the "interpretative lawfare" against China.[178]

From China's point of view, Western-centered legal views fail to recognize the existence of "indeterminacy" in the current law of the sea system while adhering to the concept of the "one and universal" Law of the Sea.[179] China criticizes Western lawyers for assuming that their legal experience in the regional context is the embodiment of the universality of the Law of the Sea with the need for "interaction between the international and the local as a relevant dimension of their professional practice."[180]

In the shadow of U.S. hegemonic influence, peripheral States have led a seemingly tranquil international life in the eyes of Western States, but much of this stability has been due to the size and reach of the broader intellectual, legal, and cultural environment that the United States has created.[181] However, peripheral States, such as China, entertain different visions for and perspectives on the legitimate interpretation of the law of the sea according to each State's concrete historical and local context.[182] As balance of power shifts towards China and gains more voices, China begins to assert its views on the (il)legitimacy of the American interpretation of the rules governing (regional) maritime order.[183]

In a fundamental sense, China, posing as the champion of non-Western interpretation of UNCLOS, puts forward its interpretation of the maritime institutions in order to address the "long-standing

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176 BYERS, *supra* note 1, at 37.

177 Kai He, *China's Bargaining Strategies for a Peaceful Accommodation After the Cold War*, *in* ACCOMMODATING RISING POWERS: PAST, PRESENT, AND FUTURE 201, 206 (T.V. Paul ed., 2016).

178 In this lawfare, contrary views on the law of the sea have been successfully suppressed. *See* BYERS, *supra* note 1, at 37 (discussing how more powerful States have the influence to exert their position to maintain, change, or develop international custom to suit their interests).

179 LORCA, *supra* note 10, at 26.

180 *Id.* at 29.

181 SANDHOLTZ & SWEET, *supra* note 84, at 270.

182 *See* LORCA, *supra* note 10, at 27-28 (stating that "international law and international legal profession are actually embedded in concrete contexts").

183 SANDHOLTZ & SWEET, *supra* note 84, at 245.

injustice of international law," which (in China's view) is full of "development deficit" and "democracy deficit."[184] China further claims that the legal situation of most of the States will be improved if the maritime legal system accepts more proposals for the interpretation of UNCLOS from developing States.[185] Given that the Chinese legal view stands in sharp contrast to that of the United States, the controversy over the interpretation and implementation of UNCLOS as to whether a particular act is lawful or not is likely to continue.[186]

Questions are thus posed to legal scholarship: at what point can the current Western-centric maritime legal arrangements (and its prevailing interpretation) survive as politically tolerable? In addition, in the event of institutional change in maritime institutions, which means will prevail—orderly adaptation through interpretation and amendment or less orderly means such as the use of force?[187] For one thing, in East Asia, the legitimacy of the U.S.-led order, which has been built on "ideological control by means of [U.S.] virtual monopoly on the production of social, cultural, and symbolic capital" over the definition of international institutions, including maritime institutions, appears to have declined dramatically,[188] thereby affecting the political tolerability of maritime institutions. Overall, China rejects U.S. ideological hegemony over the privilege of UNCLOS interpretation, through which America has maintained maritime stability despite a certain degree of indeterminacy in UNCLOS.[189]

For another, the mode of maritime institutional change is linked to the fact that States are compelled to explain and justify their actions in legal terms.[190] States make use of international law to

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184 CAI, *supra* note 79, at 24.

185 *See* Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUROPEAN J. INT'L. L. 755, 755-83.

186 KAPLAN & KATZENBACH, *supra* note 47, at 7 (noting that controversy will continue because of the absence of authority for judicial resolution).

187 KAPLAN & KATZENBACH, *supra* note 47, at 16-17.

188 Schweller & Pu, *supra* note 78, at 49-50, 53-54 (emphasizing that "China has been contesting the current order in several ways").

189 *See* Peter-Tobias Stoll, *Compliance: Multilateral Achievements and Predominant Powers, in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 456, 476 (Michael Byers & Georg Nolte eds., 2009).

190 *See* Heath Pickering, *Why Do States Mostly Obey International Law?* E-INTERNATIONAL RELATIONS (Feb. 4, 2014), https://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/ [https://perma.cc/6PKR-NPSM]; *see also* Andrew Hurrell, *International Society and*

argue about, bolstering, and contending particular decisions in concrete settings.[191] If the United States does not allow for institutional change when a growing number of States call for adaptation of the law of the sea system, the American authority to interpret UNCLOS will be significantly diminished. This is because material power alone cannot support U.S. authority over maritime governance, at least, in the Indo-Pacific area.[192] In other words, despite China's overtures to the United States, if the United States relies only on material power in lieu of consultation and accommodation, the result may be less orderly means between China and the United States and, ultimately, the illegitimacy of legal transformation.[193]

So far, both China and the United States seem to have adopted an orderly means of attacking the other side for contradictory logic and unacceptable results arising from the opposing legal arguments, within the normative structures of UNCLOS, with a view to obtaining "legitimacy" of interpretation from weak States.[194] Since China adduces alternative interpretations in the eyes of the States, its proposal should offer better legal situations for the region; otherwise, "the result could be a return to the old thinking."[195]

Theoretically, the most dominant State (the United States) does not always prevail in this normative debate because the Law of the Sea is not a "mere static body of rules" but a "whole decision-

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the Study of Regimes: A Reflective Approach, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 49, 59 (Volker Rittberger & Peter Mayer eds., 1993).

191 *See* Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283, 1306 (2020); JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15 (2012) (noting that "[a]ll normal governments employ experts to provide routine and other advice on matters of international law and constantly define their relations with other States in terms of international law").

192 *See* Hakimi, *supra* note 191, at 1299 (arguing that law fosters "the expectation that governance decisions must be rooted in authority").

193 *See* Stephen Toope, *Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 287, 316 (Michael Byers & Georg Nolte eds., 2003).

194 *See* Krisch, *supra* note 5, at 374 (arguing that *weak* players internalize certain interpretations of powerful States as "legitimate" through socialization); SANDHOLTZ & SWEET, *supra* note 84, at 256-57; Jeffrey W. Legro, *Purpose Transitions: China's Rise and the American Response*, *in* CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 163, 173 (Robert S. Ross & Zhu Feng eds., 2008).

195 Legro, *supra* note 194, at 173.

making process."[196] The New Haven School understands the Law of the Sea system as follows:

> [a] process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation-[S]tates unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers . . . weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-[S]tate officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.[197]

Similarly, Higgins argues that "[i]nternational law is the whole process of competent persons making authoritative decisions in response to claims which various parties are pressing upon them, in respect of various views and interests."[198] Audience in other States (legal elites as decision-makers) will participate in an "argumentative practice" on UNCLOS, making use of public normative references.[199] China and the United States (as players) publicly justify their decisions and clarify how the "interests and values of a broader group" have been reflected in each interpretation.[200]

In some cases, China (or the United States) may deploy both an orderly means (legal arguments) and a less orderly means (material power) to pull other States into its legal orbit. However, if either side relies only on the application of raw power to justify its position on UNCLOS, instability and escalation will inevitably follow; as a result, the international, regional, or local community will not

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196 Myres McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea,* 49 AM. J. INTL. L. 356, 356-57 (1955).

197 *Id.* at 357.

198 Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L. COMPAR. L. Q. 58-59 (1968).

199 Hakimi, *supra* note 191, at 1300.

200 *Id.*; *see generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005) (proposing an argumentative practice structured in the international law system).

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regard such a legal campaign as a "legal" or "legitimate interpretation."[201]

The normative debate or an "argumentative practice" over certain maritime institutions is in full swing, with a focus on Asia and not least on the South China Sea. Hakimi implicitly suggests that by actively participating in the argumentative process of the law of the sea, China and America can show respect to decision-makers in other countries who care about or are affected by American and Chinese interpretations.[202] After due consideration, decision-makers, who should be held accountable for their decisions, will side with a particular interpretation that they believe is acceptable and legitimate.[203] When the United States or China disengage from the law of the sea argumentative practice, it becomes "independent wrongs."[204]

As the rise of China encompasses economic, military, and legal dimensions, States may increasingly engage in strategic accommodation as a balancing behavior; in such a process (balancing is a process, not an outcome), States (not least Asian states) may be compelled by China to support or at least not to oppose Chinese legal positions on UNCLOS (or by the United States to support traditional Western views).[205]

In the eyes of the United States, the Chinese interpretation of UNCLOS and its accompanying campaign to attract more States to its position may seem like mere "noncompliance" with the law of the sea and an "incitement" to noncompliance. However, according to Byers, "[s]ometimes noncompliance actually led to improved compliance; at other times it resulted in the development of new multilateral instruments or the clarification of particular points of law."[206] In fact, when China perceives some UNCLOS regimes as squarely hampering Chinese core interests (e.g., security) it attempts

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201 *See* Toope, *supra* note 193, at 316; BYERS, *supra* note 1, at 6.

202 *See* Hakimi, *supra* note 191, at 1302.

203 *Id.* at 1305 (explaining that the "argumentative practice thus gives external actors an important say on whether particular conduct is acceptable" and "[a]ccountability comes from cultivating the expectation that governance decisions that lack authority are in some sense illegitimate").

204 *Id.* at 1303.

205 *See* Robert S. Ross, *Balance of Power Politics and the Rise of China: Accommodation and Balancing in East Asia*, 15 SEC. STUD. 355, 366-67 (2006).

206 KRISCH, *supra* note 20, at 17.

to "justify this in terms of other norms or by a reinterpretation of the old norm" ("legislating change").[207]

The law of the sea system is under pressure to align itself more closely with the shifting balance of power, especially in Asia, for the sake of peaceful change. Ostensibly, China will continue to resist the U.S.-led interpretation of UNCLOS ("everyday resistance").[208] This resistance includes China resenting the "hegemonic order and criticiz[ing] its legitimacy and the hegemon's authority to rule."[209] As a result of China's repeated claims and actions, the supposedly legitimate interpretation of UNCLOS will suffer a serious setback, thereby shifting the epistemic patterns of the international community.[210]

Power transition theory argues that the risk of war is inherent in the balance of power system.[211] Seen in this way, divergent viewpoints on the law of the sea can ignite a conflagration at any time. Since a concert of power and adjustment does not occur naturally, measures to deal with power shift must be carefully constructed and maintained in the UNCLOS system.[212] To this end, we need more than political dialogues.[213] The law of the sea system should move towards reflecting political realities in order to support a peaceful redistribution of power. Hugh White argues that time is not on America's side: "[i]t is . . . in America's interests to negotiate a new relationship with China as soon as possible . . . . That means

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207 *See* KAPLAN & KATZENBACH, *supra* note 47, at 343; MAZARR, HEATH & CEVALLOS, *supra* note 83, at 66 (arguing, consistent with Schweller and Pu, that if rightful resistance produces reforms, the perceived injustices of a system will be reduced, thereby rendering the system more legitimate and sustainable).

208 Byers, *supra* note 102, at 2; *see also* Schweller & Pu, *supra* note 78, at 49-50, 57.

209 Schweller & Pu, *supra* note 78, at 50.

210 *See* Byers, *supra* note 102, at 2.

211 *See* Levy, *supra* note 111, at 17-18 (positing that Power transition theory supposes that war is inevitable between China and the United States in the South China Sea).

212 *See* HUGH WHITE, THE CHINA CHOICE: WHY WE SHOULD SHARE POWER 133 (2012).

213 *See* Elizabeth C. Economy & Adam Segal, *The G-2 Mirage: Why the United States and China Are Not Ready to Upgrade Ties*, 88 FOREIGN AFF. 23, 23 (2009) (arguing that dialogues often end up "never-ending dialogues" to establish "more empty frameworks for dialogues"); *see also* LYLE J. GOLDSTEIN, MEETING CHINA HALFWAY: HOW TO DEFUSE THE EMERGING U.S.-CHINA RIVALRY 339 (2015).

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America should take the initiative to offer China as much as it reasonably can to bring it to the table."[214]

The law of the sea system can alleviate the pressure of the Sino-American rivalry in the Indo-Pacific region by adapting to the mutually acceptable limits between China and the United States.[215] Put another way, both sides need to recognize the need for mutual accommodation between *mare liberum* and *mare clausum* while exercising strategic restraint until a new consensual (regional) maritime order emerges. Which interpretive campaign will prevail will hinge on the extent to which each side (China or America) can legitimize its envisioned maritime legal order to reflect local, regional, and international interests.[216]

IV. CONCLUSION

One of the purposes of the international law of the sea is to regulate the present and future conduct of States at sea.[217] To this end, the law of the sea is urged to reflect both "the demands of the powerful and the ideals of justice held by international society at a given moment."[218] In other words, the role and rules of international law should be constructed and adapted out of regard for the balance of power.[219] If China or the United States, not to mention other actors such as the European Union and the Association of Southeast Asian Nations, adhere to a particular way of interpreting UNCLOS as a moral mandate (rather than "as the product of international negotiation"), gradual and peaceful adaptation will be difficult.

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214 WHITE, *supra* note 212, at 153-54. However, as White explains elsewhere, "shift in power is being driven by China's rise, not by America's decline. There is not much America can do about it." *Id.* at 4.

215 *See* James Manicom, *China and American Seapower in East Asia: Is Accommodation Possible?*, 37 J. STRATEGIC STUD. 366, 366 (2014) (emphasizing that the first step for America and China should be cooperation and avoiding war, even though neither party seems prepared to accommodate the preferences of the other); *see also* WHITE, *supra* note 212, at 127.

216 In general terms, Charles Kupchan lists three conditions that characterize peaceful transition. *See* Charles A. Kupchan, *Introduction: Explaining Peaceful Power Transition*, *in* POWER TRANSITION: THE PEACEFUL CHANGE OF INTERNATIONAL ORDER 8, 8-9 (Charles A. Kupchan, Emanuel Adler, Jean-Marc Coicaud & Yuen Foong Khong eds., 2001).

217 *See* BYERS, *supra* note 1, at 49.

218 Krisch, *supra* note 5, at 408.

219 *See* Vagts & Vagts, *supra* note 14, at 556.

McLauchlin rightly points out that "for institutions to be effective, they need to be treated not with veneration, but as a tool for resolving disputes, useful in the short run and adaptable to change."[220] Obviously, changing circumstances generate political demands for changes in the law.[221] With this qualification, the UNCLOS system is "criticized for being static and out of touch with reality"[222] if it remains the same without taking account of change.

Compared to the purpose of war in the past (occupation or annexation or colonies), today's war is about eliminating threats to a stable international order.[223] On this basis, if the West and the United States inexorably perceive the Chinese interpretation of UNCLOS as a threat to a stable regional maritime order, war may break out between China and the West, most likely in the Indo-Pacific region, such as the South China Sea. In this sense, how (rather than whether) to reflect power shift in the law of the sea system is the right question to ask when avoiding war because the ultimate measure of adaptation should affect not only the utility and effectiveness of the law of the sea, but also the peace and stability of the oceans.

International lawyers and diplomats are faced with these important tasks on the table. If the law of the sea regime produces gradual adjustments every year, it should be considered a success;[224] as a matter of fact, UNCLOS, as a multilateral treaty, cannot have an absolute, immutable character.[225] Let us suppose that international law misses an opportunity by not proactively accommodating a proposed and desired amendment to deal with Sino-American lawfare against the Law of the Sea. In this case, realpolitik will lead the legal issues, and international law will lose its meaning of

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220 McLauchlin, *supra* note 95, at 307.

221 *See* ANDREAS LAURSEN, CHANGING INTERNATIONAL LAW TO MEET NEW CHALLENGES: INTERPRETATION, MODIFICATION AND THE USE OF FORCE 10 (2006).

222 *Id.* at 11.

223 *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 161-63 (2005) (noting that "[the United States] went to war not to gain territory or a colony, nor to defeat an enemy ideology, but to remove a threat to the international order posed by a tyrannical dictator"). Political scholars suggest, concerning law and war, that "norms don't constrain [S]tates at all" or "norms matter, but [S]tates will violate them when they can." JONATHAN RENSHON, FIGHTING FOR STATUS: HIERARCHY AND CONFLICT IN WORLD POLITICS 176 (2017) (citations omitted).

224 *See* MAZARR, HEATH & CEVALLOS, *supra* note 83, at 125.

225 *See* South West Africa (Liber. v. S. Afr.), Judgment, 1966 I.C.J. 325, at 439 (Jessup, J., dissenting).

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existence. [226] We should remember that international law and politics must "evolve to confront the threats of this century, not those of the last, without encouraging conflicts that cause more harm than good." [227]

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[226] *See* Frank Ching, *Dark Side of the Great Renewal: Chinese Nationalism*, GLOBE & MAIL (Dec. 5, 2012), https://www.theglobeandmail.com/opinion/dark-side-of-the-great-renewal-chinese-nationalism/article5973783/ [https://perma.cc/Q82J-32JJ].

[227] JOHN YOO, POINT OF ATTACK: PREVENTIVE WAR, INTERNATIONAL LAW, AND GLOBAL WARFARE 3 (2014).