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The Role of Naval Power in the Development of Customary International Law

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THE ROLE OF NAVAL POWER IN THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

John J. Chung*

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I. INTRODUCTION

Customary international law ("CIL") forms the foundation of international law.1 According to Article 38 of the Statute of the International Court of Justice, international custom is "evidence of a general practice accepted as law."2 CIL is regarded as "the oldest and the original source of international law."3 Its formulation is simple enough:

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1 As Professor Henkin stated: "The core of traditional international law and its principal assumptions and foundations have been unwritten 'customary law,' made over time by widespread practice of governments acting from a sense of legal obligation." LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 33 (2d ed. 1979); see also HANS Kelsen, PRINCIPLES OF INTERNATIONAL LAW 438 (Robert W. Tucker ed., 2d ed. 1966) ("Custom is the older and the original source of international law, of particular as well as of general international law.").


CIL "results from the general and consistent practice of states followed by them from a sense of legal obligation."\(^4\) One of the early, influential commentators described CIL as "[c]ertain rules and customs, consecrated by long usage and observed by Nations as a sort of law, constitute the *customary Law of Nations*, or international custom."\(^5\)

CIL has two components: it must (1) be followed as a general practice—states adhere to the general practice because they believe they have a legal obligation to do so—(an objective element), and (2) be accepted as law.\(^6\) The second of these components is viewed as a subjective or psychological element, known as *opinio juris*.\(^7\) In sum, the widely accepted view among scholars is that CIL is the product of implicit state consent, and CIL rules "form because states engage in or acquiesce in particular practices and eventually recognize them as obligatory."\(^8\)

Despite centuries of study and reflection, commentators still struggle with identifying how CIL originated and developed. An influential observer once noted that the development of CIL is shrouded in "mystery and illogic."\(^9\) Part of the problem undoubtedly results from

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\(^4\) *Restatement (Third) of the Foreign Relations Law of the United States*, § 102(2) (AM. LAW INST. 1987); see also J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 499 (2000) ("The modern paradigm of customary international legal theory can be stated simply as follows: CIL is formed by the general and consistent practices of states accepted by them as law. CIL binds all states. New members of the international community of states are bound by existing customary law. However, an existing state is not bound by emerging customary law if it persistently objects.").


\(^6\) *David J. Bederman, International Law Frameworks* 16 (3d ed. 2010); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999); see also Steiner et al., *supra* note 3, at 240 (describing a view of CIL that includes four criteria: "(1) ‘concordant practice’ by a number of states relating to a particular situation; (2) continuation of that practice over a ‘considerable period of time’; (3) a conception that the practice is required by or consistent with international law; and (4) general acquiescence in that practice by other states.").

\(^7\) *Bederman, supra* note 6, at 17; Goldsmith & Posner, *supra* note 6, at 1116.

\(^8\) *Jeffrey L. Dunoff et al., International Law Norms, Actors, Process* 77–78 (3d ed, 2010).

the fact that the making of CIL may be "informal, haphazard, not deliberate, even partly unintentional and fortuitous." It is likely that the origins of particular principles of CIL were not contemporaneously recorded, and only became recorded after long-standing usage. Under such circumstances, the historical record may not reflect when a custom began or which ruler initiated the custom.

One of the oldest rules of CIL illustrates this situation. Rulers of states have, for the most part, abided for centuries by the principle that foreign diplomats must be protected by the ruler of the country in which they are stationed—the principle of diplomatic immunity. The genesis of this rule is not entirely known. The most plausible explanation may be that "some particular powerful prince early asserted sovereign or diplomatic immunity, and his lawyers provided conceptual underpinning for it." This may be as far as scholarship can go in tracing the source. But again, what is missing from this narrative are several facts, such as: (1) the time when this occurred; (2) the identity of the ruler; (3) the willingness or unwillingness of other rulers to abide by this principle; and (4) the amount of time it took for this custom to rise to the level of CIL.

These missing facts are the unknowns. This observation by Professor Henkin, however, does state certain (or, at least, highly plausible) knowns. In the beginning, there must have been a ruler with sufficient power to impose and enforce this principle. From there, it is likely that there were a variety of responses from other rulers. Some weaker rulers must have acquiesced because they were unable to resist pressure from the powerful ruler, while other weaker rulers refused to honor the rule and were punished. Other rulers may have adopted the rule because it also served their self-interest. These responses may not have been mutually exclusive. For example, a weaker ruler may have acquiesced to diplomatic immunity not out of weakness, but because it served her or his interest.

Along these lines, the development of CIL may be described in the following manner:

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10 Henkin, supra note 1, at 34.
11 See, e.g., Respublica v. De Longchamps, 1 U.S. (1 Dal.) 111, 116 (Pa. Oyer & Terminer, 1784) ("[T]he assault on a French consul is an infraction of the law of Nations .... The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world.").
12 Henkin, supra note 1, at 35.
When one examines the emergence of such universally applicable customary rules and principles as those relating to diplomatic immunities, the prohibition of piracy and privateering, and sovereign rights over the continental shelf, it is impossible to show that every State positively consented to the emergence of the rule in question. Yet it is virtually unanimously accepted that these rules have come to bind all States.\(^{13}\)

The real nature of the process by which these customary rules emerged seems to be more along the following lines. Some States actively created the practice, either by initiating it or by imitating it, and others, who were directly affected by the (express or implied) claims in question, by acquiescing in them. This initiation, imitation and acquiescence may plausibly be described in terms of will. But others still, who were not directly affected, sat by and did nothing, and in due course found themselves bound by the emerging rule.\(^{14}\)

What underlies this discussion is the fact that power was crucial to the initiation of the custom. Some ruler necessarily had to possess sufficient power to impose or influence the development of the law.\(^{15}\)

It is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.\(^{16}\)

Power expresses itself in a number of ways.

More specifically, we can quite easily identify a list of power resources potentially relevant to the development of customary international law: (1) issue-specific power, for example in terms of military technology where the United States has the clear capacity to shape how wars can be fought; (2) what

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\(^{15}\) This article’s use of the term “power” is borrowed from Professor Byers, who describes power as “the ability, either directly or indirectly, to control or significantly influence how actors—in this case States—behave.” MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 5 (1999). Two common sources of national power are military strength and wealth. Id.

\(^{16}\) MALCOLM N. SHAW QC, INTERNATIONAL LAW 79 (6th ed. 2008).
one might call the power of the critical moment and the capacity both to act and to argue in a manner that can help crystallize or catalyze the emergence of a new customary norm...; (3) institutional power, relevant because of the close linkages that exist between custom and treaty and the ever increasing role of institutional and multilateral forums in norm development; (4) the power to shape the context or background against which customary norms emerge...; or the capacity of the United States to navigate successfully within transnational civil society and to exploit the role of civil society in norm development to its own advantages; and (5) the power over the complex processes of coercive socialization by which weaker actors in the system come to accept and to internalize norms originating elsewhere in the system. Coercive socialization represents a political reality that has always threatened to destabilize or dilute the formal concept of consent in international law.\textsuperscript{17}

This article focuses on one particular form of power in the development of CIL, and suggests that it may be the historically most important and influential factor: naval power. As stated by Professor D.P. O'Connell in his classic work, \textit{The Influence of Law on Sea Power}: \"[S]ea power can express and sustain legal decisions that could not be represented even remotely credibly in any other way; and it has revealed the peculiar capacity of navies to manifest the concept of law and order among nations.\"\textsuperscript{18}

He added: \"[A]nd since navies, alone of the armed services, operate essentially in an international environment their connection with international law has always been obvious.\"\textsuperscript{19} Throughout history, the shape of CIL has been determined, or at least heavily influenced, by the ruler or state with the most powerful navy.

As a historical fact, the great body of customary international law was made by remarkably few States. Only the States with navies – perhaps 3 or 4 – made most of the law of the sea. Military power, exercised on land and sea, shaped the customary law of war and, to a large degree, the customary rules on territorial rights and principles of State responsibility. ‘Gunboat diplomacy’ was only the most obvious form of coercive law-making.\textsuperscript{20}

\textsuperscript{17} See Andrew Hurrell, \textit{Comments on Chapter Ten and Eleven}, in \textit{UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW} 352, 352–53 (Michael Byers & Georg Nolte eds., 2003) [hereinafter “U.S. HEGEMONY”].

\textsuperscript{18} D.P. O’CONNELL, \textit{THE INFLUENCE OF LAW ON SEA POWER} I (1975).

\textsuperscript{19} Id. In this article, naval or sea power will be defined as “force and threat of force on the oceans. It is usually embodied in a national navy composed of vessels most of which are armed and capable of striking at other ocean craft and at targets on land” and in the air. MARK W. JANIS, \textit{SEA POWER AND THE LAW OF THE SEA} xiii (1976) [hereinafter JANIS SEA POWER].

Professor O’Connell noted this theme:

The law has never been static. Its pliable character has meant that it has been made to serve the purposes of sea power, and so has become a weapon in the naval armoury. Just how it has played this role has depended on the issues that occasioned resort to naval force, but it has always been prominent in giving form and character to the issues as well as in influencing the conduct of those who have sought their resolution.\(^1\)

CIL and naval power are intertwined to the point that it may not be possible to draw a boundary between them. “Just as strategic objectives influenced what the law had to say, so the law, if it could be made to prevail, influenced the means of attaining those objectives.”\(^2\)

Despite the relationship between naval power and CIL, only a minority of international law professors in the United States (and perhaps elsewhere) appear to demonstrate interest in, or examination of, the subject.\(^3\) There also appears to be little interest in explaining this relationship to students. A rough survey of the indices of the leading casebooks on International Law reveals no mention of “Navy” or “Naval Power.”\(^4\) Perhaps naval power does not merit its own mention in an index, but references to “Navy” or “Naval Power” are also missing from the sub-listings under “Law of the sea” in the indices.\(^5\) This article contends that the relationship of naval power and CIL merits continued examination, and attempts to re-introduce the study of the role of naval power in the development of CIL and to show how it may influence emerging legal norms.

Part II of this article begins with a brief summary of the law of the sea during the period of European colonization (and before), and the legal clashes between the ocean trading European nations.\(^6\) At that time and “[u]ntil the twentieth century, almost all of the law of the sea

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\(^{21}\) O’CONNELL, supra note 18, at 16.

\(^{22}\) Id. at 17.

\(^{23}\) One notable exception is Professor Janis. See JANIS SEA POWER, supra note 19.


\(^{25}\) CARTER ET AL., supra note 24; DAMROSCH & MURPHY, supra note 24; JANIS & NOYES, supra note 24.

\(^{26}\) This article uses the terms “law of the sea” and “maritime law” interchangeably. Even though they are not identical in meaning, any difference in meaning is not material for purposes of this article.
consisted of customary law that was premised on freedom of the sea."\textsuperscript{27} The open and highly contentious question that was unresolved as the European powers aggressively opened and pursued trade with Asia and the Americas in the 16th and 17th centuries was whether, or to what extent, a state could claim exclusive jurisdiction over the oceans and restrict the navigation rights of other states. Much of today’s law on this issue is traceable to the work of Hugo Grotius, whose role is also examined in Part II. Part III discusses the role of naval power through the period of European colonization and the post-colonial period, and the dispositive role it played in settling unresolved legal issues. The navies of Portugal, Spain, Holland, and England shaped the development of the law during this era of colonialism, and, as the article jumps to the post-WWII era, the role of the United States Navy will emerge. Part IV examines why naval power is unique in its power and ability to shape and influence customary international law. Navies can act (lawfully) in ways that other military branches cannot, and powerful navies operate, for the most part, in international waters. Thus, naval operations and international law are, to a large extent, inseparable.

There are emerging legal norms in human rights law, and though it may seem counter-intuitive to discuss naval power in this context, this article asserts that the two are linked. In particular, Part V examines the relationship between naval power and the right to use force to address humanitarian crises. Contemporary international law prohibits use of force by states, except in situations where the U.N. Security Council authorizes use of force or in cases of self-defense. There is, however, recognition that use of force may be legal in order to address or avert catastrophic humanitarian crises. There has also been recent discussion whether states have a responsibility to protect populations from grave violations of international law such as genocide. In such situations, if states are to act in response to such crises, naval power will be necessary to address or avert them. In this sense, naval power will play a crucial role in determining whether international law develops to the point where the responsibility to protect against humanitarian disasters becomes widely-accepted law. Part VI concludes this article. In doing so, this article will also touch upon instances in which naval power has been used to violate international law or norms, and instances in which it has been ineffective in the face of violations of international law.

\textsuperscript{27} \textsc{Carter et al.}, \textit{supra} note 24, at 836.
II. A BRIEF SUMMARY OF MARITIME LAW DURING THE PERIOD OF EUROPEAN COLONIZATION (AND BEFORE)

Maritime law refers to "the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation." Maritime law arose out of the practical needs of the first merchants who set sail from their shores to engage in commerce. Given its origins and purpose, maritime law is inherently international in nature. Indeed, maritime law is one of the earliest forms of international law and may be the quintessential international law. Early forms of maritime law are found in the Code of Hammurabi from around 1800 B.C. The Phoenicians, and later the island of Rhodes, dominated maritime activity and law, and Rhodes is reputed to have developed the Rhodian Sea Code around 900 B.C. (although there is considerable dispute as to whether Rhodes did in fact develop such a code). The imperial Romans adopted and further developed the maritime law of the ancient Greeks, and this law became part of the Jus

28 THOMAS J. SCHÖENBAUM, 1 ADMIRALTY AND MARITIME LAW, PRACTITIONER TREATISE SERIES 2 (4th ed. 2004). Although commonly used as synonyms, admiralty law is distinct from maritime law in that admiralty law is about the law of ships and shipping. id. at 1. This article refers to maritime law, or law of the sea, because of its wider scope. See id. 29 Id. at 2. A 19th century American scholar described maritime law's relationship to commerce in the following manner:

"Commerce naturally and necessarily followed upon navigation. To regulate the multiform transactions of the former, and to encourage the latter, soon required the attention of the early commercial States. Maritime laws were adopted, appropriate to the limited wants of an infant trade, but containing nevertheless the elements of the expanded system, that now comprehends the commerce of the world, and prescribes the rule of decision, in all contested cases arising out of it.

HENRY FLANDERS, A TREATISE ON MARITIME LAW 3 (Boston, Little, Brown and Co. 1852); see also GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY II (1957) ("Maritime law was secreted in the interstices of business practice. It arose and exists to deal with problems that call for legal solution, arising out of the conduct of the sea transport industry . . . .")."

30 SCHÖENBAUM, supra note 28, at 2. Schoenbaum adds, "Although its rules are a part of the internal legal order of each country and, consequently, important national differences persist, the essential concepts and institutions of maritime law are remarkably similar all over the world." Id.

31 See JANIS INTRO, supra note 3, at 216 ("Long the most important international jurisdiction and long, too, one of the most elaborate parts of international law in general has been the law of the sea.").

32 SCHÖENBAUM, supra note 28, at 3 (provisions relating to marine collisions and ship leasing).

33 Id. at 3–5; see also JOSHUA S. FORCE & STEVEN FRIEDELL, 1 BENEDICT ON ADMIRALTY § 3 (LexisNexis 2015).
Gentium, the law governing all within the Roman Empire. Following the fall of the Western Roman Empire, the Italian city-states (starting around the year 1000) dominated maritime activity in the Mediterranean and further developed the Roman maritime law. In the latter part of the 13th century, trade between Aquitaine, England and Flanders resulted in the Rolls of Oleron, the most important and influential of the medieval sea codes, which was derived from Roman and Italian sources. "[T]he Rolls became the basis of the common maritime law of the North Sea and Atlantic Ocean", and also served as the chief early authority for the English Admiralty. The Maritime Court in Barcelona produced the Libro del Consulat del Mar, which was first printed in 1494, and the court provided the model for the Admiralty of England. After gaining its independence, the United States' maritime laws were influenced (but not restricted) by England's experience, and the United States "received" the traditional body of maritime law (subject, of course, to its particular needs and circumstances). It is the 17th century, however, that deserves particular emphasis.

A. The Influence of Hugo Grotius

The name Hugo Grotius (1583–1645) is undoubtedly familiar to anyone with even a casual interest in international law. Some have described him as the founder of modern international law. In the seventeenth century, the Dutch jurist Hugo Grotius argued that the law of nations also established legal rules that bound the sovereign states of Europe, then just emerging from medieval society, in their relations with one another. Grotius' classic of 1625, The Law of War and Peace, is widely acknowledged, more than any other work, as founding the modern discipline of the law of nations, a subject that, in 1789, the English philosopher Jeremy Bentham renamed as "international law."

More modestly, he has been described as "the best known of an important school of international jurists guided by the philosophy of

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34 Schoenbaum, supra note 28, at 4, 7.
35 Id. at 7.
36 Id. at 9.
37 Id. at 9–10.
38 Schoenbaum, supra note 28, at 11; see also Benedict on Admiralty, supra note 33, § 9.
40 Janis Intro, supra note 3, at 1.
natural law."\textsuperscript{41}

For purposes of this article, Grotius plays a key role because he, probably more than anyone else, is credited with establishing the customary international legal principle of freedom of the high seas. To put this into context, it is necessary to briefly examine the trade competition between Holland, on the one hand, and Portugal and Spain, on the other, during the 16th and 17th centuries.

In the 16th century, Portugal and Spain began highly lucrative trade with and via Asia, and by the end of that century, the united Spanish-Portuguese Empire dominated European trade with Asia.\textsuperscript{42} Vast amounts of silk, gold, silver, porcelain, and spices flowed between the regions.\textsuperscript{43} This Asian trade route also generated spectacular profits for Spain from silver mined in Latin America.\textsuperscript{44} In 1570, China suffered a financial crisis which forced the ruler to decree that all taxes must be paid in silver, but there was not enough silver to meet demand, so prices skyrocketed.\textsuperscript{45} The solution to China's financial crisis and silver shortage was a Spanish-controlled silver mine in the Andes Mountains.\textsuperscript{46}

For more than a century [after 1571], [Spanish] galleons shipped around 150 tons of silver a year across the Pacific from Mexico to Manila where it was traded for gold, silks and ceramics from China. Similarly large amounts of silver travelled eastwards from Potosi [in the Andes], via Europe. The price of silver in China — as measured against gold — was double that in Europe. Simply by shipping Andean silver to China, exchanging it for gold and selling that gold in Europe, the Spanish Empire was able to make vast profits — and pay for its wars in Europe. At the same time the European elite rapidly developed a taste for the luxuries of Chinese silk and porcelain.\textsuperscript{47}

The profits generated by the Spanish-Portuguese traders understandably attracted the attention of the Dutch. The Portuguese and Spanish argued, however, that they had exclusive rights to trade in Asia.

\textsuperscript{41} DAMROSCH & MURPHY, supra note 24, at xxi. By any measure, Grotius lived an atypical life. He was born into a powerful family, graduated from college at the age of 11, was sent to meet the King of France at the age of 15, and became a barrister. BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 38 (2014). For the last ten years of his life, he was the ambassador of Sweden in Paris. DAMROSCH & MURPHY, supra note 24, at xxi.

\textsuperscript{42} HAYTON, supra note 41, at 35-36.

\textsuperscript{43} Id. at 35.

\textsuperscript{44} Id.

\textsuperscript{45} Id.

\textsuperscript{46} HAYTON, supra note 41, at 35.

\textsuperscript{47} Id.
and navigate the routes because they had discovered the sailing routes to it.\textsuperscript{48} The matter came to a head in 1603 when the Spanish ship, the \textit{Santa Catarina}, was attacked and seized by Dutch ships owned by the Vereenigde Oostindische Compagnie ("VOC") in the region that is today Singapore.\textsuperscript{49} The VOC was the Dutch East India Company, an arm of the Dutch state, licensed to pursue trade in Asia and contest Portugal's claims to exclusive rights.\textsuperscript{50} When the cargo of the \textit{Santa Catarina} was auctioned off in the Netherlands, it generated 3.5 million guilders—half of the total capital of the VOC.\textsuperscript{51} In order to provide legal legitimacy and authority to its claim that it had the right to navigate the seas in Asia, the VOC hired Grotius in 1604.\textsuperscript{52} In contrast to Portugal’s argument that it had the right to decide who could sail the seas in its domain, Grotius argued that the sea, like the air, could not be occupied by any one power and was therefore free for all states to use.\textsuperscript{53} These arguments were designed to "defend the right of the VOC to sign contracts with Asian rulers. Grotius [later argued] that these contracts could legitimately exclude everyone else and justify the use of force against anyone who tried to impede shipping or renege on contracts."\textsuperscript{54} Grotius' arguments on behalf of the VOC became public when they were published anonymously in \textit{Mare Liberum} (The Free Sea).\textsuperscript{55}

[In \textit{Mare Liberum}, Grotius advanced what became a widely accepted fundamental principle: that the high seas, that is, oceans apart from narrow coastal zones, should be open to the ships of all states, an argument he based on the "most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it."\textsuperscript{56}]

\textsuperscript{48} Id. at 36; DAMROSCH & MURPHY, \textit{supra} note 24, at xxi–xxii.
\textsuperscript{49} HAYTON, \textit{supra} note 41, at 37.
\textsuperscript{50} Id. at 36.
\textsuperscript{51} Id. at 37.
\textsuperscript{52} Id. at 38.
\textsuperscript{53} Id. at 38.
\textsuperscript{54} HAYTON, \textit{supra} note 41, at 38.
\textsuperscript{55} Id. In his own colorful way, Hayton has a less than charitable view of Grotius, calling him a "spin doctor" for Dutch interests, and adding: "Grotius was a lobbyist for the VOC and a determined advocate of Dutch commercial and political rights. He chose his arguments to suit the occasion, misconstrued the positions of others and relied on shaky references. Nonetheless, his writings have had a lasting impact." Id. at 38–39.
\textsuperscript{56} Id. at 38. Grotius was 26 years old at the time of publication of \textit{Mare Liberum}.
\textsuperscript{56} JANIS INTRO, \textit{supra} note 3, at 216 (quoting HUGO GROTIUS, THE FREEDOM OF THE SEAS 7 (Magoffin trans. 1916) (1609)).
One recent news article observed that "[o]ver the following centuries [Mare Liberum] was used by global powers as justification to sail merchant vessels where they liked, often with gunboats sailing alongside to enforce their authority." Grotius' publication was perfectly suited to support Dutch interests because the Dutch became the dominant force in the South China Sea for most of the 17th century, as traders and middlemen in voyages between Asian destinations. With superior naval power the Dutch forced the Portuguese out of the Japanese silver trade and most of the spice ports.

Despite Mare Liberum and the rise of the Dutch navy, the issue whether navigation of the high seas was open to all or could be restricted by states remained an open issue. A leading English lawyer, John Selden (1584–1654) opposed Grotius' arguments for open seas and published a defense of closed or restricted seas called Mare Clausum Sive De Dominio Maris (Mare Clausum) in 1635. King James I hired Selden to rebut the open sea argument because he strongly objected to Dutch fishing fleets sailing along the Scottish and English coasts to harvest the annual migration of herring. Selden argued that states had the right to restrict access and claim specific areas of the high seas as sovereign territory; this view of the law was designed to protect the English herring fishermen.

Selden was clearly in favour of drawing imaginary lines through waves but ultimately even Grotius conceded that bays, gulfs and straights could be possessed. However, although they both concluded that it was possible and right to draw lines through the sea, they disagreed about exactly where these lines should be drawn. By the end of the seventeenth century, European states had reached a compromise, sometimes called the 'cannon shot' rule, allowing a country to control the waters up to three or four nautical miles from its coast [—the distance a cannon ball could fly from a coastal battery].
As matters stood in the 17th century, it appears that England and Selden were on the wrong side of history, and England’s attempt to impose a closed sea regime on Holland failed. Tides turned, however, and England came to a different view of the issue. England emerged as the globe’s dominant naval power, and it saw that its national interest was best served by open seas where its navy could operate without interference. England, then, made sure that open seas became customary international law.

63 Id.
64 Id.
65 DAMROSCH & MURPHY, supra note 24, at xxi. The law of the sea is now generally governed by the 1982 United Nations Convention on the Law of the Sea, which came into effect on November 16, 1994. DEP’T OF THE NAVY, NAVAL WARFARE PUBLICATION 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 1-1 (July 2007) [hereinafter “NWP 1-14M”]; see generally United Nations Convention on the Law of the Sea—Final Act, U.N. Doc. E.83.V.5 (Nov. 1982) [hereinafter “UNCLOS”], available at http://www.un.org/depts/los/convention_agreements/convention-overview-convention.htm. UNCLOS was the result of the Third United Nations Conference on the law of the sea. See NWP 1-14M, supra note 65, at 1-1. The need for this conference was precipitated by the emergence of new concepts such as claims to exclusive economic zones, which expanded the jurisdictional claims of littoral states. Id. The United States is not a party to UNCLOS. Id. The United States, however, does view the navigation and overflight provisions of UNCLOS as an accurate reflection of customary law, and thus acts in accordance with the Convention, except for the deep seabed mining provisions. Id.

The United Nations Convention on the Law of the Sea lays down a comprehensive regime of law and order in the world’s oceans and seas establishing rules governing all uses of the oceans and their resources. It enshrines the notion that all problems of ocean space are closely interrelated and need to be addressed as a whole.

The Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica. This marked the culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems and the spectrum of socio/economic development. At the time of its adoption, the Convention embodied in one instrument traditional rules for the uses of the oceans and at the same time introduced new legal concepts and regimes and addressed new concerns. The Convention also provided the framework for further development of specific areas of the law of the sea.

The Convention entered into force in accordance with its article 308 on 16 November 1994, 12 months after the date of deposit of the sixtieth instrument of ratification or accession. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea.


• Some of the key features of the Convention include the following: Coastal States exercise sovereignty over their territorial sea which they have the right to establish its breadth up to a limit not to exceed 12 nautical miles; foreign
III. THE ROLE OF NAVAL POWER IN DEVELOPING CUSTOMARY INTERNATIONAL LAW

There is a school of thought based on the observation that “successive hegemons have shaped the foundations of the international legal system,”—from Spain in the 16th century, Holland in the 17th century, France in the 18th century, Britain in the 19th century, to the United States today.66 This theme is amplified by a widespread view of how CIL is made. Only a few nations participate in the development of CIL, and (not surprisingly) those few nations are the militarily and politically powerful nations.67

Although all States are equally entitled to participate in the customary process, in general, it may be easier for more ‘powerful’ States to behave in ways which will significantly influence the development, maintenance or change of customary rules. . . .

Among other things, powerful States generally have large, well-financed diplomatic corps which are able to follow international developments globally

- vessels are allowed “innocent passage” through those waters;
- Ships and aircraft of all countries are allowed “transit passage” through straits used for international navigation; States bordering the straits can regulate navigational and other aspects of passage; . . .
- Coastal States have sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection; . . .
- Coastal States have sovereign rights over the continental shelf (the national area of the seabed) for exploring and exploiting it; the shelf can extend at least 200 nautical miles from the shore, and more under specified circumstances; . . .
- All States enjoy the traditional freedoms of navigation, overflight, scientific research and fishing on the high seas; they are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve living resources . . .

Id. 66

Michael Byers, Introduction to U.S. HEGEMONY supra note 17, at 1.

67 See Kelly, supra note 4, at 453 (“Few nations participate in the formation of norms said to be customary. The less powerful nations and voices are ignored.”). Other commentators have expressed similar views:

But it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition.

MALCOLM N. SHAW, INTERNATIONAL LAW 68 (5th ed. 2003).
across a wide spectrum of issues. This enables those States to object, in a
timely fashion, to developments which they perceive as being contrary to their
interests. If more than oral or written objection is required, powerful States
also have greater military, economic and political strength which enables them
to enforce jurisdictional claims, impose trade sanctions and dampen or divert
international criticism.\footnote{Byers, supra note 15, at 37.}

In light of this view of international law-making, more attention
should be devoted to one particular attribute of power that enable states
to dominate the creation of CIL—naval power.

Power manifests itself in numerous forms, but historically naval
power has played a unique role in the development of CIL. Although it
is difficult to ascribe exact weight to any single factor that determines a
nation’s influence when it comes to making international law, the CIL-
making states have shared a common attribute—dominant naval power.
It has been a consistent theme over time. According to one prominent
naval historian, the dominant nation in world affairs since the time of the
Romans has been whichever nation commanded naval superiority.\footnote{See
Bernard Semmel, Liberalism and Naval Strategy 3 (1986).}

As Hayton observed: “In each era, the global hegemon—the
Netherlands, then Britain and today the United States—has argued in
favour of freedom of navigation and used military force to prevent
others challenging that freedom.”\footnote{Hayton, supra note 41, at 40.}

The disagreement between the colonial European powers over
freedom of the seas was not settled by reasoned discussion around a
conference table or in court. It may seem odd today to think of a regime
where the right to sail the seas would be controlled by one country.
Portugal and Spain, however, claimed control over the ocean.\footnote{John
W. Coogan, The End of Neutrality, The United States, Britain and
Maritime Rights 1899–1915, at 17 (1981).} Their
claims were abandoned due to the superior naval power of first the
Dutch, then the British. The CIL principle of freedom of the seas was
imposed on the Iberian states by England and Holland “whose cannon[s]
shattered Spain’s claim to oceanic sovereignty.”\footnote{Id.} Similarly, the
difference in opinion between Grotius and Selden was not resolved by
discussion. It was resolved when Great Britain became the dominant
naval power in the world.\footnote{Until World War II, the Royal Navy was the most powerful in the world. The Royal Navy, Encyclopaedia Britannica, 2015}
From then on, London’s interests were better served by Grotius’ arguments than Selden’s. The British Empire was based on the presumed right of countries—and one country in particular—to trade freely around the world. Rather than arguing for wider territorial waters to save the herring, Britannia now argued for narrower ones so that it could rule more of the waves. That required minimizing other rulers’ rights to limit navigation. The Royal Navy could usually be relied upon to resolve any major disagreements over this point of legal principle with the application of its own version of the ‘cannon shot’ rule.\textsuperscript{74}

Great Britain’s motivations were obvious; as the world’s greatest trading nation, it needed to defend access to the empire’s far-flung ports.\textsuperscript{75} Britain accomplished its goals by using its superior naval strength to create “an international maritime regime based on the freedoms of the high seas, freedoms to travel and to fish without coastal state regulation outside a 3-mile territorial sea.”\textsuperscript{76} This new era of CIL was not the product of formal treaties or conventions; these rules, however, were “remarkably effective [and] respected by most states in times of peace from the end of the Napoleonic Wars in 1815 to the end of World War II in 1945.”\textsuperscript{77}

The dominance of the Royal Navy came to an end with the conclusion of World War II in 1945, and the United States Navy emerged as the dominant global power.\textsuperscript{78} World War II cemented America’s status as the most powerful naval force in the world, and it

\textsuperscript{74} HAYTON, supra note 4, at 40.


\textsuperscript{76} JANIS SEA POWER, supra note 19, at xiii–xiv.

\textsuperscript{77} Id. As a result, for over a century, civil and military vessels could sail freely on seas covering some 70 percent of the earth’s surface. Only within a narrow three mile buffer—the territorial sea—did coastal states impose some legal limits on the mobility of naval forces. Id.; see also Morgan, supra note 73, at 5 (“British oceanic enterprise provided the shipping, commerce, settlers and entrepreneurs that held these far-flung territories together. In the Indian Ocean, the English India Company dominated trade with India, Southeast Asia and China. . . . Trade was backed by naval power and by efficient handling of private and public credit, including substantial borrowing via the Bank of England.”).

\textsuperscript{78} See JANIS SEA POWER, supra note 19, at xiv.
has remained the largest and most powerful naval force since then.\(^79\) The United States wasted little time in exercising its new role as the world’s naval superpower after the end of World War II in August 1945. This (peaceful) exercise of naval power was demonstrated one month later in September 1945, when President Truman issued a proclamation extending the United States’ control over its seabed resources from 12 nautical miles to the edge of the continental shelf.\(^80\)

With the stroke of a pen, President Truman upended well-established CIL regarding jurisdiction over coastal waters. “At the time it was made, this claim was inconsistent with pre-existing international


Though it did not become the dominant naval power until 1945, America established itself as a global naval power before the Civil War. The American imperial project in Asia began with Commodore Perry’s exemplary display of gunboat diplomacy in Tokyo harbour in 1853: plenty of gunpowder but no casualties. Rather than resist, as the Qing court had done, the Japanese elite embraced modernisation and, within half a century, were to join in the dismemberment of China. American success in Japan led to greater ambitions. In 1890, the president of the US Naval War College, Alfred Mahan, published The Influence of Sea Power upon History, 1660–1783—analysing Britain’s success in creating a global empire. Mahan argued that for the United States to prosper, it needed to secure new markets abroad and protect trade routes to them through a network of naval bases. His argument resonated with a new generation of politicians. The opportunity came eight years later. By the end of the Spanish-American War, the US had truly become a Pacific power, annexing the Philippines, Hawaii and Guam.

\(^80\)Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945). The Truman Proclamation declared in pertinent part:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf. Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the water above the continental shelf and the right to their free and unimpaired navigation are in no way thus affected.

\textit{Id.}
Furthermore, "[n]o State had ever made a general claim to control over all of the seabed resources of its continental shelf beyond twelve nautical miles, nor had anything approaching such a claim appeared in any treaty." What was the purpose of this proclamation? It was to assert control over seabed resources, particularly offshore oil. Why was the United States able to unilaterally assert such a right? Because it was the world’s dominant naval power.

The Truman Proclamation follows the hypothesis that CIL principles were formed by powerful rulers who established a practice that was then adopted by other rules. Just as England and the Royal Navy used their dominance to ensure that freedom of the high seas became CIL, the United States used its navy to ensure that control of offshore resources became CIL. In both instances, scores of weaker countries enthusiastically embraced the new CIL.

Yet notwithstanding the initial inconsistency between the United States’ claim and pre-existing international law, the claim rapidly acquired the status of customary international law as other States followed the lead of the United States and made similar claims to jurisdiction over their own continental shelves.

Why was the Truman Proclamation so successful in promoting the development of a rule of customary international law? One important factor was undoubtedly the position of the United States. In 1945 the United States was by far the world’s most powerful State, having emerged victorious and relatively unscathed from the Second World War.

The passage of the Truman Proclamation legitimized and provided cover for other, even weaker, littoral states to exercise the same right. As a result, other countries advantageously expanded their jurisdiction further and further into their coastal waters. While these other nations

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81 BYERS, supra note 15, at 91.
82 Id.
83 See JANIS INTRO, supra note 3, at xiv. (The Truman Proclamation “asserted United States ownership of the oil and gas beneath the offshore continental shelf, an underwater plateau extending, in many places, hundreds of miles out to sea.”). To put the Proclamation into historical context, the Truman administration was concerned that the United States was “about to become a net importer of oil, and its dependence on foreign sources of petroleum would swell in the years ahead.” DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER 407 (1991).
84 See JANIS INTRO, supra note 3, at 216–17.
85 See id.; see also BYERS, supra note 15, at 91.
86 BYERS, supra note 15, at 91–92.
87 See JANIS INTRO, supra note 3, at 216–17.
88 See id.
may not have been powerful enough to establish the practice themselves, the powerful nation's proclamation opened the door for other nations to follow in its wake.89

The law of the sea is the creature of international order, reflecting patterns of compromise and consensus, insofar as they exist, among the competing and complementary interests of states. Since security interests are vital to every country, it is only reasonable to expect that states will consider sea power when devising ocean policy. It would be remarkable if a workable legal order for the oceans did not accommodate national naval interests.

Sea power influences the development of the law of the sea not only by imposing the need to reconcile naval interests in international negotiations, but when naval force is used to advance national claims to international law of the sea. The law of the sea can be developed both by convention and by custom. Outside of the development of the law of the sea in the Third United Nations Law of the Sea Conference and in other diplomatic meetings, states attempt to develop customary law of the sea, making claims and counterclaims in their actual maritime practice. Navies often have a role in this process of customary law making.90

The Truman Proclamation is one notable illustration of how naval power has been especially effective and necessary in forming CIL. States are rightly concerned about the law of the sea; it raises issues of territorial sovereignty, control of natural resources, and access to trading routes. These issues directly affect national prestige, security, commerce, and wealth. Naturally, states strive to assert maximum self-interest in staking out their positions on such issues.91 Against such interests, law assumes a lesser priority (assuming there is governing law in the first place).92 At the time he wrote his book, Professor O'Connell made this observation of the state of the law of the sea:

Government departments everywhere have produced instant experts on the law of the sea, usually without legal training, whose anxiety appears to be to 'beat the gun' by staking out a claim in advance of the [Law of the Sea] conference so as to present other delegations with a fait accompli. No element of opinio juris is discernible in this activity; no consideration is given to the elements of effectiveness and consent which are the concomitants of customary law; and, because it becomes impossible to raise the level of analysis above the mere anecdotal, the notion of State practice has become devoid of any significant

89 See ILA Report, supra note 3, at 39.
90 JANIS SEA POWER, supra note 19, at xvii.
91 See A.O. Sykes, International Law, in 1 HANDBOOK OF LAW AND ECONOMICS 764 (Polinsky & Shavell, eds. 2007).
92 See O'CONNELL, supra note 18, at 12–13.
content. In this intellectual morass, where opinions and views are a substitute for law, the occasions for controversy, dispute and violence become ever more numerous and frequent. The law of the sea has thus become the stimulus to sea power and not its restraint.  

In situations where there is no governing law or where competing claims are made without principled legal bases, the resolution of issues will ultimately be decided by the naval power that is able to advance and establish the governing regime. In this way, "[s]tates may use their navies to demonstrate and enforce their perceptions of the proper law of the sea. If such naval operations are consistent, effective, and accepted, customary law of the sea may develop."  

As Professor Janis summed it up: "In the customary process, naval operations and the exercise of sea power may play a vital role because naval activities are an authoritative and forceful expression of state interest and policy."  

IV. THE UNIQUE ATTRIBUTES OF NAVAL POWER TO MAKE CUSTOMARY INTERNATIONAL LAW  

Naval power is unique among the forms of military power in its ability to shape CIL, and much of that uniqueness is due to Grotius' prevailing argument that the high seas are international waters that are freely navigable by all navies. Because navies are able to operate with

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93 Id. at 13.  
94 See JANIS INTRO, supra note 3, at 75.  
95 Id. at 75.  
96 Id. at 76-77. This view was also shared by the Soviet navy. See Scott C. Truver, The Law of the Sea and the Military Use of the Oceans in 2010, 45 LA. L. REV. 1221, 1233 (1985) ("The Soviet navy has also recognized the possibilities of the use of sea power to influence foreign leaders and support Moscow's foreign policies. Indeed, Soviet doctrine has accepted the classical concept of seapower . . . "). Soviet Admiral Gorshkov has written:  

Owing to the high mobility and endurance of its combatants, the navy possesses the capability to vividly demonstrate the economic and military might of a country beyond its borders during peacetime. This quality is normally used by the political leadership of the imperialist states to show their readiness for decisive actions, to deter or suppress the intentions of potential enemies, as well as to support "friendly states." . . . Consequently, the role of a navy is not limited to the execution of important missions in armed combat. While representing a formidable force in war, it has always been an instrument of policy of the imperialist states and an important support for diplomacy in peacetime owing to its inherent qualities which permit it to a greater degree than other branches of the armed forces to exert pressure on potential enemies without the direct employment of weaponry.  

Id. (footnote omitted).  
97 See JANIS INTRO, supra note 3, at 216.
freedom—without interference by other states on the high seas—naval power possesses advantages and capabilities that land-based military powers do not. Simply put, navies are able to act in ways that armies and land-based air forces cannot.

Although all armed forces function, to some extent, as an arm of foreign policy, there are several advantages to sea power. Its principal advantage is flexibility. Since naval forces operate in an international medium—the high seas—they can be moved into an area without the necessity of obtaining overflight or diplomatic clearances. Another classical advantage of sea power is its “universality” or “pervasiveness,” meaning that the sea permits naval vessels to reach distant countries independent of nearby bases. Moreover, sea-based forces are not subject to host-country employment restrictions, a problem encountered by United States land-based forces during the 1973 Middle East conflict. Further, the use of ground troops generally signifies strong resolve and a long-term commitment that tends to escalate rather than de-escalate a conflict. The decision to use ground forces almost always results in a violation of the territorial integrity of another nation, whereas naval forces can remain outside but near territorial waters for long periods, thereby allowing for much greater flexibility in terms of a final decision to commit the forces. Finally, naval forces enjoy an important operational advantage since a significant part of the Navy’s support is organic to the combat unit, thus simplifying communications and logistics. Taken together, these features have made naval forces, in the words of former Chief of Naval Operations Elmo Zumwalt, the “relevant factor” in almost all crises that have occurred since World War II.

Returning to Professor O’Connell:

Navies alone afford governments the means of exerting pressure more vigorous than diplomacy and less dangerous and unpredictable in its results than other forms of force, because the freedom of the seas makes them locally available while leaving them uncommitted. They have the right to sail the seas and the endurance to do so for requisite periods, while land-based forces cannot present a credible level of coercion without overstepping the boundaries of national sovereignty.

He added:

The sea, then, is the only area where armed forces can joust with more or

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98 See O’CONNELL, supra note 18, at 3–4.
100 O’CONNELL, supra note 18, at 3–4.
less seriousness in order to promote political objectives; the only area where they can be concentrated, ready for intervention but not overtly threatening to intervene. An army that crosses a frontier represents a use of force altogether different from a navy that crosses the seas.¹⁰¹

“Blue water” navies, then, are able to sail the globe without violating territorial sovereignty, have freedom of movement in international waters, and are designed for flexibility in movement.¹⁰² This is why naval power is so intertwined with international law.

Special attributes and broad options inherent in the use of naval forces have made them particularly well suited for the purposes of the defense of sea lines of communication (SLOC) and the projection of power into regions of importance to the state. Naval units have the capability to respond quickly to crisis situations and contingencies world-wide with the precise type and magnitude of force necessary to achieve the stated objective. The naval forces of the major maritime powers have the capability to apply military power deftly across the entire spectrum of armed force: from the maintenance of unobtrusive presence, to the deliberate show of force for political purpose, to limited war, to general conventional war, to a launch of a strategic nuclear attack. Naval force, then, is flexible and possesses wide geographical reach. As Hedley Bull has described these special qualities:

As an instrument of diplomacy, sea power has long been thought to possess certain classical advantages vis-a-vis land power and, more recently, air power. The first of these advantages is its flexibility: a naval force can be sent and withdrawn, and its size and activities varied, with a higher expectation that it will remain subject to control than is possible when ground forces are committed. The second is its visibility: by being seen on the high seas or in foreign ports a navy can convey threats, provide reassurance, or earn prestige in a way that troops or aircraft in their home bases cannot do. The third is universality or pervasiveness: the fact that the seas, by contrast with the land and the air, are an international medium allows naval vessels to reach distant countries independently of nearby bases and makes a state possessed of sea power the neighbor of every other country that is accessible by sea.

Inherent in the peacetime use of navies, however, is the ability to travel freely upon the oceans of the world. Without the free use of international ocean space, these special attributes of naval force for the exercise of sea power in peacetime can provide little benefit to the nation with great power

¹⁰¹ Id. at 8.
¹⁰² "Blue water" navies are ones that can operate in high seas far from their home country, as opposed to navies whose capabilities are limited to coastal operations. JANIS SEA POWER, supra note 19, at xiii.
ambitions.\textsuperscript{103}

Thus, though it may not be apparent to casual observers, naval power and international law are, in fact, intertwined and inseparable. Moreover, naval power has been instrumental in forming and/or enforcing international law. This fact has been demonstrated throughout history, and continues to hold force.\textsuperscript{104}

\textbf{A. A Brief Description of the United States Navy}

Because naval power occupies such a crucial role in international law-making and enforcement, this article will briefly describe the status of the United States Navy. The United States Navy is, by far, the largest in the world.\textsuperscript{105}

In 2010, then Secretary of Defense, Robert M. Gates, provided this summary of the status of the U.S. Navy:

- The U.S. operates 11 large carriers, all nuclear powered. In terms of size and striking power, no other country has even one comparable ship.
- The U.S. Navy has 10 large-deck amphibious ships that can operate as sea bases for helicopters and vertical-takeoff jets. No other navy has more than three, and all of those navies belong to [our] allies or friends. Our Navy can carry twice as many aircraft at sea as all the rest of the world combined.
- The U.S. has 57 nuclear-powered attack and cruise missile submarines – again, more than the rest of the world combined.
- Seventy-nine Aegis-equipped combatants carry roughly 8,000 vertical-launch missile cells. In terms of total missile firepower, the U.S. arguably outmatches the next 20 largest navies.
- All told, the displacement of the U.S. battle fleet – a proxy for overall fleet capabilities – exceeds, by one recent estimate, at least the next 13 navies combined, of which 11 are our allies or partners.
- And, at 202,000 strong, the Marine Corps is the largest military force of its kind in the world and exceeds the size of most world armies.\textsuperscript{106}

Secretary Gates affirmed that “the United States stands unsurpassed

\textsuperscript{103}Truver, \textit{supra} note 96, at 1228–29 (footnote omitted).
\textsuperscript{104}See Schachter, \textit{supra} note 20, at 536–37.
He also noted the historical roots of the Navy’s importance:

But we must always be mindful of why America built and has maintained a Navy, Marine Corps, and Coast Guard. Indeed, it was an Army general, Ulysses Grant, who said that “[m]oney expended in a fine navy, not only adds to our security and tends to prevent war in the future, but is very material aid to our commerce with foreign nations in the meantime.” And in fact, this country learned early on, after years of being bullied and blackmailed on the high seas, that it must be able to protect trade routes, project power, deter potential adversaries, and, if necessary, strike them on the oceans, in their ports, or on their shores.108

The Navy is charged with four missions: (1) Control of the Sea; (2) Projection of Power Ashore; (3) Strategic Deterrence; and (4) Naval Presence.109

The foreign policy or political use of naval power differs from other applications of military power in that its use is continuous. Routine naval activities, or “preventive deployments,” contribute in several ways to the overall American foreign policy goal of conflict avoidance. First, preventive deployments demonstrate the United States’ military and political commitment to particular states or groups of states. The continuous presence of the Sixth Fleet in the Mediterranean is an example. Preventive deployments also demonstrate to foreign governments the capability of U.S. naval forces to act, if required, in support of our interests. And, naval presence forces confirm, on a routine basis, our political commitments to others. . . .

107 Id.
108 Id.

The first mission, “sea control,” is that role historically associated with navies and still considered the fundamental function of the U.S. Navy. It involves keeping open sea lanes of communication for U.S. and allied purposes while denying their use to the enemy. . . .

“Projection of power ashore” describes the attainment of military objectives on land by the use of Marine Corps amphibious forces. Although this mission is also largely war-related, the frequent peacetime use of Marine Corps forces to support foreign policy broadens its political dimension. . . .

The third mission of the Navy, “strategic deterrence,” involves the use of naval forces—principally ballistic missile submarines—to discourage adversaries from launching a nuclear attack. . . .

. . . The term “naval presence” simply means the use of naval forces short of war to achieve political objectives. The broad aims of naval presence are to encourage actions in the best interests of the United States or her allies, and to deter actions inimical to those interests by projecting a stabilizing influence into an area of crisis.

_id. (footnotes omitted).
A second type of deployment supporting foreign policy is the “reactive deployment” in response to a crisis. Such deployments may simply signal American interest in the outcome of the crisis; alternatively, the presence of naval forces on scene may be intended to induce a preferred course of action.\footnote{Id. at 87–88 (footnotes omitted).}

The United States has relied upon its naval power in numerous instances to advance foreign policy interests.

A study by the Brookings Institution found that the United States employed its armed forces 215 times for political purposes between 1946 and 1975. Naval forces participated in 80% of these instances, and more than 100 incidents involved only naval forces. If the period surveyed were narrowed to include only political uses since 1955, the Navy was involved in nine of every ten incidents. These figures clearly support President Warren G. Harding’s assessment that “the Navy is rather more than a mere instrumentality of warfare. It is the right arm of the State Department.”\footnote{Id. at 81–82 (footnotes omitted).}

The Navy, in one of its Commander’s Handbooks, recognizes the importance of international law and its role.

\footnote{NWP I-14M, \textit{supra} note 65, at 20.}

\footnote{See Truver, \textit{supra} note 96, at 1226–1228. Truver went on to note:}

\begin{footnotes}
\item[1]International law is defined as that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, nations comply with international law because it is in their interest to do so. Like most rules of conduct, international law is in a continual state of development and change.\footnote{See Truver, \textit{supra} note 96, at 1226–1228. Truver went on to note:}

In light of the multi-faceted roles of naval power, it is inaccurate to view naval power as simply one form of military power to be utilized when violent force is required (usually when legal processes or diplomacy fail). It is also an integral arm of foreign policy, and is uniquely capable of making and enforcing law. Any study of the development of CIL without examination of its role would be incomplete.\footnote{See Truver, \textit{supra} note 96, at 1226–1228. Truver went on to note:}
V. THE CONTINUING ROLE OF NAVAL POWER TO SHAPE CUSTOMARY INTERNATIONAL LAW

Though it may seem indelicate to discuss matters of force and violence in academic discussions, it is an inescapable fact that navies

As important as the civil maritime assets are, however, this discussion is concerned solely with the present and future uses of naval power, especially in the legal-politico-military context of the future law of the sea. That is, why do states want navies and what purpose does sea power serve in a “peacetime” environment? Second, what are the special attributes of sea power which permit states to pursue their politico-military objectives by relying upon naval force? And finally, what are the roles of naval power as an instrument of foreign policy in situations short of war?

The U.S. Navy publication, Strategic Concepts of the U.S. Navy, NWP-1, provides a clear statement of the importance of sea power to the United States. America’s geographical position, the location of major allies, America’s great dependence on international seaborne trade, and the increasing importance of the oceans as sources of food, energy and minerals offer compelling rationales for the missions, structure, and size of the U.S. Navy. The central importance of the seas to continued American prosperity and national security is evident in this excerpt from NWP-1:

The United States is a maritime nation with only two international frontiers and thousands of miles of coastline bordering on two of the world’s largest oceans.... Unlike its potential adversaries, the United States is heavily involved in the interdependent world economy. Should the sea lines of communication be interdicted for any length of time, the welfare of U.S. citizens would be radically impaired. The majority of U.S. allies are overseas and even more dependent [on] free use [of] the seas than we are. The critical support required by them in time of war is that which can be projected across the seas. All U.S. international relations, be they economic, political, or military, are influenced by this heavy dependence on free and unimpeded passage on the oceans of the world. The dependence on the seas impacts directly on any consideration of national strategy.

The doctrinal foundation for this statement was expressed at the end of the nineteenth century in the writings of Admiral Alfred Thayer Mahan, whose conception of the close relationships among national power, foreign policy, and sea power provided a cardinal thesis for the use of sea power to further national objectives. Mahan perceived the sea as “a great highway” or “a wide common” providing countries having access to it with an easier and cheaper means of transportation than across land. Using Great Britain as an example and citing the effective use of the sea for both commercial and military transport which brought Great Britain tremendous wealth and international prestige, Mahan argued that no nation that aspired to great power status could ignore the importance of sea power. Navies, the tools with which to forge great power, had two purposes in Mahan’s scheme. The first was to protect commerce, so that no country could interfere with the free use of the oceans as an avenue for international trade. The second purpose was to carry out “aggression” or combat.

Id. (footnotes omitted).
(and all military branches) exist to engage in use of force, if necessary. This fact is juxtaposed alongside the driving theme and first principle of international law: Avoidance of use of force. Indeed, in listing the purposes of the United Nations, the Charter starts:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.\textsuperscript{114}

The Charter reinforces this point in Article 2. Paragraph 3 provides: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”\textsuperscript{115}

Paragraph 4 provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”\textsuperscript{116}

The Charter provides only two exceptions to the prohibition of use of force: (1) use of force is authorized if approved by the Security Council; and (2) self-defense.\textsuperscript{117}

In light of these fundamental principles, an air of illegitimacy may seem to surround the idea of naval power influencing the development of CIL. The notion that force or the (express or implied) threat of force is involved in making law runs counter to the aspirations of a world governed by law. This article contends, however, that naval power has a legitimate role to play in developing CIL, even when it comes to advancing human rights law (which may seem counter-intuitive). To develop this contention, this article looks to the legal and factual events relating to the bombing of Kosovo by NATO forces in 1999.

The disintegration of the former Yugoslavia resulted in violent conflict among the various ethnic groups in the region. In particular, violence escalated between ethnic Serbs and ethnic Albanians. In 1998, the U.N. Security Council condemned “the excessive and indiscriminate

\textsuperscript{114} U.N. Charter art. 1, ¶ 1.
\textsuperscript{115} U.N. Charter art. 2, ¶ 3.
\textsuperscript{116} U.N. Charter art. 2, ¶ 4.
\textsuperscript{117} U.N. Charter arts. 39, 51.
use of force by Serbian security forces and the Yugoslav army" against the ethnic Albanians. Despite the violence, the Security Council failed to authorize the use of force to protect the ethnic Albanians. In early 1999, ethnic Serbian forces killed dozens of ethnic Albanian civilians in a village in Kosovo. These events led NATO to intervene with force to end the violence. In March 1999, NATO began a bombing campaign against Serbia with the purpose of protecting the ethnic Albanians from the ethnic Serbs. It is important to note that this use of force was not authorized by the Security Council, and no NATO member could plausibly claim self-defense. In other words, there was no legal basis for this use of force under the U.N. Charter. Russia denounced the bombing as a "flagrant violation" of the U.N. Charter. The United Kingdom denied Russia's claim, and asserted its justification for the use of force: "We are in no doubt that NATO is acting within international law and our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe."

The problem with Britain's position was that it was arguable whether the use of force was based on an "accepted" principle. Russia certainly did not agree, and the principle is found nowhere in the U.N. Charter. After the fact, an independent international commission concluded that NATO's use of force was "illegal, yet legitimate." Kofi Annan, the Secretary-General, commented:

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?

Despite the ambiguities regarding the legality of NATO's use of

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119 DAMROSCH & MURPHY, supra note 24, at 1154.
120 Id.
121 Id.
122 Id.
123 DAMROSCH & MURPHY, supra note 24, at 1155.
force against Serbia, this use of force has given rise to a possible third exception to the prohibition of use of force: Use of force is now arguably legal to avert a humanitarian catastrophe. This exception was discussed in a legal memorandum dated March 7, 2003, from British Attorney-General Goldsmith to Prime Minister Tony Blair in the build-up to the invasion of Iraq in 2003.\footnote{Memorandum from Att’y Gen. Goldsmith on Iraq Resolution 1441 to Prime Minister Blair (Mar. 7, 2003), available at http://downingstreetmemo.com/docs/goldsmithlegal.pdf.} In that memorandum, Goldsmith identifies three bases for the legal use of force: “(a) self-defence (which may include collective self-defence); (b) exceptionally, to avert overwhelming humanitarian catastrophe; and (c) authorization by the Security Council acting under Chapter VII of the UN Charter.”\footnote{Id.} Goldsmith goes on to observe that subpart (b) “has been emerging as a further, and exceptional, basis for the use of force. It was relied on by the UK in the Kosovo crisis and is the underlying justification for the No-Fly Zones. The doctrine remains controversial, however.”\footnote{Id.}

Since then, there has been discussion in diplomatic circles about State responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.\footnote{See, e.g., G.A. Res. 60/1 ¶¶ 138–40 (Oct. 24, 2005); U.N. Secretary General, Implementing the Responsibility to Protect, ¶ 11, U.N. Doc. A/63/677 (Jan. 12, 2009); see also Mehrdad Payandeh, Note, With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking, 35 YALE J. INT’L L. 469 (2010).} The responsibility to protect has not risen to the level of binding international law; it is merely aspirational at this time.\footnote{See id. at 514.} If it ever becomes accepted as law, however, it will only have effect so long as a State possesses the power to enforce it against the violators. This is why naval power matters.

The bombing of Kosovo confirmed the advantage of naval power over land-based attacking options. In 2001, the General Accounting Office\footnote{In 2004, the General Accounting Office was renamed to the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. 108-271, § 8, 118 Stat. 811, 814 (2004).} (“GAO”) published a review of the operational challenges in conducting the campaign.\footnote{U.S. GENERAL ACCOUNTING OFFICE, GAO-01-461, KOSOVO AIR OPERATIONS: COMBAT AIRCRAFT BASING PLANS ARE NEEDED IN ADVANCE OF FUTURE CONFLICTS (2001), available at http://www.gao.gov/assets/240/231723.pdf.} The GAO made several recommendations addressing a variety of operational challenges that emerged during the campaign. The challenges related to issues such as: (a) “working with
the host countries and U.S. embassies to obtain permission to base aircraft in specific locations;” (b) “conducting extensive site visits to determine what improvements must be made to foreign airfields and arranging for the improvements to be completed;” (c) “ensuring that U.S. aircraft have adequate ramp space, hangars, and fuel;” and (d) “obtaining all the logistics services necessary to sustain and house the personnel who will be deployed at foreign airfields.” The use of naval aircraft carriers does not raise these issues. The aircraft carriers sail in international waters, and may engage in operations without the logistical challenges faced by land-based aircraft. Naval power provides flexibility and independence that is not provided by other military branches. Crises (humanitarian, or otherwise) may occur anywhere, and only a naval power has the ability to respond without raising additional complications of territorial sovereignty and cooperation by other states.

A more recent example of the U.S. Navy’s ability to address humanitarian crises occurred in 2014. That summer, thousands of Yazidis were trapped on Mt. Sinjar in Iraq by Islamic State of Iraq and the Levant (ISIL) forces, who sought to kill or enslave the Yazidis. In

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133 Id. at 7.

As you know, yesterday, we announced that a team of U.S. military personnel accompanied by USAID conducted an assessment on the situation on Mount Sinjar and the impact of U.S. military actions to date. The team assessed that there are far fewer Yazidis trapped on Mount Sinjar than previously feared, and that’s largely because of our successful humanitarian air drops and U.S. airstrikes on ISIL targets. These are the kinds of missions, as you know, that the military trains for all the time and we do it better than anybody else.

These efforts enabled the Peshmerga to assist thousands of Yazidis in evacuating from the mountain each night over the last several days. Those who remain on Mount Sinjar are in better condition than we previously thought they might be, and they continue to have access to the food and water that we have airdropped. And as you may know, we did yet another airdrop last night.

The secretary is very proud that we’ve been able to effect this kind of change around Mount Sinjar, and in particular thanks to the skill and professionalism of our military personnel.

While this assessment has led us to conclude that an evacuation mission is far less likely, we’re not taking our eye off the ball with respect to the humanitarian crisis in Iraq. We continue to assess the needs of the Yazidi people, as well as others who have been displaced in northern Iraq. We will conduct additional humanitarian airdrops, if needed, and we appreciate the assistance of the British, the French, and other countries, as well as our interagency partners, working with us to provide assistance to the Iraqi people.

Meanwhile, as Secretary Hagel reiterated last night, the situation in Iraq remains dangerous and our efforts there are not over. The president has been clear
response to the threats posed by ISIL, the United States engaged in airstrikes against ISIL. The strikes were initiated by the launching of 47 missiles from U.S. warships operating in international waters.  

Though it may seem that discussion of military power, including naval power, is somehow inconsistent with human rights, the opposite may be true. Events like genocide and ethnic cleansing are violent exercises of power by those with power over those without. If human rights law is to advance to the point where it becomes universally (or, at least, widely) accepted that use of force is lawful in order to address or avert such grave violations of international law, enforcement will depend on states with the willingness and capability to stop or remedy such violations. The states with the greatest capacity to do so will be the ones with dominating naval power.

VI. CONCLUSION

Naval power has played a key role in the development of CIL, and will no doubt continue to do so. It may also play a role in the advancement of human rights (though its primary purpose will always remain defense and projection of force). The purpose of this article, however, is not to extol the unquestioned virtue of naval power or to assert that it always plays a positive, beneficial role in international law. Indeed, the discussion would be incomplete without an examination of the role of naval power in violating laws or norms. Professor O'Connell acknowledged this fact: “But navies can play the part of the criminals as well as of maritime regional crime squads, and it is sometimes difficult to know which of the two roles they are in fact playing...”  

about our limited military objectives in Iraq. They are, one, to protect American citizens and facilities; two, to provide advice and assistance to Iraqi forces as they battle ISIL; and, three, to join with international partners to address the humanitarian crisis.

U.S. military remains ready to conduct—or continue, I’m sorry, airstrikes to protect U.S. personnel and facilities in and around Erbil and to protect the Yazidi people. However, while our airstrikes and our humanitarian aid have had an impact on the situation in northern Iraq, there is still no American military solution to the larger crisis in Iraq. The only lasting solution is for the Iraqis to come together and form an inclusive government that represents the legitimate interests of all Iraqi citizens and unifies the country in its fight against ISIL.

Id.  


136 O'CONNELL, supra note 18, at 1.
One example of the (mis)use of naval power was displayed by the Royal Navy (the most powerful navy in the world at the time) in the First Opium War in 1839 to 1842. \(^\text{137}\) At that time, British traders imported large amounts of opium into China, generating large-scale profits for the traders and widespread addiction in the Chinese population. \(^\text{138}\) Alarmed by the rates of addiction, the Chinese emperor attempted to restrict the import of opium. \(^\text{139}\) China’s attempt to suppress the import of opium by British traders triggered a massive response by the Royal Navy. Britain’s response “introduced ‘gunboat diplomacy’ to Asia in raw and undiluted form.” \(^\text{140}\) After a few early battles in 1839 and early 1840, Britain dispatched a fleet to wage war on China. \(^\text{141}\)

“The fleet consisted of 48 ships—16 warships mounting 540 guns, four armed steamers, 27 transports and a troop ship . . . .” \(^\text{142}\) China’s attempt to shut down the opium trade was forcefully defeated. The Royal Navy was the instrument to promote and maintain unrestricted drug trade by the Western powers, particularly Britain.

Another example of the failure of naval power in matters of international law also involved the Royal Navy and its relationship to the slave trade. Britain outlawed the British slave trade in 1807. \(^\text{143}\) Prior to 1807, however, the Royal Navy was itself involved in the slave trade. \(^\text{144}\) It had its own enslaved Africans in parts of the Caribbean, and escorted slave ships down the African coast. \(^\text{145}\) Up to three million Africans were transported in British ships from 1650 to 1807, and at the end of the 18th century Britain dominated the slave trade, with an average of more than 150 slave ships leaving English ports each year. \(^\text{146}\) Britain was the pre-eminent slave trading nation during the 18th century, and illegal British slave trading continued after 1807. \(^\text{147}\) Prior to 1807, all of this was done, of course, under the protection of the Royal Navy. Even after Britain


\(^{138}\) Id. at 2–4.

\(^{139}\) Id. at 11.

\(^{140}\) Id. at 31.

\(^{141}\) Perdue, *supra* note 137, at 32–35.

\(^{142}\) Id. at 35.


\(^{144}\) Id.

\(^{145}\) Id.

\(^{146}\) Id.

\(^{147}\) Lewis-Jones, *supra* note 143.
made slave trading illegal, a quarter of all Africans who were enslaved in the period from 1500 to 1870 were transported across the Atlantic after 1807.148

After 1807, the Royal Navy began patrols of the African coast in an attempt to stop the slave trade.

The Royal Navy began an anti-slavery patrol in 1808 following Britain’s decision to abolish its slave trade in 1807. In 1819, the Navy created a naval station in West Africa, an independent command under a Commodore (prior to this the ships were on “particular service”).

Between 1808 and 1860, the Royal Navy, West Africa Squadron seized approximately 1600 ships involved in the slave trade and freed 150,000 Africans who were aboard these vessels.

Although the Royal Navy is estimated to have captured no more than 10 percent of the ships involved in the slave trade, the consistent role of the West Africa Squadron can be argued to have exerted considerable pressure on the nations that continued to trade in slaves after 1807.

There were few benefits to serving on the West Africa squadron. Daily life was tedious, there were little chances of promotion and disease was common. The dangers of the coastal climate were exacerbated by the operational necessity of the men traveling through rivers and swamps in boats, and many suffered from fevers. Moreover, the ships of the squadron were unsuited to their task and often easily out-run by the slavers.149

Britannia ruled the waves, yet its ships were outrun by the slave traders, and the trade remained robust.150 So how was it that the most powerful navy in the world was powerless to stop the slave trade? Perhaps the Royal Navy was unable to commit sufficient resources to the task due to its conflicts with other European powers and the newly freed colonies in America, or perhaps it was unwilling. Why did the slave trade remain so active after 1807? Why was the Royal Navy insufficiently equipped to deter the slave trade in a meaningful way? Why did the Royal Navy provide so little career incentive to its officers to combat the trade? Whatever the situation may have been, the Royal Navy was unable or unwilling to devote maximum effort to ending the slave trade, notwithstanding Britain’s abolition.

148 Id.
150 See Lewis-Jones, supra note 143 ("Patrolling the coast was arduous, unpleasant and frustrating, and the vessels employed on the station were often too old, too slow, and too few in number to catch the slave ships.").
These are two examples where naval power was used to engage in efforts that would be considered illegal today (the Opium Wars) or where there was less than full commitment—and perhaps a lack of enthusiasm—to stop illegal activity (the slave trade). Like anything else, naval power may be misused to promote illegal activity or it may be used to develop and promote beneficial international law. On a more positive and hopeful note, the United States Navy recognizes its role to uphold international law:

U.S. naval forces constitute a key and unique element of our national military capability. The mobility of forces operating at sea combined with the versatility of naval force composition—from units operating individually to multicarrier strike group formations—provide the President and the Secretary of Defense with the flexibility to tailor U.S. military presence as circumstances may require.

Naval presence, whether as a showing of the flag during port visits or as forces deployed in response to contingencies or crises, can be tailored to exert the precise influence best suited to U.S. interests. Depending on the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent. So long as they remain in international waters and international airspace, U.S. warships and military aircraft enjoy the full spectrum of high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers, subject only to the requirement to observe international standards of safety, [and] to recognize the rights of other ships and aircraft that may be encountered . . . . Deployment of a carrier strike group into the vicinity of areas of tension and augmentation of U.S. naval forces to deter interference with U.S. commercial shipping in an area of armed conflict provide graphic illustrations of the use of U.S. naval forces in peacetime to deter violations of international law and to protect U.S. flag shipping.151

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151 NWP 1-14M, supra note 65, at 4-3 (emphasis added). NWP 1-14M states its purpose as:

This publication is intended for the use of operational commanders and supporting staff elements at all levels of command. It is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict. The explanations and descriptions in this publication are intended to enable the naval commander and his staff to comprehend more fully the legal foundations upon which the orders issued to them by higher authority are premised and to understand better the commander’s responsibilities under international and domestic law to execute his mission within that law.

Id. at 19.
Given the historical and continuing role of naval power in developing and influencing customary international law, this role merits a place in the study of international law. Naval power possesses the potential to advance international law in positive ways, but it can also be misused. If it is to be employed to achieve aspirational goals, policymakers must first be aware of its role and why that role is so important. This is why any student of international law should take naval power into account.