

Dark Law on the South China Sea

Stephen Cody*

Abstract

In Democracies and International Law, Tom Ginsburg warns of an emerging post-liberal order influenced by powerful authoritarian regimes and new illiberal laws that repurpose global rights, undermine international courts, and expand executive power. Autocrats and kleptocrats embedded in the global economy increasingly appear to use international law to preserve their power, protect norms of non-intervention, and enhance the global stability of autocratic rule. Legalistic autocrats, for example, exploit judicial deference and vague statutory language in national security laws to circumvent checks on their authority. This process, which I call “dark law,” aids in the consolidation of state power and the global entrenchment of authoritarianism. In this Essay, I argue that dark law also contributes to the construction of authoritarian international law. Conflicts in the South China Sea illustrate how authoritarian regimes use law to pursue illiberal ends. By disregarding multilateral treaty obligations, resisting third-party adjudication, and repurposing national security laws, authoritarian states sabotage maritime norms and principles. International dark law makes global waterways more dangerous for sailors and fishing communities, undermines international cooperation on marine protection, and threatens maritime accountability and ocean governance. Future protection of oceans and seas depends on state compliance with international law and the effectiveness of multilateral enforcement.

* Assistant Professor of Law, Suffolk University Law School; PhD, J.D., University of California, Berkeley; MPhil, Cambridge University; B.A., Temple University. The author is grateful to the *Chicago Journal of International Law* editors and symposium participants Karen Alter, Asli Ü. Bâli, Shai Dothan, Aleksandra Dzięgielewska, Veronika Fikfak, Tom Ginsburg, Aziz Huq, Tokujin Matsudaira, Eric Posner, Mariana Olaizola Rosenblat, Brad Roth, and Tim Webster. I also appreciate feedback from Amanda Beck and Joshua Weishart.

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I. INTRODUCTION

These are perilous times for democracies and international law.¹ Tom Ginsburg warns of an emerging post-liberal order defined by powerful authoritarian regimes that repurpose global rights, undermine international courts, and expand executive power.² Autocrats embedded in the global economy appear increasingly willing to cooperate with each other and use international law to counter democratic challenges to their power.

Legalistic autocrats regularly exploit judicial deference and vague statutory language in national security laws to circumvent checks on their authority.³ This process, which I call “dark law,” aids in the consolidation of state power and the global entrenchment of authoritarianism.⁴ But dark law also transforms norms and principles of international law.

Conflicts in the South China Sea illustrate how authoritarian regimes strategically repurpose national security laws to circumvent international legal obligations. Most visibly, the People’s Republic of China (China) repeatedly disregards treaty obligations, rejects third-party adjudication, and enacts domestic laws in violation of its commitments under the United Nations Convention on the Law of the Sea (UNCLOS). While steadfastly defending norms of non-intervention and principles of Westphalian sovereignty,⁵ President Xi Jinping and the Chinese Communist Party continue to use law to shift international benchmarks and avoid accountability on the South China Sea.

In this Essay, I argue that legal vagueness and a lack of meaningful judicial review have given way to a rising tide of dark law in the contested waters of the South China Sea. Although China argues for “historic rights” to exclusive control of vast maritime territories, coastal neighbors strongly dispute those claims.⁶ Governing law under UNCLOS clarifies the requirements for establishing territorial boundaries in oceans and seas and emphasizes adjudication and arbitration as mechanisms to resolve maritime conflicts.⁷ However, China has

¹ See TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* 9 (2021).

² See *id.* at 187.

³ See Stephen Cody, *Dark Law: Legalistic Autocrats, Judicial Deference, and the Global Transformation of National Security*, 6 U. PA. J.L. & PUB. AFFS. 643, 647 (2020).

⁴ *Id.* at 650–53.

⁵ See Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT’L L. 98, 105 (2013).

⁶ Bill Hayton, *The Modern Creation of China’s ‘Historic Rights’ Claim in the South China Sea*, 49 ASIAN AFFS. 370, 372 (2018); Zou Keyuan, *Historic Rights in International Law and in China’s Practice*, 32 OCEAN DEV. & INT’L L. 149, 163 (2001).

⁷ See Sara McLaughlin Mitchell & Andrew P. Owsiak, *Judicialization of the Sea: Bargaining in the Shadow of UNCLOS*, 115 AM. J. INT’L L. 579, 599 (2021).

demonstrated a willingness to assert jurisdictional control and deploy military power in defiance of UNCLOS principles and norms.⁸

Enter dark law, a relational approach to the study of national security lawmaking and legality. Autocratic legalism and poorly defined security laws exacerbate legal uncertainty beyond national jurisdictions. The exploitation of domestic statutory language and judicial weakness reinforces the power of autocrats to pursue illiberal ends and generally supports authoritarian forms of international law. Dark law is not a category of law, but rather a web of legislative-judicial-political relations that erode legal protections and empower legalistic autocrats. The term describes contradictory processes by which autocrats rely on statutory vagueness in national security laws to engage in state actions counter to established international law. Dark law, therefore, aids and abets the genesis of authoritarian international law. In recent years, China has enacted or revised domestic maritime security laws to provide legal cover for acts of aggression and illegality on the South China Sea.⁹ Dark law helps to focus analytic attention on the relations between lawmaking, judicial review, and autocratic politics. It provides insight into these maritime disputes and a porthole into the recursive construction of authoritarian international law.¹⁰

Ocean governance depends on multilateral cooperation and enforcement. But authoritarian penchants for domestic control, political stability, and bilateralism often undermine maritime law and regulatory ocean compliance.¹¹ International dark law thus threatens treaty compliance and oceanic accountability. Under some circumstances, it can also erode customary law and subvert international governance of the high seas. Below, I analyze two recent maritime laws to show how Beijing employs dark law to skirt its international legal obligation under UNCLOS. I conclude with modest proposals that would increase ocean protection and resolve disputes in the South China Sea.

II. INTERNATIONAL LAW FAILS IN THE SOUTH CHINA SEA

The South China Sea is a semi-enclosed ocean basin crucial to global trade and rich in natural resources.¹² Therefore, it has regional and global economic

⁸ See Jerome A. Cohen, *Law and Power in China's International Relations*, 52 N.Y.U. J. INT'L L. & POL. 123, 132–45 (2019).

⁹ See Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INT'L L. STUD. 257, 268–73 (2020); Andrew S. Erickson, Joshua Hickey & Henry Holst, *Surging Second Sea Force: China's Maritime Law-Enforcement Forces, Capabilities, and Future in the Gray Zone and Beyond*, 72 NAVAL WAR COLL. REVIEW 11, 11–12 (2019).

¹⁰ See generally Terence Halliday, *Recursivity of Global Norm Making: A Sociolegal Agenda*, 5 ANN. REV. L. & SOC. SCI. 263 (2009).

¹¹ See Ginsburg, *supra* note 1, at 267–69.

¹² See CHOON-HO PARK, *EAST ASIA AND THE LAW OF THE SEA* 283–84 (1983).

significance.¹³ Nearly one-third of all global commerce and about half of global oil and gas shipments pass through the sea annually.¹⁴ About \$3.4 trillion in goods—including 14% of all U.S. trade, 40% of China's, and 86% of Vietnam's—traverse the Sea's waterways.¹⁵ The Sea also yields about 12% of the world's fish catch, providing crucial livelihoods and food security for coastal communities in surrounding states.¹⁶ Dwindling fish stocks caused by overfishing and declining biodiversity have worsened territorial disputes in recent years.¹⁷

Debates over seabed rights and opportunities for resource exploration have also exacerbated regional tensions.¹⁸ The South China Sea has substantial reserves of oil and gas. A 2010 U.S. Geological Survey estimated a mean of 21.6 billion untapped barrels of oil and a mean of nearly 300 trillion cubic feet of natural gas in 23 southeast Asian provinces around the Sea.¹⁹ Chinese surveys are even more optimistic and estimate as much as 105 billion barrels of oil near the Spratly Islands continental shelf alone.²⁰ Scores of companies are jostling to exploit these natural resources.²¹

Hundreds of small islands, reefs, and rocks are scattered throughout the South China Sea. However, only a few dozen maritime features—including the Paracel Islands, the Spratly Islands, the Pratas Islands—naturally stay above water at high tide and, thus, support territorial claims.²² Seven countries make overlapping claims to these islands and other territory in the South China Sea: Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam. Conflicts between these coastal states have dogged the region since the Geneva Conventions established an international law of the sea in the 1960s.²³ By the 1970s, UNCLOS negotiations had raised the stakes for coastal countries, who risked losing access to undiscovered oil and natural gas reserves. Consequently,

¹³ See generally BILL HAYTON, *THE SOUTH CHINA SEA* (2014).

¹⁴ See TOMMY KOH, *BUILDING A NEW LEGAL ORDER FOR THE OCEANS* 156 (2020).

¹⁵ *How Much Trade Transits the South China Sea?*, CHINA POWER (Mar. 28, 2022), <https://perma.cc/796G-J3M9>.

¹⁶ Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare*, 106 CORNELL L. REV. 1085, 1102 (2021).

¹⁷ See Elizabeth R. DeSombre, *The Security Implications of Fisheries*, 95 INT'L AFFS. 1019, 1020 (2019).

¹⁸ See generally MARK J. VALENCIA, JON M. VAN DYKE & NOEL A. LUDWIG, *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* (2021).

¹⁹ U.S. GEOLOGICAL SURV., *ASSESSMENT OF UNDISCOVERED OIL AND GAS RESOURCES OF SOUTHEAST ASIA 1* (2010).

²⁰ ANDERS CORR, *GREAT POWERS, GRAND STRATEGIES: THE NEW GAME IN THE SOUTH CHINA SEA* 292 (2018).

²¹ See Katherine Morton, *China's Ambition in the South China Sea: Is a Legitimate Maritime Order Possible?*, 92 INT'L AFFS. 909, 915 (2016).

²² U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

²³ See Gao & Jia, *supra* note 5, at 105.

state political leaders began to insist on unilateral control over coastal waters, maritime features, and exclusive resource rights.

China claims historic rights to about 80% of the South China Sea, including all waters and maritime features enclosed by a nine-dash line, a U-shaped zone stretching 1,200 miles south of the Chinese mainland.²⁴ The nine-dash line has remained central to Beijing's maritime claims and even become part of Chinese national identity.²⁵ Legal experts and neighboring states, however, regularly criticize China's nine-dash line as an overstated territorial claim and strongly dispute China's assertions based on principles set forth in UNCLOS.²⁶

UNCLOS establishes a framework for maritime governance in oceans and seas worldwide, including the contested waters of the South China Sea.²⁷ The European Union and 167 countries have signed and ratified the Convention, which came into force in 1994 and replaces the 1958 "Convention on the High Seas." UNCLOS also created several bedrock maritime institutions, including the International Tribunal for the Law of the Sea (ITLOS), the International Seabed Authority (ISA), and the Commission on the Limits of the Continental Shelf (CLCS).

China signed UNCLOS in 1982 and ratified the treaty in 1996.²⁸ During the Third United Nations Conference on the Law of the Sea (UNCLOS III), China also voted to approve the treaty language regarding maritime territories.²⁹ Under UNCLOS, each state is entitled to 12 nautical miles of territorial sea and a 200 nautical mile Exclusive Economic Zone (EEZ), where states have exclusive rights to exploit natural resources.³⁰

However, these territorial rights and offshore boundaries often depend on the legal status of maritime features. An island, for example, can support the 12 nautical mile territorial sea and the 200 nautical mile EEZ for its country. But a feature achieves the legal status of an "island" only if, in its natural condition, it

²⁴ Hayton, *supra* note 13, at 55.

²⁵ Zheng Wang, *The Nine-Dashed Line: "Engraved in Our Hearts"*, DIPLOMAT (Aug. 25, 2014), <https://perma.cc/38MK-SJY4>.

²⁶ See Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT'L L. 142 (2013).

²⁷ See UNCLOS, preamble at 4:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

²⁸ UNCLOS: Declarations Made Upon Signature, Ratification, Accession, or Succession or Anytime Thereafter, China, June 7, 1996, 1833 U.N.T.S. 397, <https://perma.cc/3M4P-NV48>.

²⁹ Beckman, *supra* note 26, at 154.

³⁰ UNCLOS, *supra* note 22, at 43.

can sustain either a stable long-term community of people or an economic activity that is not dependent on outside resources or purely extractive in nature.³¹ This legal status distinction matters a great deal because artificial islands or other structures built on reefs do not satisfy the UNCLOS definition of an island or establish territorial seas. It has also led to national claims and counterclaims characterized by Tommy Koh, former President of UNCLOS III, as: “My rock is an island, and your island is only a rock.”³²

For decades, China has violated maritime boundaries established by UNCLOS in the South China Sea.³³ In 1988, China unlawfully occupied several reefs in the Spratly Islands. It has since built harbors and military buildings there and even added an airstrip and surface-to-air missile platforms.³⁴ Several states—including Brunei, Malaysia, the Philippines, and Vietnam—continue to dispute Chinese claims to the Spratly Islands.³⁵

Beyond territorial disputes, littoral states have expressed concerns about Chinese sea lane restrictions, military maneuvers, and use of maritime militia.³⁶ Regional negotiations have established some baseline understandings and resulted in a code of conduct declaration (2002), guidelines for the implementation of the declaration (2011), a framework for the code of conduct (2017), and draft text (2018).³⁷ However, these efforts have not produced a binding agreement. This may be partly due to Beijing’s backchannel economic statecraft and coercive diplomacy, particularly its reliance on bilateral agreements to sidestep UNCLOS compliance.³⁸

Few states have directly challenged China under international law. The Philippines, however, initiated an arbitration against China over noncompliance with UNCLOS and other maritime conflicts. On July 12, 2016, the Permanent Court of Arbitration (PCA) announced a unanimous award in favor of the Philippines.³⁹ In a nearly 500-page ruling, the PCA dismissed as invalid China’s

³¹ *Id.* at 442. *See generally* Marius Gjetnes, *The Spratlys: Are They Rocks or Islands?*, 32 OCEAN DEV. & INT’L L. 191 (2001).

³² Koh, *supra* note 14, at 160.

³³ *See* Julia Lisztwan, *Stability of Maritime Boundary Agreements*, 37 YALE J. INT’L L. 153, 198 (2012).

³⁴ Bill Hayton, *Why China Built Its New Islands: From Abstract Claim to Concrete Assets*, in GREAT POWERS, GRAND STRATEGIES: THE NEW GAME IN THE SOUTH CHINA SEA 25, 34 (Anders Corr ed., 2018).

³⁵ *See* Beckman, *supra* note 26, at 163.

³⁶ *See generally* Keyuan Zou, *China’s Approach to UNCLOS and the South China Sea*, in LAW OF SEA 364 (Jill Barrett & Richard Barnes eds., 2016).

³⁷ *See* Bill Hayton, *After 25 Years, There’s Still No South China Sea Code of Conduct*, FOREIGN POL’Y (July 21, 2021), <https://perma.cc/T78C-W8F2>.

³⁸ *See* Corr, *supra* note 20, at 2.

³⁹ South China Sea Arbitration (Phil. v. China), Award, PCA Case Repository 2013-19 (Perm. Ct. Arb. 2016).

claims to historic rights by way of its nine-dash line.⁴⁰ The ruling also found that China had violated the Philippines' sovereign rights by interfering with fishing and resource exploration and aggravated other disputes through its dredging and construction of artificial islands. Finally, the PCA clarified the characteristics of "islands," effectively eliminating China's claim that its artificial islands generate legal entitlements under UNCLOS. The court declared that features in the Spratly Islands failed to generate a territorial claim for China.⁴¹ Still, the PCA acknowledged that it does not have the authority to establish territorial sovereign boundaries or maritime delimitation.⁴²

Although the PCA award in the Philippines' favor can be viewed as a victory of international law, the ruling also shows the weakness of UNCLOS enforcement against major powers. The PCA was able to move forward with China *in absentia* by inviting comment on specific substantive and procedural issues and exercising jurisdiction based on public statements, a position paper, and Chinese communications with tribunal officials.⁴³ In this way, the PCA established that a state's refusal to participate does not necessarily bar UNCLOS proceedings.⁴⁴ But China's refusal to participate in the tribunal's constitution or to submit pleadings demonstrates how powerful nation-states can selectively engage with international law. Even as it documented Chinese violations, the PCA award did little to dissuade Beijing from continuing island construction or from expanding Chinese military and maritime militia patrols. China continues to cite vague national security laws to legitimate South China Sea actions that violate UNCLOS and international law.

III. THE RISE OF INTERNATIONAL DARK LAW

Authoritarian states often participate in international institutions and obey international law to facilitate their interstate interests.⁴⁵ But autocrats also brandish

⁴⁰ See Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration Between the Philippines and China*, 110 AM. J. INT'L L. 746, 747–48 (2016).

⁴¹ See South China Sea Arbitration, *supra* note 39, at 41.

⁴² See Anne Sheehan, *Dispute Settlement Under UNCLOS: The Exclusion of Maritime Delimitation Disputes*, 24 U. QUEENSLAND L.J. 165, 183 (2005).

⁴³ See Goldenziel, *supra* note 16, at 1114.

⁴⁴ See UNCLOS, *supra* note 22, at 573:

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

⁴⁵ See Ginsburg, *supra* note 1, at 187–92; Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2650 (1997).

law to cloak illegality.⁴⁶ Dark law describes the process by which legalistic autocrats exploit statutory vagueness and a lack of judicial review to take actions that are, in fact, counter to the rule of law.⁴⁷ Dark law is a relational concept that describes the convergence of national security lawmaking, judicial deference, and autocratic politics. However, beyond masking autocratic illegality within a nation state, dark law can shape international law and establish configurations of legislative-judicial-political relations that aid the entrenchment of authoritarian international law.

Dark law as an analytic category seeks to move beyond static conceptions of national security law and toward recognition of national security lawmaking as a series of dynamic relationships that unfold as part of transnational politics. In this sense, dark law and authoritarian international law draw attention to authoritarian logics and relationships that direct state power to enhance domestic social control and promote global models of authoritarianism.

Autocratic leaders pragmatically cooperate with other states, in both democracies and nondemocracies, to achieve common goals and produce public goods unavailable through domestic channels.⁴⁸ Authoritarian international law, like other forms of international law, relies on relationships between diplomats and other state officials to construct rules, principles, and norms. Through interpersonal interactions and exchanges in domestic forums and international organizations, authoritarian officials can create new kinds of relationships that shift transnational normative understandings and expectations.⁴⁹ From a relational perspective, international law is the embodiment of interpersonal processes and interactions and is experienced through the constraints and directionality these social relations give to lawmaking and state action. Rather than view international law as a fixed body of substantive agreements and rules, relational approaches see it as historically contingent processes between state officials and other transnational actors. Networks of relations constitute, sustain, and transform the ‘morality’ of international law. Durable international law relations transcend specific social interactions to create enduring norms, political ideologies, state commitments, and customary practice. But, at the same time, individual actions in particular situations shape these evolving relational norms. Both immediate decisions of state officials and broader entanglements and interdependencies condition the development of international law. Authoritarian regimes can

⁴⁶ See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547 (2018); Kim Lane Scheppele, *Autocracy Under Cover of the Transnational Legal Order*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 188, 190 (Gregory Shaffer, Tom Ginsburg & Terence C. Halliday eds., 2019).

⁴⁷ See Cody, *supra* note 3, at 658.

⁴⁸ See Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT’L L. 221, 226 (2020).

⁴⁹ See Cassandra V. Emmons, *International Organizations: Enablers or Impediments for Authoritarian International Law?*, 114 AM. J. INT’L L. 226, 228 (2020).

promote common interests, like reasserting norms of noninterference or redefining obligations under international law, and simultaneously develop new terms to facilitate unlawful or illiberal activities.⁵⁰ For example, authoritarian leaders commonly repurpose human rights by placing emphasis on economic and cultural rights in order to weaken enforcement for violations of civil and political rights worldwide.⁵¹

Authoritarian regimes have other general traits as well. Autocrats rarely relinquish sovereignty or submit to third-party adjudication in international tribunals or arbitration courts.⁵² Also, because authoritarians focus primarily on political survival, international law will tend to be viewed as a mechanism to reinforce internal state control.⁵³ However, even as authoritarians tactically and sometimes reluctantly engage with international law, this engagement constructs new layers of international law that can strengthen the stability of authoritarian regimes and enhance illiberalism.⁵⁴

Dark law and authoritarian international law offer complementary models of undemocratic legal change that are layered, dynamic, and historically contingent. They are also related concepts. Dark law enhances and entrenches authoritarian international law. Legalistic autocrats not only repurpose vague security laws to circumvent checks on their authority but also manage to reconstitute forms of international law through that process. Dark law reconstructs transnational relations and interactions in ways that reinforce authoritarian norms and strengthen illiberal institutions. National security lawmaking in authoritarian regimes often cultivates legal grey zones that transform the normative content of international law more generally.⁵⁵ If democratic backsliding continues and the balance of power shifts to favor authoritarians, vague and overbroad security laws and weak or non-existent judicial review will converge to empower autocrats through dark law and authoritarian international law.⁵⁶

⁵⁰ See Ginsburg, *supra* note 1, at 187.

⁵¹ See Ginsburg, *supra* note 48, at 225.

⁵² See *id.*

⁵³ See Ginsburg, *supra* note 1, at 191.

⁵⁴ See CORR, *supra* note 20, at 9.

⁵⁵ See generally Congyan Cai, *Enforcing a New National Security?: China's National Security Law and International Law*, 10 J. E. ASIA & INT'L L. 65 (2017).

⁵⁶ See CORR, *supra* note 20, at 217.

IV. OCEANIC IMPUNITY

China operates with virtual impunity on the South China Sea partly by employing dark law to challenge weak forms of international law.⁵⁷ Maritime patrols authorized by law repeatedly target civilian fishing vessels and interfere with resupplies of food and water to foreign sailors and marines in violation of UNCLOS.⁵⁸ Chinese vessels even ram foreign ships to deter rival coastal states from exercising control over fishing grounds or strategic waterways.⁵⁹ This all occurs without serious economic or political consequences for China, which continues to organize an expansive network of civilian fishing vessels to assist with its strongarm diplomacy, particularly against Japan, Vietnam, and the Philippines.⁶⁰

These maritime civilian militia, sometimes called “the little blue men,” receive substantial support and training from the Chinese government and frequently coordinate their activities with the People’s Liberation Army Navy (PLAN).⁶¹ Often equipped with advanced communications and radar systems, the militia vessels enforce China’s unilateral fishing bans and provide logistical support to forces occupying artificial island outposts.⁶² These irregular maritime forces assist in the assertion of China’s sovereign control of disputed islands, reefs, and seas while avoiding direct military-to-military confrontations.⁶³ Generally, military rules of engagement prohibit the U.S. Navy and other foreign warships from pursuing counter-measures against these civilian vessels.⁶⁴

Complicating the challenges of countering China’s maritime militia, many militia vessels are not visible on traditional maritime tracking systems because of a new law on data protection enacted in November 2021.⁶⁵ The law, titled the Personal Information Protection Law of the People’s Republic of China, prohibits

⁵⁷ See Press Statement, Michael R. Pompeo, U.S. Secretary of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), <https://perma.cc/N4EX-MSB4>; See generally, Douglas Guilfoyle, *The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea*, 95 INT’L AFFS. 999 (2019).

⁵⁸ See CORR, *supra* note 20, at 109.

⁵⁹ See Shashank Bengali & Vo Kieu Bao Uyen, *Sunken Boats. Stolen Gear. Fishermen are Prey as China Conquers a Strategic Sea*, L.A. TIMES (Nov. 12, 2020), <https://perma.cc/KS8Y-VH6G>.

⁶⁰ See James Kraska & Michael Monti, *The Law of Naval Warfare and China’s Maritime Militia*, 91 INT’L L. STUD. 450, 452 (2015).

⁶¹ *Id.* at 451–42.

⁶² See CORR, *supra* note 20, at 452.

⁶³ See Elizabeth K. Kiessling, *Gray Zone Tactics and the Principle of Non-Intervention: Can “One of the Vaguest Branches of International Law” Solve the Gray Zone Problem?*, 12 HARV. NAT’L SEC. J. 116, 127–29 (2021).

⁶⁴ See Rob McLaughlin, *An Incident in the South China Sea*, 96 INT’L L. STUD. 505, 517 (2020).

⁶⁵ See Personal Information Protection Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 20, 2021), <https://perma.cc/H7MN-ETWR>.

the export of personal data collected in China to other countries.⁶⁶ Domestic and foreign organizations that process personal information are now subject to heightened localization requirements that prevent the use of traditional tracking systems, such as the Automatic Identification System (AIS), which relies on cross-national data transfers to track maritime vessels. This legal change effectively cloaks the position of civilian militia ships.⁶⁷ Framed by Beijing as a data safeguard for China's residents, the law also serves China's broader efforts to increase clandestine patrols and reinforce maritime claims in the South China Sea.

Oceans and seas have long been considered a common resource of all humankind under international law.⁶⁸ States generally enjoy expansive fishing rights in open waters and freedom of navigation beyond coastal territories.⁶⁹ However, China has sought to undermine these longstanding maritime principles. In 2021, for example, China revised and enacted new laws that expand the scope of its territorial jurisdiction and condone aggressive police and military tactics in disputed waters. Below, I briefly discuss China's Maritime Police Law and its Maritime Traffic Safety Law as examples of dark law that facilitate China's evasion of international legal obligations under UNCLOS.

A. Maritime Police Law

In January 2021, the Standing Committee of China's National People's Congress enacted a new Maritime Police Law (MPL) to regulate Chinese maritime agencies, including China's Coast Guard.⁷⁰ The law covers a broad range of maritime activities and interests, including efforts to stop offshore smuggling, manage fisheries, develop natural resources, protect the environment, and maintain maritime security. However, the law's vague statutory language and vast jurisdictional scope make it ripe for abuse.⁷¹

Statutory vagueness is problematic for two chief reasons: vague legal statutes fail to provide sufficient public notice of legal standards, and they delegate discretion to law enforcement agencies, which can result in arbitrary or

⁶⁶ See Yiming "Ben" Hu, *China's Personal Information Protection Law and Its Global Impact*, DIPLOMAT (Aug. 31, 2021), <https://perma.cc/7RR5-7FQA>.

⁶⁷ *Translation: Personal Information Protection Law of the People's Republic of China – Effective Nov. 1, 2021*, STAN.: DIGICHINA, (Sept. 7, 2021), <https://perma.cc/P3B8-7HAB>.

⁶⁸ See Koh, *supra* note 14, at 48.

⁶⁹ See generally H.S. Kent, *Historical Origins of the 3 Mile Limit*, 48 AM. J. INT'L 537 (1954).

⁷⁰ Maritime Police Law of the People's Republic of China, Art. 84 (promulgated by Standing Committee, 13th Nat'l People's Cong., Jan. 22, 2021, effective Feb. 1, 2021) XINHUA NEWS AGENCY (Jan. 22, 2021), <https://perma.cc/276V-2XF7> [hereinafter MPL].

⁷¹ See Raul (Pete) Pedrozo, *Maritime Police Law of the People's Republic of China*, 97 INT'L L. STUD. 465, 466 (2021).

discriminatory enforcement.⁷² In the context of international maritime activities, broad and unclear statutory language in recent maritime laws give extraordinary discretion to China's law enforcement agencies.

Many of the law's vague terms— or absent definitions— seem intentional. Article 3, for example, stipulates that enforcement agencies shall conduct operations in waters under the jurisdiction of China, which presumably includes disputed seas claimed by China within the nine-dash line.⁷³ A sovereign state's maritime jurisdiction extends only twelve nautical miles under UNCLOS. The law of the vessel's flag state applies beyond these territorial seas. However, by using vague statutory language not recognized under UNCLOS, such as "waters under jurisdiction" or "jurisdictional seas," China claims expansive jurisdiction to disputed exclusive economic zones (EEZ) and waters near the continental shelf. China's use of unrecognized maritime boundaries violates the PCA ruling and Article 74 of UNCLOS.⁷⁴ It also creates legal grey zones in can be used to shift rules and norms of international law.

Article 12 further tasks coastal police with guarding islands and reefs, including artificial islands and disputed maritime features, to prevent any acts that "endanger national sovereignty, security, and maritime rights and interests."⁷⁵ Article 17 authorizes coastal police to order foreign vessels to leave China's territorial seas and sanctions the detention, forced removal, and forced towing of vessels that illegally remain in Chinese waters.⁷⁶ Article 23 also sanctions the use of administrative penalties, including restrictions of personal freedom, for organizations and individuals who violate Chinese laws or regulations.⁷⁷ Coastal police can take advantage of the statutory language to justify the seizure of virtually any vessel that navigates within the nine-dash line. The law goes even further regarding foreign construction in the South China Sea. Article 20 tasks the Chinese Coast Guard with blocking all unauthorized foreign construction and demolishing unauthorized foreign facilities built within China's jurisdiction.⁷⁸ This language is particularly concerning because nearly all state claimants maintain permanent facilities within China's claimed jurisdictional waters, including numerous outposts in the Spratly, Paracel, and Pratas islands.⁷⁹

The MPL also escalates use of force authorization against foreign government vessels and warships. Article 1, for example, directs China's Coast

⁷² See generally, Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137 (2017).

⁷³ MPL, *supra* note 70, art. 3.

⁷⁴ See Raul (Pete) Pedrozo, *China's Revised Maritime Traffic Safety Law*, 97 INT'L L. STUD. 956, 957 (2021).

⁷⁵ Pedrozo, *supra* note 71, at 468.

⁷⁶ MPL, *supra* note 70, art. 17.

⁷⁷ *Id.* art. 23.

⁷⁸ MPL, *supra* note 70, art. 20.

⁷⁹ Pedrozo, *supra* note 71, at 468.

Guard and maritime police “to protect the sovereignty of the State, and to safeguard the legitimate interests of the public, corporations, and other organizations,” language which appears to endorse near limitless enforcement activities in the South China Sea.⁸⁰ Article 21 also sanctions any precautions or control measures necessary to stop non-commercial foreign vessels, including government ships and military warships, from illegally entering China’s jurisdictional waters and further authorizes the forced eviction and towing of foreign vessels that present a serious harm or threat.⁸¹ Article 22 further authorizes all necessary measures, including military force, to stop illegal infringements or imminent threats of illegal infringement on China’s sovereign territory, rights, or jurisdiction.⁸² The meaning of illegal infringement under the law is unclear and open to broad interpretation by Chinese authorities. But Article 22 potentially authorizes military violence, including firing on or ramming vessels, in response to foreign activities protected under freedom of navigation principles and UNCLOS rules.

The law also expands authorization on the use of weapons and approves more aggressive weaponry. Article 47 authorizes the use of small arms weapons if there is evidence that a ship is carrying criminal suspects or illegally carrying weapons, ammunition, state secrets, or drugs and refuses to obey an order to stop.⁸³ Coast Guard members are directed to “use weapons if there is no time for warning or if there is a risk of serious harm after giving warning.”⁸⁴ Firing on foreign ships is also authorized for illegal entry when captains refuse orders to stop or to accept boarding or inspection.⁸⁵ The MPL further authorizes the use of military weapons during counterterrorism missions, when confronting serious incidents of violence at sea, or when attacked by weapons or other dangerous methods.⁸⁶

Finally, the MPL threatens freedom of navigation principles by authorizing coastal police to restrict or prohibit passage based on the establishment of temporary maritime security zones.⁸⁷ Under the law, the maritime police can establish a security zone for various reasons, including to perform maritime security tasks, combat illegality, deal with emergencies, guard marine resources, protect the environment, or address “any other situation that requires the

⁸⁰ MPL, *supra* note 70, art. 1.

⁸¹ *Id.* art. 21.

⁸² *Id.* art. 22.

⁸³ *Id.* art. 47.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ MPL, *supra* note 70, art. 48.

⁸⁷ *Id.* art. 25.

delimitation of temporary maritime security zones.”⁸⁸ Under the law, which imposes no temporal restrictions, these security zones could continue for days, months, or even years.

Widespread vagueness in the MPL provides significant legal flexibility to maritime agencies and, if abused, constitutes a form of dark law. The MPL permits maritime police to act with wide discretion while simultaneously tasking the police with an aggressive agenda that expands Chinese claims and ratchets up the potential use of force. Additionally, the new law integrates the Coast Guard into Chinese national defense forces by authorizing Coast Guard members to participate in both military and police operations.⁸⁹ This blurs the line between domestic policing and military action. The MPL further gives broad discretion to Chinese military officials to enforce maritime claims, by force if necessary.⁹⁰ The new law exemplifies China’s efforts to repurpose domestic security laws to disregard international law.⁹¹

B. The Maritime Traffic Safety Law

In April 2021, China revised its 1983 Maritime Traffic Safety Law (MTSL) in a manner that disregarded international legal obligations under UNCLOS. The revised law is inconsistent with international law in its geographic scope and endorses unlawful monitoring and interference with maritime vessels outside of China’s territorial seas.

China’s expansive jurisdiction under the MTSL contravenes UNCLOS. Article 2, for example, extends the reach of the revised law from “coastal waters” to “sea areas under the jurisdiction of the People’s Republic of China.”⁹² This statutory change intentionally replaces “coastal waters,” a well-recognized legal term in maritime law, with a deliberately vague and indeterminate term, “seas under the jurisdiction,” which lacks any validity under international law. As revised, Beijing determines the law’s maritime jurisdiction, which presumably will apply to all territories, features, and seabed areas enclosed by the nine-dash line, in direct violation of the 2016 PCA arbitration ruling. These jurisdictional changes also violate other established UNCLOS norms that require states with overlapping

⁸⁸ *Id.* art. 25.

⁸⁹ *Id.* art. 83.

⁹⁰ See Shigeki Sakamoto, *China’s New Coast Guard Law and Implications for Maritime Security in the East and South China Seas*, *LAWFARE* (Feb. 21, 2021), <https://perma.cc/T98V-2NZT>.

⁹¹ See Shuxian Luo, *China’s Coast Guard Law: Destabilizing or Reassuring?*, *DIPLOMAT* (Jan. 29, 2021), <https://perma.cc/83W5-WHL3>.

⁹² Maritime Traffic Safety Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 2, 1983, rev’d Nov. 7, 2016, rev’d Apr. 29, 2021, effective Sept. 1, 2021), Art. 2 [hereinafter MTSL].

jurisdictional claims to refrain from any actions that might jeopardize a final agreement or third-party settlement of the dispute.⁹³

The MTSL also authorizes unlawful interference with foreign vessels in violation of well-established freedom of navigation norms. Article 19, for example, authorizes China's Maritime Administrative Agency to restrict ship routes and control maritime traffic outside of coastal waters.⁹⁴ Under UNCLOS, with limited exceptions, a state cannot exercise jurisdiction over foreign maritime vessels beyond its territorial sea.⁹⁵ Ships navigating beyond national jurisdictions, including the high seas and EEZs, generally are subject to the exclusive jurisdiction of the flag state where the vessel is registered. The flag state assumes jurisdiction and bears responsibility to ensure maritime safety, vessel integrity, and decent labor conditions. Yet, under the MTSL, China could assume jurisdiction as a non-flag state.

Article 44 further authorizes restrictions on freedom of navigation, stating: "A vessel shall not enter or pass through the restricted navigation zone in violation of provisions."⁹⁶ While UNCLOS permits states to designate traffic and sea routes for safety of navigation, it also requires coastal states to consider International Maritime Organization recommendations before establishing restrictions.⁹⁷ Coastal state laws are prohibited by UNCLOS from imposing any requirements on foreign vessels that deny their right to innocent passage.⁹⁸

Article 43 similarly constructs a legal grey zone that requires supplementary compliance from vessels in valuable fisheries or heavily traveled ship routes. Captains may be asked to improve lookouts, slow down, or abide by other Chinese rules of navigation in these areas. While efforts at added safety appear reasonable, these auxiliary rules provide a mechanism for China to exercise control over vessels in contested and international waters. Vague standards and a lack of meaningful judicial oversight empower Beijing to disregard established maritime norms and principles.

Vagueness and overbreadth in these new laws, like other dark law relations, create opportunities for Beijing to circumvent and redefine its international legal obligations under UNCLOS. These revisions also make the laws applicable to waters enclosed by the nine-dash line and legitimate Chinese aggression in contested waters of the South China Sea. To the degree that these strategies prove effective, we can expect to see greater reliance on vague national security laws and corresponding shifts toward authoritarian international law.

⁹³ See Pedrozo *supra* note 74, at 956, 958.

⁹⁴ MTSL, *supra* note 92, art. 19.

⁹⁵ *Id.* art. 19.

⁹⁶ *Id.* art. 44.

⁹⁷ UNCLOS, *supra* note 22, art. 22.

⁹⁸ *Id.* art. 24.

V. CONCLUSION

This Essay argues that authoritarian regimes leverage statutory vagueness in domestic security laws to evade international legal obligations and, through this process, contribute to the normative development of authoritarian international law. I advance the concept of dark law as a relational framework for interpreting conflict in the South China Sea and as a way to understand how national security law can erode democratic norms and institutions, both in domestic and international contexts. Legalistic autocrats wield ill-defined statutes in efforts to entrench legal terms and ideas that will buttress authoritarianism in the international system. Conflicts in the South China Sea reveal how Chinese authorities have strategically repurposed domestic laws to undermine UNCLOS. In recent decades, China has emerged as global power and a legalistic state.⁹⁹ President Xi and the Communist Party appear increasingly willing to employ law to strengthen regime legitimacy. It is vital that the international law community acknowledge and work to limit the development of authoritarian international law.

The question of how to limit authoritarian entrenchment in international law, of course, demands context. Regarding conflicts in the South China Sea, I offer a few modest suggestions. A binding code of conduct for coastal states promises stability that could serve all claimant parties. Strengthening UNCLOS enforcement offers another mechanism to encourage state compliance. Countries and international institutions can do much more to promote multilateralism in maritime governance. Continued failed governance and protection of the world's oceans and seas will have dire consequences for coastal communities and marine ecosystems. Long overdue are a new generation of international agreements that will protect biodiversity beyond national jurisdictions and establish a meaningful system for oceanic accountability.

⁹⁹ See Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306, 388 (2019).