DEFEATING THE ENEMY WITHOUT FIGHTING AT SEA: A LEGAL ANALYSIS OF GREY ZONE OPERATIONS IN THE SOUTH CHINA SEA

Submitted by Caroline Tuckett, to the University of Exeter as a dissertation for the degree of Masters by Research in Law, November 2020.

I certify that all material in this dissertation which is not my own work has been identified and that any material that has previously been submitted and approved for the award of a degree by this or any other University has been acknowledged.

(Signature) ……*Signed electronically by email due to COVID-19 restrictions*……

ABSTRACT

This dissertation investigates the legal implications of China's growing dominance in the South China Sea. Described as operating in the "grey zone", namely without recourse to an armed conflict, China has asserted control over significant swathes of an area of ocean that is both rich in natural resources and a vital global trading route.

The analysis was conducted through the study of real events which have occurred at sea and in the region, followed by an application of the principles of international law. This has shown that China is prepared to deliberately push and explore the accepted norms of international law, and on occasion, disregard them. Such a strategy can be described as *lawfare* and has been applied both to the people at sea and the places in the region, such as islands and reefs.

The research also demonstrated that several possible responses are available in international law, and even domestic law, by which other nations could attempt to persuade China to step back from its hostile stance. These response options range from specific military operations which do not involve a use of force, through to multilateral engagement using organs of the United Nations.

I conclude that a combination of ambiguity in operations at sea, a consistent national narrative, and a willingness to push the boundaries of international law, all supported in the background by the presence of a large military power base, have ensured China's increasing influence and power in the South China Sea. China's success can be countered, and the mechanisms exist to do so, but not without a political and diplomatic consensus within the international community. Until the necessary political will is found, either in the region or on a global setting, China will continue to strengthen its control over the South China Sea.

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INTRODUCTION

Grey zone operations are activities which aspire to achieve strategic aims without recourse to the use of force. The concept is not new, as acknowledged by Sun Tzu: "to win one hundred victories in one hundred battles is not the pinnacle of excellence; defeating the enemy without fighting is the pinnacle of excellence."[1] For political, financial and humane reasons, achieving a national objective whilst minimizing bloodshed is often preferable. Equally, it has long been recognized that strategic advantages can be gained through a combination of both military and non-military means.[2] Whilst not a recent phenomenon, grey zone operations are becoming increasingly important owing to the technological advances on offer combined with the enhanced media scrutiny from both international and domestic populations. Why would a state, or indeed a non-state actor, commit troops to a violent conflict, with inevitable casualties, when the same objective could be achieved through, for example, enhanced peacetime patrols?

Grey zone operations or hybrid warfare?

Terminology is not the lawyer's friend here. The concept of grey zone operations is not easily defined, and a detailed definition is beyond the scope of this paper. There has been significant debate about the correct terminology, and often with confusing outcomes, serving to emphasise the fluid nature of the concept.[3] Indeed, it has even

[1] Translation from https://www.academia.edu/43237855/Sun_Tzu_The_Art_of_War_Verse_3_02. Accessed 1 September 2020. See also Sun Tzu, *The Art of War* (Amazon Classics, trans Lionel Giles, 2017) Verse 3.2. The introduction to this book explains the difficulties with getting a precise translation of Sun Tzu, owing to the number of texts available. An equally valid translation would be: "Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting."

[2] For a discussion on the history of hybrid warfare, and how it has been used throughout past centuries, see Williamson Murray and Peter Mansoor (eds), *Hybrid Warfare: Fighting Complex Opponents from the Ancient World to the Present* (Cambridge University Press 2012).

[3] For a comprehensive overview, see Michael J. Mazaar, *Mastering the Gray Zone: Understanding a Changing Era in Conflict* (United States Army War College, 2015) In particular, the term "grey zone" can be conflated with "grey war", which further adds to the confusion, see Adam Elkus, '50 Shades of Gray: why the Gray Wars concept lacks strategic sense' (*War on the Rocks*, 15 December 2015) <https://warontherocks.com/2015/12/50-shades-of-gray-why-the-gray-wars-concept-lacks-strategic-sense/> accessed 5 March 2019. A precis of the term 'grey zone' and what it means in the context of the South China Sea is provided by Peterson, in Andrew Erickson and Ryan Martinson (eds), *China's Maritime Gray Zone Operations* (China Maritime Studies Institute and The Naval Institute Press 2019).

been suggested that such terminology should be "eliminated from the strategic lexicon" altogether.[4]

Nor is the terminology consistent. The phrase "hybrid warfare" has been used often in relation to Ukraine, and indeed was part of the inspiration for this dissertation.[5] There are a number of fundamental differences however, between the Ukraine/Crimea conflict, and the South China Sea. In 2014, Russia was using grey zone tactics to try and coerce Kiev into a more pro-Russian stance through political and economic coercion. When this failed, by mid-April 2014, the tactics changed, and Russia began to deploy local irregular forces and the infamous "little Green Men" in a use of force. This, in my view, is hybrid warfare: the combination of the use of force with non-forcible measures to achieve a strategic aim. When that too failed, Moscow moved to the more conventional use of force.[6] Hoffman's Spectrum of Conflict demonstrates the sliding scale:

Figure 1: Spectrum of Conflict in Unconventional Warfare[7]

I have chosen to use the phrase "grey zone operations" primarily because as per the scale above, the term "hybrid warfare" implies a near-crossing of the threshold from peace into conflict. This is not the case in the South China Sea, and while it will be shown that militaries from different States regularly encounter one another, with one notable and brief exception, this has not translated into a state of open conflict, or even

[4] Donald Stoker and Craig Whiteside, 'Blurred Lines: Gray-Zone Conflict and Hybrid War—Two Failures of American Strategic Thinking' (2020) 73 Naval War College Review.
[5] Aurel Sari, 'Hybrid Warfare, Law and the Fulda Gap' University of Exeter Law School, 2017.
[6] Erickson and Martinson Shane Reeves and David Wallace, 'The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict' (2015) 91 International Law Studies 361, p23.
[7] Frank Hoffman, *The Contemporary Spectrum of Conflict: Protracted, Gray Zone, Hybrid and Ambiguous Modes of War* (The Heritage Foundation: 2016 Index of US Military Strength, 2016).

close to it.[8] Therefore, throughout this dissertation, the law that will be analysed will predominantly be that of peace time, rather than the law of armed conflict.

Grey zone operations – a definition

For the purposes of this dissertation, one definition of grey zone activity will be referred to throughout. This will be the definition used by the Center for Strategic and International Studies, in its series of reports on grey zone activities:

> "An effort or series of efforts intended to advance one's security objectives at the expense of a rival using means beyond those associated with routine statecraft and below means associated with direct military conflict between rivals. In engaging in a gray zone approach, an actor seeks to avoid crossing a threshold that results in open war."[9]

Key to understanding the concept of grey zone operations is to recognise their purpose. Such operations "are not aimed at subversion of the international order. Rather they attempt targeted revision of particular aspects of that order, while explicitly avoiding military force".[10] With the implications of military aggression (both financial and human) continually rising, States are seeking new ways to achieve national strategic objectives at a lower cost.

Therefore, the term does not apply to all non-conventional forms of conflict where the aim is to secure territory or control of a region. While it has been suggested that China's expansion into the South China Sea comes under the same category as ISIL's regime within the territories of Iraq and Syria, this is not the case.[11] The former, as this dissertation aims to show, is a carefully crafted State-sponsored campaign of expansion that always aims to stay below that crucial dividing line between war and

[8] See Chapter 1, and the description of the Battle of the Paracels in 1974. The period studied for this dissertation runs from 1947 to 2020.
[9] Kathleen Hicks and others, *By Other Means Part 1: Campaigning in the Gray Zone* (CSIS International Security Program, 2019),p4.
[10] Andrew Erickson and Ryan Martinson (eds), *China's Maritime Gray Zone Operations* (China Maritime Studies Institute and the Naval Institute Press 2019), p17.
[11] Peter Pomerantsev, 'Fighting While Friending: The Grey War Advantage of ISIS, Russia and China' (*Indian Strategic Studies*, 1 January 2016) <http://strategicstudyindia.blogspot.com/2016/01/fighting-while-friending-grey-war.html> accessed 23 June 2018.

peace. The latter is open warfare, with the blatant use of force through arms and personnel to achieve both territorial and ideological gain.

From this definition, it can be seen there are three main elements to find in grey zone operations. Firstly, their aim is not to overturn the international system, but to seek revisions within it, for national gain. The South China Sea is an excellent example of this: China is not trying to change dynamics on a global scale, it is rather trying to assert and affirm its dominance in a specific region, and without escalating to conflict. There is an understanding that "the use of overt military force would threaten both its gains and the system in which those gains accrued."[12] Secondly, any sense of ambiguity is deliberate. For example, a co-ordinated use of firepower by warships of the People's Liberation Army (Navy) (PLA(N)) on Philippine vessels or territory would likely be viewed as in contravention of Article 2(4) of the UN Charter.[13] However, the harassment of a US Navy vessel at sea, by what appears to be a Chinese fishing vessel, is not so clear cut: it is not an overt use of force.[14] Thirdly, grey zone operations take time and investment. The dispute over the South China Sea has been ongoing for several years: grey zone operations do not provide a quick solution to a national strategic problem.[15] Rather, it requires patience, incremental planning, and a graduated approach. "Beijing appears to be quite cognisant of the advantages of this strategy, as it tends to intersperse quieter periods of consolidation and normalisation into its efforts to further defuse resistance and foster perceptions of a new status quo."[16]

Grey zone operations in the maritime environment

90% of world trade is carried via the sea, and communications systems are becoming ever more reliant on undersea cables.[17] As an island nation, the UK is very conscious

[12]Erickson and Martinson (eds), , p17.
[13] Charter of the United Nations and Statute of the International Court of Justice 1945. Article 2(4) states: "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."
[14] See Chapter Two.
[15] See timeline in Chapter One.
[16] Erickson and Martinson (eds), p19.
[17] ICS, 'Shipping and World Trade' (*International Chamber of Shipping*) <https://www.ics-shipping.org/shipping-facts/shipping-and-world-trade> accessed 24 April 2020 Hugh Morris, 'Mapped:

of maritime security. Factors such as the growth of the world population, with its corresponding demands for resources, indicate that tension, be that political, territorial or economic, could easily manifest itself at sea.[18] It is therefore prudent to anticipate that any maritime advantage currently enjoyed by the Royal Navy will be challenged in the future.

Although not directly affecting the UK at this time, such a scenario is now playing out in the South China Sea, where China is taking clear and overt action to dominate the air and maritime environment, at the detriment to her neighbours, in particular the Philippines and Vietnam.[19] In response, the Royal Navy has deployed two warships to the region during the time this dissertation was written. Therefore, it is becoming increasingly important to examine the legal issues of grey zone operations in the maritime environment, not only in order to better understand the actions of opposing forces, but also to develop the UK's response in countering them.[20]

The maritime environment adds a further layer of complexity to the concept of grey zone operations, as opposed to those conducted on land. By way of example, the international maritime legal regime, framed in the UN Convention on the Law of the Sea (UNCLOS) establishes exclusive economic zones (EEZ) of up to 200 nautical

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How the entire planet's internet is linked by cables under the sea' (*The Telegraph*, 13 December 2017) <https://www.telegraph.co.uk/travel/maps-and-graphics/underwater-sea-cables-beaches-uk/> accessed 29 August 2020.

[18] OECD, 'What is the Ocean Economy?' (*Organisation for Economic Co-operation and Development*) <http://www.oecd.org/ocean/topics/ocean-economy/> accessed 7 October 2020. By 2050, the world population is predicted to have increased from 7.8 billion to 9 billion. For discussion on how the natural resources of the South China Sea play into the larger overall national aim of achieving strategic dominance see Lloyd Thrall, 'The Relationship between Natural Resources and Tensions in China's Maritime Periphery' (*The RAND Corporation*, 4 April 2013) <https://www.rand.org/content/dam/rand/pubs/testimonies/CT300/CT385/RAND_CT385.pdf> accessed 7 October 2020.

[19] For recent examples see Jim Gomez, 'Philippines protests Chinese fishing seizures, air warnings' (*The Washington Post*, 21 August 2020) <https://www.washingtonpost.com/world/asia_pacific/philippines-protests-china-actions-vs-fishermen-aircraft/2020/08/20/5d807d00-e357-11ea-82d8-5e55d47e90ca_story.html> accessed 7 October 2020 and Viet Hung Nguyen Cao, 'Vietnam's Struggles in the S. China Sea: Challenges and Opportunities' (*The Maritime Executive*, 22 September 2020) <https://www.maritime-executive.com/editorials/vietnam-s-struggles-in-the-s-china-sea-challenges-and-opportunities> accessed 7 October 2020.

[20] For the rationale by the UK government for sending one of those ships to the region see gov.uk, 'HMS Sutherland to deploy to Asia Pacific, Defence Secretary announces on-board' (*gov.uk*, 24 November 2017) <https://www.gov.uk/government/news/hms-sutherland-to-deploy-to-asia-pacific-defence-secretary-announces-on-board> accessed 14 March 2020.

miles from the coast.[21] This is a vast area of water over which a State has sovereign rights to the natural resources.[22] Thus, a rival claim over an area of coast line (or as we shall see, an island) is not just about that section of land. It is also about access to the marine environment, including living and non-living resources such as fish and fossil fuels respectively.

The South China Sea has been chosen as the most pertinent example of where such operations are taking place now. China has staked claims, both territorial and maritime, in a contested area of the globe.[23] Despite the ruling from an international tribunal finding firmly against China, despite general condemnation of the activities occurring from the international community, and crucially despite the absence of the use of firepower, to all intents and purposes, Beijing appears to be succeeding.[24]

Structure

The dissertation will start by setting the scene in the South China Sea, and defining the key legal terminology which will be used throughout. In addition, the concept of lawfare will be introduced, described initially in the US as the "strategy of using – or misusing – law as a substitute for traditional military means to achieve a warfighting objective".[25] The paper will then examine the legal aspects of grey zone operations from two perspectives: the people at sea in the region and the geographical locations. In examining the action of the people, the focus will be on the militia, or Little Blue Sailors.[26] In the case of the relevant places in the South China Sea, I will describe the ambitious programme of artificial island building that has been pursued by Beijing, and

[21] United Nations Convention on the Law of the Sea 1982, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
Part V refers to the Exclusive Economic Zone.
[22] Ibid, Article 56 (1) (a).
[23] For an overview of all maritime claims in the region, see AMTI, 'Maritime Claims of the Indo-Pacific' (*Asia Maritime Transparency Initiative*, 7 October 2020) <https://amti.csis.org/maritime-claims-map/> accessed 7 October 2020.
[24] *The Republic of the Philippines v The People's Republic of China* PCA Case No 2013-19, 12 July 2016; hereafter referred to *The South China Sea Arbitration.*
[25] See Charles Dunlap, 'Lawfare Today and Tomorrow' (2011) 87 International Law Studies, US Naval War College 315.
[26] James Stavridis, 'The United States, the North Atlantic and Maritime Hybrid Warfare' (2017) 87:1 Whitehall Papers 92 The phrase "Little Blue Sailors" was coined by Admiral Stavridis in his article exploring the concept of hybrid warfare at sea, in response to the phrase "Little Green Men" used to described the Russian insertion of forces into the Crimea and the Ukraine in 2014.

examine its legal implications. Identifying the problem set is only half the issue however, the question then is: how to respond? The final chapter therefore will focus on potential solutions, already available within the international legal framework, which can be used to counter China's actions. The responses will demonstrate that there are plenty of options available, and indeed, no new law is required. The difficulty is finding the political will to respond to a State which currently has the overwhelming advantage in terms of a potent military capability at sea, as well as significant economic resources.

From this research, three key lessons can be drawn with regards to the conduct of grey zone operations in the maritime environment. Firstly, ambiguity can assist. The Chinese government, particularly through the use of its militia and its ambiguous status as fishermen-cum-reservists, gives other governments cause to hesitate in their response. The use of assets that may at times act like military units, but, are outwardly civilian means that if they are met with a military response from a State other than China, such a response, even if entirely lawful, could easily look disproportionate on the world stage. Further, ambiguity also exists in the statements of Beijing regarding the land features in the South China Sea. Details of precise claims are not provided: in turn, this makes it harder for other nations to counter those claims.

The second lesson identified is that the maintenance of a consistent argument throughout will bolster a State's cause. The argument is multi-layered, relying on a combination of domestic and international arguments which are mutually supportive. As such, China has been unwavering in its narrative regarding the South China Sea, and its "undisputed" sovereignty over the land features in the region. This plays to both the domestic audience showing strength and resolve, but also the international audience in presenting an almost impenetrable barrier: if there is no dispute, there is nothing to discuss.

The third lesson is that China has actively used the law as part of its strategy. This dissertation will demonstrate that China has been willing to push the legal envelope by pushing interpretations to the very edge of what other States may consider reasonable. In some instances, the approach has gone further, and China has taken the view that the law is to be actively exploited, through the use of lawfare, or *falu*

zhan. As with the consistent national narrative, this is again a multi-layered strategy and will be demonstrated through both the passing of domestic legislation and Beijing's approach to international law. It will be seen that by taking a patient and incremental approach, often over several years, China's claims in the South China Sea are underpinned by a controversial, but nevertheless reasoned legal argument.

CHAPTER ONE: SETTING THE SCENE

Introduction

The aim of this chapter is to set the context for the dispute in the South China Sea and provide an overview of the key factors and players which influence events taking place in the region. The chapter is set into two sections. The first will examine the geography and the principal reasons for tensions occurring in the first place, as well as considering the relevant international law. A timeline of recent key events will also be provided. The second section will introduce the concept of lawfare. Research for this dissertation has demonstrated that China's approach to the South China Sea encompasses many facets, and one of these is an active use of the law to achieve a national advantage.

Section I: Location and Context

The South China Sea lies between the Indian and Pacific Ocean, bordered by 7 countries: China, Taiwan, Vietnam, Malaysia, Indonesia, Brunei and the Philippines.[27] All except Indonesia, have laid claims to all or part of the area.[28] The area of water itself covers almost 3.5 million square kilometres: just a little smaller than the area of the Mediterranean.[29]

The plethora of claims that have been made over various parts of the South China Sea cover both the ocean and the land features within it.[30] As such there are three geographical features which have played a key role and will be examined in more detail throughout this paper. Firstly, there are two groups of islands, known as the Paracel Islands (to the north)[31] and the Spratly Islands (to the south).[32] These islands

[27] International Hydrographic Organisation, *Limits of the Oceans and Seas,* Special Publication No 23, 3rd edn (Monte-Carlo, Imp Monegasque, 1953) p 31. Also available at http://www.vliz.be/en/imis?module=ref&refid=78851.

[28] AMTI, 'Maritime Claims of the Indo-Pacific' (Asia Maritime Transparency Initiative, 7 October 2020) <https://amti.csis.org/maritime-claims-map/> accessed 7 October 2020.

[29] Britannica, 'South China Sea' (Britannica.com, 16 April 2020) https://www.britannica.com/place/South-China-Sea accessed 28 April 2021.

[30] See fn 28.

[31] 西沙群岛 or Xisha Islands in Chinese. For the purposes of this dissertation, the English names will be used throughout.

[32] In Chinese, known as 南沙群岛 or Nansha Islands.

are in fact groups of different types of land features including rocks and coral reefs, or archipelagos, existing in some cases just above or below the water line. They are mostly uninhabited and have never had an indigenous population. The largest of these is Woody Island in the Paracel Islands, with an area size of approximately 2.4 square kilometres.[33] In addition to the islands, there are several atolls, rocky outcrops, sandbanks and reefs, the Scarborough Shoal being the third in the list of the most sought-after features.[34]

Why are States arguing over the South China Sea?

There are three main reasons why this region is considered to be valuable to the littoral States. Firstly, the area is home to major fishing grounds for the Philippines and Vietnam in particular, but also China. Roughly half a billion people live within 100 miles of the South China Sea coastline: access to food supplies will always be a driver of competition.[35] Secondly, it looks likely that the South China Sea holds a wealth of natural resources. The World Bank estimates that the area has oil reserves of at least 7 billion barrels, and an estimated 900 trillion cubic feet of natural gas.[36] Detailed exploration has yet to be conducted, but for any nation in the area, this is a considerable potential resource to own, and then exploit.

Thirdly, international attention is focused on this area because it contains some of the world's most important shipping lanes: 33 percent of the world's maritime traffic flows through the South China Sea.[37] Ships carrying goods between markets in Asia, Europe, Africa and the Americas must transit through this area of water, to the

[33] Karl Pletcher, 'The Spratly Islands' (Britannica, 27 August 2015) <https://www.britannica.com/place/Spratly-Islands> accessed 10 June 2021, and Gloria Lotha 'The Paracel Islands' (Britannica, 10 September 2020) https://www.britannica.com/place/Paracel-Islands accessed 10 June 2021.
[34] Known as 黄岩岛 or Huangyan Dao.
[35] Beina Xu, 'South China Sea Tensions' (*Council on Foreign Relations*, 14 May 2014) <https://www.cfr.org/backgrounder/south-china-sea-tensions> accessed 9 February 2018.
[36] AMTI, 'South China Sea Energy Exploration and Development' (*Asia Maritime Transparency Initiative*, 9 February 2018) <https://amti.csis.org/south-china-sea-energy-exploration-and-development/> accessed 9 February 2018.
[37] chinapower.csis.org, 'How much trade transits the South China Sea?' (*Center for Strategic and International Studies*, 2 November 2020) <https://chinapower.csis.org/much-trade-transits-south-china-sea/> accessed 2 November 2020.

estimated sum of 5.3 trillion dollars of trade[38]. Circumnavigating the region would be both lengthy and expensive, therefore a large portion of the international community have an interest in ensuring the security of the region remains stable. In short, a State which has control over the South China Sea, has control over a huge proportion of international trade, as well as access to a wealth of resources.

Timeline of Key Events

Although this is a dispute that has been running for decades, there are some key events which are worth highlighting at this stage.

Date	Event
1947	China publishes a map outlining its claims in the South China Sea, the basis of the "Nine-Dash Line".[39] The source and author of the map remain unknown.[40]
January 1974	Battle of the Paracels, between China and Vietnam (see below for a more detailed description). More than 70 Vietnamese troops are killed. The islands are also claimed by Taiwan and Vietnam.[41]
March 1988	China and Vietnam clash again, this time over Johnson South Reef in the Spratly Islands. Vietnam again comes off worse, claiming to lose 64 sailors.[42]
November 2002	State Members of the Association of South Eastern Asian Nations (ASEAN) and China sign the "Declaration on the Conduct of Parties in the South China Sea". It is not considered

[38]Eleanor Freund, *Freedom of Navigation in the South China Sea: A Practical Guide* (Belfer Center for Science and International Affairs, Harvard Kennedy School, 2017), p24.

[39] Secretariat of Government of Guangdong Province, Republic of China - Made by Territory Department of Ministry of the Interior, printed by Bureau of Surveying of Ministry of Defence. Public Domain, https://commons.wikimedia.org/w/index.php?curid=4002269 Accessed 1 February 2018.

[40] Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historical Rights Claim in the South China Sea' (2013) 107 American Journal of International Law 124, p9

[41] Toshi Yoshihara, 'The 1974 Paracels Sea Battle: a Campaign Appraisal' (2016) 69 Naval War College Review, p9-11

[42] A Vietnamese video of this skirmish is available at https://www.youtube.com/watch?v=uq30CY9nWE8. See also John Garver, 'China's Push through the South China Sea: The Interaction of Bureaucratic and National Interests' (1992) 132 The China Quarterly 999, p1013

	to be legally binding.[43]
May 2005 – 2006	Taiwan builds a 1200m runway on Itu Aba, the only land feature it controls in the South China Sea.[44]
May 2009	China makes a submission to the UN claiming sovereignty over the islands in the South China Sea and adjacent waters, a map of the Nine-Dash Line is attached (see below at figure 4).[45]
Early 2012	China and the Philippines engage in a lengthy maritime stand-off, accusing each other of intrusions in the Scarborough Shoal.[46]
November 2012	Unverified claims that the People's Liberation Army (Navy) sabotaged two Vietnamese exploration operations lead to large anti-China protests on Vietnam's streets. Vietnam also condemns a new Chinese passport design that contains a map of China's disputed maritime claims in the South China Sea.[47]
January 2013	The Philippines initiates proceedings against China pursuant to Article 287, and Article I of Annex VII of UNCLOS. The case was brought to challenge China's claims to sovereign rights and jurisdiction in the South China Sea and the underlying sea bed within the Nine-Dash Line, and to establish Philippine sovereign rights and jurisdiction within the same region under UNCLOS. China, by way of Note Verbale, refuse to participate.[48]

[43] Nguyen Minh Quang, 'Saving the China-ASEAN South China Sea Code of Conduct' (*diplomat.com*, 29 June 2019) <https://thediplomat.com/2019/06/saving-the-china-asean-south-china-sea-code-of-conduct/> accessed 1 July 2019 and Ian Storey, 'Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea' (*iseas.edu.sg*, 8 August 2017) <https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2017_62.pdf> accessed 29 May 2020, p2

[44] Cheng-yi Lin, 'Taiwan's Spratly Initiative in the South China Sea' (2008) 8 China Brief, jamestownorg, and for pictures of the runway, see https://amti.csis.org/itu-aba-island/.

[45] People's Republic of China, Note Verbale CML/17/2009 - Position Paper on South China Sea (2009): http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf Accessed 18 February 2018.

[46] Michael Green and others, *Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence* (https://wwwcsisorg/analysis/countering-coercion-maritime-asia, 2017), p95.

[47] bbc.co.uk, 'Vietnam breaks up anti-China protests' (*BBC News*, 9 December 2012) <https://www.bbc.co.uk/news/world-asia-20656533> accessed 12 April 2021.

[48] *The Republic of the Philippines v The People's Republic of China (Award on Jurisdiction and Admissibility)* PCA Case No 2013-19, 29 October 2015, paras 26-27.

April 2013	China announces it has started to allow tourists to visit Woody Island in the Paracels as part of a cruise route.[49]
May – July 2014	Chinese oil company China National Petroleum Corporation (CNPC) moves an oil exploration rig near to Triton Island in the Paracels. Anti-Chinese riots erupt in Vietnam. Vietnamese vessels approach the rig but are stopped by Chinese boats. The stand-off ends when China moves the rig in July, a month earlier than planned.[50]
November 2014	Satellite images suggest that China is building an island at Fiery Cross Reef in the Spratlys, big enough for an airstrip.[51]
May 2015	A US Surveillance plane is warned off by Chinese Navy as it flies over artificial islands in the Spratly Islands.[52]
June 2015	Chinese Foreign Minister Wang Yi states that China has completed land reclamation work in South China Sea.[53]
October 2015	*USS Lassen* sails within 12 nautical miles of Fiery Cross Reef in a Freedom of Navigation Operation (FONOP). China objects to the US, tracks the ship and issues warnings.[54]
January 2016	Chinese civilian airliners land on the new runway at Fiery Cross Reef. Vietnam objects.[55] US Navy conducts FONOP near Triton Island in the Parcel Islands. China objects.[56]

[49] bbc.co.uk, 'China to open disputed Paracel islands to tourism' (*BBC News*, 7 April 2013) <https://www.bbc.co.uk/news/world-asia-china-22056661> accessed 12 April 2021.
[50] reuters.com, 'China oil rig finishes exploration in disputed waters off Vietnam' (*Reuters*, 16 July 2014) <https://www.reuters.com/article/uk-china-vietnam-rigs-idUKKBN0FL04K20140716> accessed 12 April 2021.
[51] AMTI, 'Occupation and Island Building, Fiery Cross Reef' (*Asia Maritime Transparency Initiative*) <https://amti.csis.org/fiery-cross-reef/> accessed 13 April 2021.
[52] Justin McCurry, 'China warns US plane to leave airspace over disputed islands' (*The Guardian*, 21 May 2015) <https://www.theguardian.com/world/2015/may/21/china-warns-us-plane-to-leave-airspace-over-disputed-islands> accessed 13 April 2021.
[53] gov.cn, 'Wang Yi on the South China Sea Issue At the ASEAN Regional Forum' (*Ministry of Foreign Affairs of the People's Republic of China*, 6 August 2015) <https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1287277.shtml> accessed 13 April 2021.
[54] Sam LaGrone, 'U.S. Destroyer Comes Within 12 Nautical Miles of Chinese South China Sea Artificial Island, Beijing Threatens Response' (*USNI News*, 27 October 2015) <https://news.usni.org/2015/10/27/u-s-destroyer-comes-within-12-nautical-miles-of-chinese-south-china-sea-artificial-island-beijing-threatens-response> accessed 13 April 2021.
[55] Ankit Panda, 'Vietnam Protests as China Lands Civilian Aircraft on Newly Constructed Spratly Airstrip' (*thediplomat.com*, 3 January 2016) <https://thediplomat.com/2016/01/vietnam-protests-as-china-lands-civilian-aircraft-on-newly-constructed-spratly-airstrip/> accessed 16 April 2021.
[56] Ankit Panda, 'Return of the FONOP: US Navy Destroyer Asserts Freedom of Navigation in Paracel Islands' (*thediplomat.com*, 31 January 2016) <https://thediplomat.com/2016/01/return-of-the-fonop-us-navy-destroyer-asserts-freedom-of-navigation-in-paracel-islands/> accessed 16 April 2021.

February 2016	China establishes surface to air missiles on Woody Island in the Paracel Islands.[57]
July 2016	The Arbitral Tribunal convened under Annex VII UNCLOS hands down its judgment in the case of *The South China Sea Arbitration.* .[58]
October 2016	*USS Decatur* conducts FONOPS in vicinity of Paracel Islands, loitering in the area and carrying out manoeuvring drills, challenging China's claims to straight baselines around the islands.[59]
May 2017	China and the ten member States of ASEAN announce a framework for a new Code of Conduct in the South China Sea.[60]
June 2017	Vietnam claims that a Vietnamese fishing boat is attacked by two small Chinese boats, manned by officers in military uniform, in waters near the Paracel Islands.[61]
December 2017	From satellite imagery, work appears to be complete on the infrastructure on Fiery Cross Reef in the Spratly Islands. There is a clear presence of military installations and equipment.[62]

The Battle of the Paracels

It follows from the definition of grey zone operations outlined in the Introduction that the law of armed conflict is not the main body of rules applicable to such operations. Although there may have been incidents involving a use of force, such as in 2012 (as described in the table above) that does not equate to a state of armed conflict being

[57] bbc.co.uk, 'China 'has deployed missiles in South China Sea' - Taiwan' (*BBC News*, 17 February 2016) <https://www.bbc.co.uk/news/world-asia-china-35592988> accessed 16 April 2021.
[58] *The South China Sea Arbitration*. This will be examined in detail throughout the dissertation.
[59] Sam LaGrone, 'U.S. Warship Conducts South China Sea Freedom of Navigation Operation' (*USNI News*, 22 October 2016) <https://news.usni.org/2016/10/21/u-s-warship-conducts-south-china-sea-freedom-navigation-operation>.
[60] Ankit Panda, 'China, ASEAN Come to Agreement on a Framework South China Sea Code of Conduct' (*thediplomat.com*, 19 May 2017) <https://thediplomat.com/2017/05/china-asean-come-to-agreement-on-a-framework-south-china-sea-code-of-conduct/> accessed 16 April 2021.
[61] Elizabeth Shim, 'Chinese boats attack Vietnamese fishermen in South China Sea' (*UPI*, 29 June 2017) <https://www.upi.com/Top_News/World-News/2017/06/29/Chinese-boats-attack-Vietnamese-fishermen-in-South-China-Sea/8561498755312/?ur3=1> accessed 10 February 2018.
[62] AMTI, ' A Constructive Year for Chinese Base Building' (*Asia Maritime Transparency Initiative*, 14 December 2017) <https://amti.csis.org/constructive-year-chinese-building/> accessed 10 February 2018.

in existence. There has also not been a declaration by any of the coastal States that they are involved in an armed conflict regarding the South China Sea.[63] This is a subjective assessment by the States involved: "[a]s long as both parties choose to consider what transpired as a mere incident, and provided that incident is rapidly closed, it is hard to gainsay that view. Once, however, one of the parties elects to engage in war, the other side is incapable of preventing the development."[64] Thus, when researching the dispute in the South China Sea, and the applicable law, it is the law of peacetime which is to be examined. However, the timeline above has shown that in the past, there have been clashes between China and other nations, notably Vietnam, with some loss of life. The most serious of these was the so-called Battle of the Paracel Islands in 1974.

Both China and Vietnam are parties to the UN Charter. The Charter provides for the peaceful settlement of disputes, and prohibits the use of force under Article 2(4) which states: "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".[65] This article is also accepted as representing customary international law.[66] The exemption to that prohibition on the use of force is the UN Charter provision on self-defence under Article 51 which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."[67] In the *Nicaragua* case, the International Court of Justice (ICJ) was asked to consider the actions of the US government which had been aimed at overthrowing the government of Nicaragua. The judgment handed

[63] Geneva Convention III Relative to the Treatment of Prisoners of War 1949, Common Article 2 states: "The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if a state of war is not recognised by one of them."
[64] Yoram Dinstein, *War, Aggression and Self Defence* (Cambridge University Press 2001), p11.
[65] Charter of the United Nations and Statute of the International Court of Justice 1945.
[66] Christine Christine Gray, *International Law and the Use of Force* (3rd edn, Oxford University Press 2008), p76. In *Nicaragua v United States of America (Military and Paramilitary Activities in and against Nicaragua)* ICJ 27 June 1986, paras 190-191 it was posited by both parties that Article 2(4) was in fact *ius cogens*, however the Court did not determinatively rule on that point. It did however hold that Article 2(4) had the status of customary international law, citing the UN General Assembly Resolution 2625 *Declaration on Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* as an example of *opinion juris.*
[67] Charter of the United Nations and Statute of the International Court of Justice 1945, Article 51.

down has therefore provided useful guidance of what would constitute a "use of force" and as such be in violation of Article 2(4). Several incidences were considered to meet this definition, such as laying mines in Nicaraguan waters and attacks on Nicaraguan ports. The arming and training of the *contras* was also considered a use of force, whereas funding them did not in itself meet that definition.[68]

When the parameters set out above are applied to the facts of the Battle of the Paracels, it can be shown that China did use force within the meaning of Article 2(4). On 16 January 1974, the Republic of Vietnam Navy (RVN) discovered units from the Chinese People's Liberation Army (Navy)(PLA(N)) in the area of the Crescent Group in the western Paracel Islands, claimed and occupied at the time by South Vietnam.[69] Chinese troops were also seen on Drummond and Duncan Islands, both also claimed by Vietnam. In the course of the following two days, the two naval forces jostled with each other, coming into close-proximity on several occasions. On the morning of 19 January, Vietnamese soldiers landed on Duncan island, and came under fire from Chinese troops. Three Vietnamese were killed, and more were injured. Then, mid-morning, the Vietnamese warships opened fire on the Chinese warships, and a sea battle lasted 40 minutes. Both sides took damage.[70] The following day, Chinese aircraft from Hainan bombed the islands, and an amphibious landing was made.[71] The outnumbered Vietnamese troops left ashore were forced to surrender. China now had full control over all the Paracel Islands. Despite only lasting mere days, this is arguably one of only three post-1945 conflicts where the dispute was principally fought in the maritime domain at an operational level.[72]

The details described above indicate that there was a use of force within the meaning of Article 2(4) of the UN Charter, and further that the events themselves amounted to

[68] *Nicaragua vs USA*, para 228.
[69] For a comprehensive analysis of the Battle of the Paracels, see , p9-11 deal with the actual events as reproduced here.
[70] LeRinh, 'The Paracel Islands (Hoang-Sa) Sea Battle' (*Doan Ket Magazine*) <https://web.archive.org/web/20070506213733/http://www.xuquang.com/dialinhnk/hsrinh.html> accessed 16 April 2021, provides an account from the perspective of a Vietnamese officer present.
[71] globalsecurity.org, 'Paracel (Xisha) Islands -1974' (*globalsecurity.org*) <https://www.globalsecurity.org/military/world/war/paracel.htm> accessed 16 April 2021
[72] The other two being the Falklands/Malvinas Conflict and the Gulf of Sidra Action. See S Haines, 'War at Sea: Nineteenth Century Laws for Twenty-First Century Wars? ' (2016) 98 (2) International Review of the Red Cross 428

an international armed conflict, between China and Vietnam. The force used went beyond that of a "mere frontier action" and may even amount to an armed attack given the scale and effects of the incident.[73] Rather than being a skirmish involving border forces of opposing sides, this was a deliberate use of force by China to acquire territory that was held by Vietnam.[74]

Turning from *ius ad bellum* to *ius in bello*, and so the applicability of the law of armed conflict, the Commentary of the Geneva Conventions of 1949 states "[e]ven if none of the Parties recognize the existence of a state of war or of an armed conflict, humanitarian law would still apply provided that an armed conflict is in fact in existence. How States characterize the armed confrontation does not affect the application of the Geneva Conventions if the situation evidences that the State concerned is effectively involved in hostile armed actions against another State."[75] In case law, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that "an armed conflict exists whenever there is resort to armed force between States".[76] Thus, while the two opposing forces continued to confront each other over the two-day period, a state of armed conflict was in existence to which the law of armed conflict applied.

This was an isolated incident, however, as the timeline above demonstrates, and the applicability of the main body of the law of armed conflict terminated with the general close of hostilities after two days. The legal instruments to be considered and applied to People's Republic of China (PRC) and other stakeholders in the South China Sea

[73] *Nicaragua vs USA* paras 191, 195.
[74] Ibid, para 231. The ICJ referred to the "circumstances and motivations" of the attack by way of distinguishing between the two categories. The decision by the ICJ to differentiate between a "use of force" and "mere frontier action" has caused controversy, seeDinstein p195, although Dinstein accepts that the distinction is useful when determining whether or not a state of war is in play. For the influence the *Nicaragua* case has had on cases since, see also Abdulqawi Yusuf, 'The Notion of 'Armed Attack' in the Nicaragua Judgment and Its Influence on Subsequent Case Law' (2012) 25 Leiden Journal of International Law 461.
[75] ICRC, 'Commentary of 2016 on the Geneva Conventions' (International Committee for the Red Cross, 2016) https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518 accessed 18 May 2021, para 213. By way of contrast in the 1952 commentary, it was stated: "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place." J Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field* (ICRC, Geneva 1952).
[76] *The Prosecutor v Dusko Tadic* ICTY IT-94-1-A, 2 October 1995, para 70.

now are ones which have been drafted for peacetime application: in essence, this is the conundrum of grey zone operations.

The law applicable to grey zone operations

Owing to the maritime environment in which this dispute is being played out, the key legal arguments regarding the South China Sea are framed around the United Nations Convention on the Law of the Sea (UNCLOS).[77] Not every State however, is a signatory: China, as the State making the boldest assertions with regards to UNCLOS, did ratify the treaty on 7 June 1996. The United States, as the State leading the way with Freedom of Navigation Operations (FONOPS) in protest against China's claims, has not ratified UNCLOS. The US position nevertheless, is that the substantive provisions of UNCLOS reflect customary international law.[78] The UK ratified UNCLOS on 25 July 1997, and the Philippines on 8 May 1984.[79]

UNCLOS covers many aspects of the law of the sea, from the right to board vessels through to the difference between a rock and an island, much of which will be covered in more detail throughout this dissertation. For the purposes of scene setting however, it is worth outlining the rules which govern a coastal State's entitlement to maritime zones, as it is these zones which then provide a State with access to the natural resources that are so in demand, as well as certain jurisdictional rights and obligations.

Coastal Baselines: it is from a coastal baseline that the seaward limits of maritime zones are governed. The normal baseline is the low water line along the coast.[80] Clearly, coastlines are rarely (if ever) convenient straight lines from which to measure, and so UNCLOS also provides that straight base lines may be drawn "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity", a very good example of where this is applied

[77] See fn 21.
[78] USA, *Limits in the Seas: China - Maritime Claims in the South China Sea* (Bureau of Oceans and International and Scientific Affairs, United States Department of State, 2014).
[79] treaties.un.org, 'United Nations Treaty Collection Depositary' (*United Nations*) <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019.
[80] UNCLOS, Article 5.

is along the western seaward coast of Norway.[81] Waters on the landward side of the baseline are internal waters.[82] For the purposes of the South China Sea, provisions are also made for baselines regarding archipelagic States such as Indonesia and the Philippines: the claiming State may "draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1."[83]

Archipelago: An archipelago is defined as a group of islands, including parts of islands, with interconnecting waters and other natural features which are so closely correlated that such islands, waters and other natural features "form an intrinsic geographical, economic and political entity, or which historically have been regarded as such".[84] Straight archipelagic baselines may be drawn to join the outermost points of the outermost islands and drying reefs of the archipelago.[85]

Territorial Sea: The territorial sea may extend up to 12 nautical miles from the baseline, within which the coastal State exercises full sovereignty.[86] However, and as is proving particularly pertinent within the South China Sea, one of the fundamental principles enshrined within UNCLOS is that all other States enjoy the right of innocent passage through the territorial waters of the coastal State.[87]

Innocent passage: this is defined as passage which is continuous and expeditious, but will only be considered as *innocent* if it is not prejudicial to the peace, good order or security of the coastal State.[88] UNCLOS provides a list of activities that if engaged in, would make a passage not innocent. These include the use of weapons, the launching or recovery of aircraft, surveillance operations and fishing activities.[89] In practical terms, this means that any ship transiting through territorial waters must move

[81] Ibid, Article 7.
[82] Ibid, Article 8.
[83] Ibid, Article 47. This will be examined in more detail in subsequent chapters.
[84] Ibid, Article 46 (b).
[85] Ibid, Article 41(1).
[86] Ibid, Article 3.
[87] Ibid, Article 17.
[88] Ibid, Articles 18 and 19(1).
[89] The full list can be found in Ibid, Article 19(2).

directly through that area of water, and crucially, not commence any activity that may hinder a continuous and expeditious passage. Pertinent to the South China Sea is the issue regarding the requirement (or not) for advance permission for a warship of one State to transit through the territorial sea of another State, exercising innocent passage. The US position for example, is that such permission is not required, and as part of its Freedom of Navigation Programme, will regularly sail its warships through the territorial waters of those States who *do* consider that prior permission is required.[90] One of these States which requires permission is China.[91]

Contiguous Zone: this area extends beyond the territorial sea to a maximum of 24 nautical miles from the baseline, within which a coastal State may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations applicable within its territory or territorial sea.[92]

Exclusive Economic Zone (EEZ): The EEZ may extend to a maximum of 200 nautical miles from the baselines. Within the EEZ, the coastal State has enumerated rights, notably, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" and "jurisdiction as provided for" in the Convention with regard to "the establishment and use of artificial islands, installations and structures" as well as "marine scientific research " and " the protection and preservation of the marine environment".[93] At the same time, the freedoms of navigation, overflight, laying and maintenance of submarine cables, and other uses related to these freedoms are also preserved in the EEZ.[94]

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[90] US Navy (ed) *The Commander's Handbook on the Law of Naval Operations*, vol NWP 1-14M (Department of the Navy, Department of Homeland Security 2007) para 2.5.2.4; USA, *Annual Freedom of Navigation Report Fiscal Year 2017* (Department of Defense Report to Congress 31 December 2017) p3 references an operation conducted near the Paracel Islands regarding the right of innocent passage.

[91] https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec Accessed 8 February 2018. China made the following declaration on 25 August 2006: "The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state."

[92] UNCLOS, Article 33.

[93] Ibid, Article 56.

[94] Ibid, Article 58.

High Seas: all water beyond 200 nautical miles, open to all States to exercise the freedom of navigation, whether coastal or landlocked, for peaceful purposes only.[95]

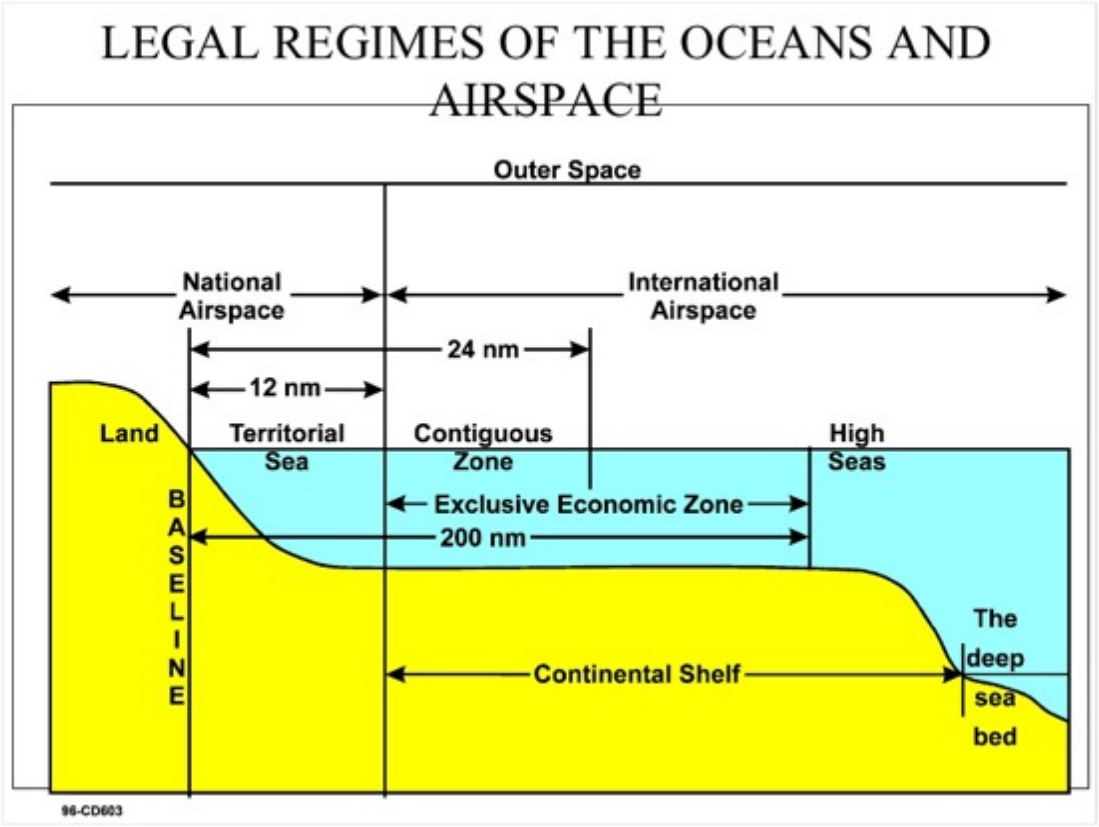

Figure 1: Legal Regimes of the Oceans and Airspace.[96]

Who claims what?

As can be seen from *Figure 2* below, China claims the largest portion of the area: in essence, the entirety of the South China Sea, stretching hundreds of miles south and east from its most southerly province of Hainan. The claim is based on historical precedent, with China stating that Chinese sailors were the first to discover the islands over 2,000 years ago.[97] During World War Two, Japan controlled the islands, but

[95] Ibid, Articles 87, 88.
[96] Reproduced from https://www.slideshare.net/roesroesmana/maritime-zone-and-jurisdiction Retrieved 8 February 2018.
[97] gov.cn, 'Full Text of Chinese Government Statement on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea' (*www.gov.cn*, 2016) <http://english.gov.cn/archive/publications/2016/07/12/content_281475391807773.htm>.

following Japan's defeat, in 1946 the Chinese sent ships into the area to reclaim them.[98] Upon the signing of the Peace Treaty with Japan at the San Francisco Conference on 7 September 1951, the sovereignty of the Spratly and Paracel Islands was left unresolved, although both China and Vietnam asserted their rights to the them.[99] Later, in 1955 the Philippine government also laid claim to some islands of the archipelagos through a note to the UN.[100]

Figure 2: Maritime Claims within the South China Sea[101]

[98] Ibid.
[99] Article 2f of the Treaty states that Japan renounced sovereignty of the Spratly and Paracel Islands. The treaty is available at the United Nations Treaty Collection, https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf accessed 12 April 2021. China's assertion of sovereignty was initially based on a statement made by the USSR in their favour at the conference, followed by further assertions by the Chinese government: Raul Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea* (CNA Analysis Solutions, https://wwwcnaorg/cna_files/pdf/iop-2014-u-008433pdf, 2014), p31. Vietnam made claims of sovereignty during the plenary conference: ibid p33 and also Hong Thao Nguyen, 'Vietnam's Position on the Sovereignty over the Paracels & Spratlys: Its Maritime Claims, ' (2012) 1 Journal of East Asia International Law, p187.
[100] Hayee Yorac, 'The Philippine Claim to the Spratly Islands Group' (1983) 58 Philippine Law Journal.
[101] Reproduced from https://www.maritime-executive.com/editorials/historical-support-for-china-s-south-china-sea-territorial-stance-1. Retrieved on 18 February 2018.

The now infamous Nine-Dash Line is a series of non-connected lines drawn in a U-shape around the South China Sea region. It is not clear exactly which maritime zones are being marked. The line was originally an eleven-dash line first shown on a map published by the government in December 1947 to justify its claims in the South China Sea (*Figure 3)*. The 1947 map, titled "Map of South China Sea Islands," originated from an earlier one published by the Republic of China's Land and Water Maps Inspection Committee in 1935.[102] In 1953, the eleven-dash line was revised down to nine, and this claim has remained the same since.[103]

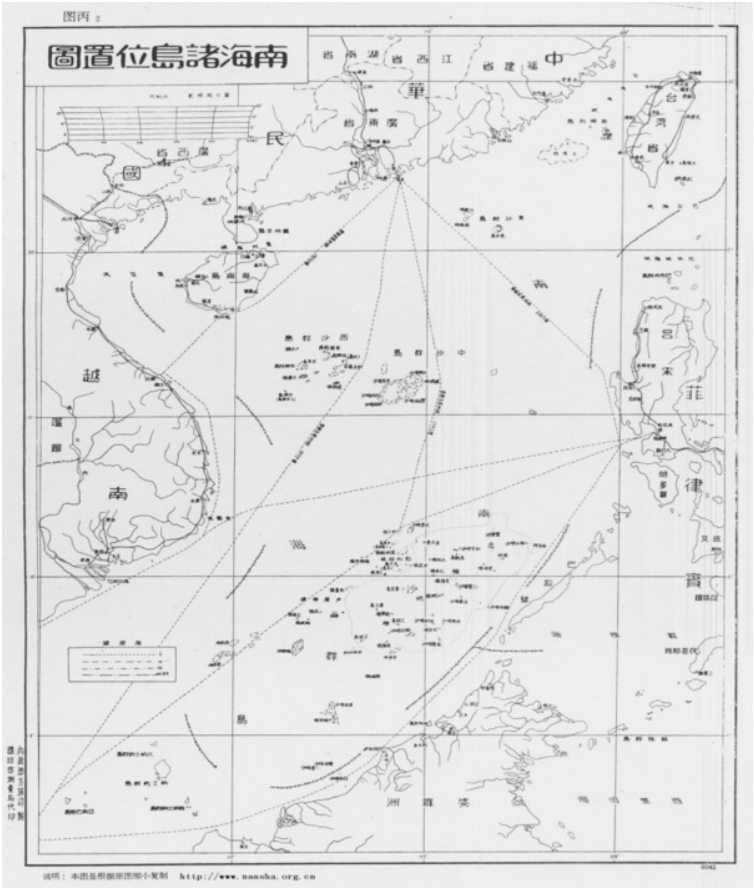

Figure 3: Map of the South China Sea Islands, 1947.[104]

[102] Stefan Talmon and Bing Bing Jia (eds), The South China Sea Arbitration: A Chinese Perspective (Hart Publishing 2014), p3.

[103] Zhiguo Gao, and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications." The American Journal of International Law 107, no. 1 (2013): 98-124, p103. The most likely reason for the reduction to nine dashes was a thawing of relations between China and Vietnam: the northern-most dashes – stretching up to the Gulf of Tonkin – were removed. See ibid, p103 fn 37.

[104] Secretariat of Government of Guangdong Province, Republic of China - Made by Territory Department of Ministry of the Interior, printed by Bureau of Surveying of Ministry of Defence. Public Domain, https://commons.wikimedia.org/w/index.php?curid=4002269 Accessed 1 February 2018.

On 7 May 2009, China submitted to the UN a map showing the Nine-Dash Line, along with an accompanying Note Verbale (Figure 4).[105] A quick glance at the map shows that despite the formality of the submission, the nine dashes themselves do not appear to be as accurate as would be desired, and indeed, China has not provided any precise co-ordinates.[106] In fact, there are even inconsistencies between the lines drawn on the 1947 map, and the ones on the 2009 version. The wording of the claim has also been left as very broad:

> "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. The above position is consistently held by the Chinese Government and is widely known by the international community."[107]

The wording was also seen as a counter to a joint submission that had been made by Vietnam and Malaysia, just the day before, regarding their claims to the region.[108] To add to the confusion and debate, China has not clarified the legal basis upon which it stakes its claim.

[105] People's Republic of China, Note Verbale CML/17/2009 - Position Paper on South China Sea (2009) available at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf Accessed 18 February 2018.

[106] https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/GBR_MZN100_2014_00ill2.jpg (accessed 24 April 2021) for the chart deposited with the UN by the United Kingdom in 2013, following the establishment of an Exclusive Economic Zone.

[107] People's Republic of China, *Note Verbale CML/17/2009 - Position Paper on South China Sea* (2009) available at http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf Accessed 18 February 2018. There are now more recent versions of the maps available, showing ten dashes – however this final addition relates to the area of sea to the east of Taiwan, and therefore not in the South China Sea.

[108] https://www.un.org/Depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm, accessed 26 April 2021.

Figure 4: China's Submission to the UN in 2009 – the "Nine-Dash Line".[109]

In 2011, the Philippines lodged a diplomatic protest against China for claiming the whole of South China Sea illegally.[110] In response, China issued another Note Verbale, reiterating the claims above, and adding that "China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence."[111]

In response to China's claims, the Bureau of Oceans and International Environmental and Scientific Affairs, under the auspices of the US State Department, published a study examining China's claims, and interpreted them in line with international law.[112]

[109] http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf Accessed 18 February 2018.
[110] https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf. Accessed 26 April 2021.
[111] PRC, *Note Verbale CML/8/2011* (2011) available at https://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf Accessed 18 February 2018.
[112] USA, *Limits in the Seas: China - Maritime Claims in the South China Sea*.

The study concluded that there were three possible bases upon which China had made this claim, and assessed each accordingly:

1. *The dashes are lines within which China claims sovereignty over the islands, along with the maritime zones those islands would generate under UNCLOS:* this would clearly mean that China's maritime claims would be strictly limited to those under UNCLOS – a limitation which China's actions demonstrate is not being accepted. Further, because sovereignty over the land is disputed (with Vietnam for the Paracel Islands for example), so too are the maritime zones disputed. Even if China possessed the sovereignty of the islands, then any maritime zones generated by those islands would be subject to maritime delimitation in accordance with Article 121 UNCLOS.[113]

2. *The dashes indicate national boundary lines*: it is assessed that these lines do not have a basis within the law of the sea. There has not been, for example, any agreement reached with neighbouring States. Further, under this argument, small isolated islands would be accorded more weight in determining a maritime boundary than the long and continuous coastlines surrounding them: this would not be in accordance with state practice or indeed UNCLOS itself. The dashes themselves, even on an approximate basis, are beyond 200nm from any Chinese land feature.[114]

3. *The dashes indicate the limits of historic claims:* the law of the sea does not permit States to override another State's claim on the basis of history.[115]

Vietnam disputes China's historical account, claiming to have ruled over both the Paracels and the Spratlys since the 17th Century, and to have the documents to prove

[113] Ibid, p11- 14. UNCLOS Article 121 provides the definition of an island as "a naturally formed area of land, surrounded by water, which is above water at high tide". A State which has sovereignty over a land feature meeting this definition will be able to claim a territorial sea, contiguous zone, EEZ and continental shelf.
[114] Ibid, p14-15.
[115] Ibid, p15-22.

it.[116] The Philippines' claim to the Spratly Islands is based on its geographical proximity to them. It was indeed this claim which led to the Philippines seeking resolution from the Arbitral Tribunal convened under Annex VII of UNCLOS, as a response to China's actions within the region.[117] As shown by Figure 1, to add to the complexity of the situation in the region, Brunei and Malaysia also lay claims.[118]

What attempts have been made to resolve the dispute?

As can be seen from the timeline, there have been some efforts to keep tensions to a minimum in the region. In 2002, and again in 2012, announcements were made for a South China Sea Code of Conduct.[119] It is likely that this Code will cover the topics of marine environmental protection, marine scientific research, safety of navigation and communication at sea, search and rescue and combatting transnational crime, but going by the latest announcement, it remains a framework and has yet to be finalised.[120] Even if a document is agreed to by all members of the ASEAN community and China, it is not expected to be legally binding.[121]

In 2013, the Philippines initiated international arbitration proceedings against China through the dispute resolution mechanisms provided for by UNCLOS. Under this mechanism, disputes concerning the interpretation or application of UNCLOS which have not been resolved by other means may be submitted, at the request of any party to the dispute, to a judicial or arbitral body for binding settlement.[122] States are free to choose among the following judicial or arbitral bodies for these purposes:

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[116] Vietnam, *White Paper on the Hoang Sa (Paracel) and the Truong Sa (Spratly) Islands* (Republic of Vietnam, Ministry of Foreign Affairs, 1975).
[117] *The South China Sea Arbitration*.
[118] For a very comprehensive diagram of all maritime claims made in the South China Sea and surrounding areas see: https://amti.csis.org/maritime-claims-map/.
[119] ASEAN, 'Declaration on the Conduct of Parties in the South China Sea' (asean.org, 17 October 2012) https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 accessed 5 May 2018
[120] Quang NM, 'Saving the China-ASEAN South China Sea Code of Conduct' (*diplomat.com,* 29 June 2019) <https://thediplomat.com/2019/06/saving-the-china-asean-south-china-sea-code-of-conduct/> accessed 1 July 2019
[121] The author attended the 12th International Conference on the South China Sea on 16-17 November 2020, hosted by the Vietnam Diplomatic Academy. Vietnam is the ASEAN Chair for 2020. The intention that the Code of Conduct would not be legally binding was confirmed.
[122] UNCLOS, Article 286.

1. The International Tribunal for the Law of the Sea, established under Annex VI;[123]
2. The International Court of Justice;[124]
3. An arbitral tribunal constituted under Annex VII;[125]
4. A special arbitral tribunal constituted under Annex VIII.[126]

Since neither the Philippines nor China have chosen a particular means from the above list as a preferred method of dispute resolution, any dispute between them under this mechanism goes to an Annex VII arbitral tribunal by default.[127] Following the initiation of proceedings by the Philippines, such a tribunal was duly appointed, and in August 2013 it issued Rules of Procedure. Included in these was the declaration that the International Bureau for the Permanent Court of Arbitration (PCA) based at the Hague would serve as the Registry for the proceedings.[128]

Despite being a signatory to UNCLOS, China did not participate in the proceedings: in short, they disputed the jurisdiction of the Arbitral Tribunal and asserted their "historic" claims over the South China Seas.[129] The Philippines requested clarification over the following issues:

a. The "Nine-Dash line" and China's claim to historic rights in the maritime areas of the South China Sea (Submissions No 1 and 2);

b. The status of features in the South China Sea under UNCLOS, such as Scarborough Shoal, Fiery Cross Reef, and the Spratly Islands as a whole (Submissions No 3 to 7), and thus any maritime rights which would apply;

[123] Ibid, Article 287 (1)(a).
[124] Ibid, Article 287 (1)(b).
[125] Ibid, Article 287 (1)(c).
[126] Ibid, Article 287 (1)(d).
[127] Ibid, Article 287 (3) and (5). See also United Nations, https://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm, accessed 12 April 2021.
[128] https://pcacases.com/web/sendAttach/233, See Rules of Procedure, Article 5, accessed 12 April 2021.
[129] China's approach to the case considered by the Arbitral Tribunal will be considered in more detail in Chapter Three.

c. Chinese activities in the South China Sea (Submissions No 8 to 13);

d. Aggravation or extension of the dispute between the Parties (by China) (Submission No 14);

e. The future conduct of the Parties (Submission No 15).

The Tribunal ruled in favour of the Philippines' arguments, the following being the salient points, all of which will be examined in further detail throughout the dissertation:

a. China has no "historical" rights based on the "Nine-Dash Line";[130]

b. China has, through its construction of installations and artificial islands at Mischief Reef without the authorisation of the Philippines, breached Articles 60 and 80 of the Convention with respect to the Philippines' sovereign rights in its EEZ and continental shelf; and as a low tide elevation, Mischief Reef is not capable of appropriation;[131]

c. China has, through the operation of its marine surveillance vessels in tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and the Second Thomas Shoal in May 2013, failed to exhibit due regard to the Philippines; sovereign rights with respect to fisheries in the EEZ. Accordingly, China has breached its obligations under Article 58(3) UNCLOS;[132]

d. China has, by virtue of the conduct of Chinese law enforcement vessels in the vicinity of Scarborough Shoal, created serious risk of collision and danger to Philippine vessels and personnel. The Tribunal found China to have violated Rules 2, 6, 7, 8, 15, 16 of the

[130] *The South China Sea Arbitration*, para 278.
[131] Ibid, para 1043.
[132] Ibid, para 757.

COLREGs and as a consequence to be in breach of Article 94 of UNCLOS;[133]

e. China has in the course of these proceedings aggravated and extended the disputes between the Parties through its dredging, artificial island building and construction activities.[134]

Section II: Lawfare in the South China Sea

Throughout this dissertation I will demonstrate that Beijing is deliberately using the law as part of its overall strategy towards the South China Sea by engaging in "lawfare". This concept has different definitions depending on which perspective is taken: Western or Chinese. Although there is significant academic debate in the West regarding lawfare, as the sections below will show, it is the Chinese who have an established doctrine on the topic. For the purposes of setting the scene, below are two practical examples in the South China Sea. The first is chronological, and show how over time, China has used both domestic and international law to pre-condition the legal theatre. The second example is based on the legal arguments surrounding baselines, and will show how China has deployed lawfare in a much more targeted sense.

What is "lawfare"?

The phrase "lawfare" was first coined by Charles Dunlap, at the time a serving officer in the US Air Force. He describes the concept as: "The strategy of using – or misusing – law as a substitute for traditional military means to achieve a warfighting objective".[135]

Western perceptions are often that the use of lawfare is a negative or unacceptable tactic. Dunlap himself notes the "provoking or exploiting of civilian casualties" is a form

[133] Ibid, para 1109.
[134] Ibid, para 1181.
[135] Dunlap, p315.

of lawfare, when referring to the actions of the Taliban in Afghanistan.[136] In such an example, the Taliban were relying on the fact that UK forces had respect for the principles of the law of armed conflict, specifically the principle of distinction.[137] That respect for the law was then exploited. To tie in with Dunlap's definition, that would be a misuse of the law.[138]

Noting that the definition is to achieve a warfighting objective with *a substitute* for military means, it is not in reality, all bad news. A current example would be the use of sanctions by the European Union against Russia, following Moscow's annexation of the Crimea. In other words, it is the deployment of an economic tool (the financial penalties inflicted on entities assisting in the annexation, such as building a linking railway between Russia and Crimea) used under a legal and diplomatic construct (internationally enforceable sanctions) to achieve a military objective (the withdrawal of Russia from Crimea).[139] While admittedly, the sanctions appear to have little effect, neither have military forces from within the EU been committed to participating in a conflict.

Since Dunlap's proposal, Kittrie has developed the theory and suggests a 2-stage test for an action to qualify as lawfare:

1. The actor uses the law to create the same or similar effects as those traditionally sought from conventional kinetic military action – including impacting the key armed force decision-making and capabilities of the target; and

[136] Ibid, p315.
[137] As articulated in Additional Protocol I 1977 to the Geneva Conventions of 12 August 1949, Article 52.
[138] For just one example of how such actions then impact domestic court cases, see: Con Coughlin, 'Legal action against soldiers could undermine Britain on the battefield warns chief of general staff' (*The Telegraph*, 29 January 2016) <https://www.telegraph.co.uk/news/uknews/defence/12130929/Legal-action-against-soldiers-could-undermine-Britain-on-the-battlefield-warns-chief-of-general-staff.html> accessed 9 April 2018.
[139] consilium.europa.eu, 'EU restrictive measures in response to the crisis in Ukraine' (*Council of the European Union*, 5 October 2020) <https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/> accessed 6 October 2020.

2. One of the actor's motivations is to weaken or destroy an adversary against which the lawfare is being deployed.[140]

This definition maintains a warfighting focus, because of the requirement to achieve an effect usually sought from kinetic action on the tactical or operational level. Goldenziel has broadened the definition somewhat significantly to be either:

1. The purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or

2. The purposeful use of law to bolster the legitimacy of one's own strategic, operational, or tactical objectives toward a particular adversary, or to weaken the legitimacy of a particular adversary's particular strategic, operational, or tactical objectives.[141]

By opening the concept of lawfare up to include strategic objectives, this infers that the phrase can be used to what may also be described as statecraft. This makes the concept almost limitless: by way of example, the creation of the UN Charter, and the UK's decision to become a become a Permanent Member with all the influence that brings, could be described as lawfare.

The above definitions are but three different ones used by Western academics, which alone shows how the concept of lawfare remains malleable. The Chinese position, however, is much more developed.

***Falu zhan* (lawfare)**

Despite the phrase being coined by a US government official, the US has not, as yet, adopted a lawfare strategy: China, on the other hand, has a published and well-developed doctrine. The concept first surfaced in 1996, when President Jiang Zemin stated to a group of Chinese international law experts: "we must be adept at using

[140] Orde Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press 2016), p8.
[141] Jill Goldenziel, 'Law as a Battlefield: The U.S., China, and Global Escalation of Lawfare' (2020) 106 Cornell Law Review, p11.

international law as a weapon".[142] In 1999 a book called *Unrestricted Warfare,* written by two senior PLA officers, was published by the PRC government. The book provides a list on "non-military" means of warfare and includes in that list "establishing international laws that primarily benefit a certain country".[143]

The concept of "non-military" warfare is now widely recognised as having been developed into three particular strands, known as the Three Warfares. The Three Warfares were first introduced in the Political Work Guidelines of the People's Liberation Army in 2003 and have forced other governments to view China's approach to grey zone operations with a healthy level of respect: "[T]he Three Warfares, taken individually are manageable; but taken together they do not conform to our concept of war".[144] They have been defined by the US Department of Defense as the following:

> 1. *Psychological Warfare* – seeks to undermine an enemy's ability to conduct combat operations through operations aimed at deterring, shocking, and demoralising enemy military personnel and supporting civilian populations.
>
> 2. *Media Warfare* – is aimed at influencing domestic and international public opinion to build support for China's military actions and dissuade an adversary from pursuing actions contrary to China's interests.
>
> 3. *Legal Warfare* – uses international and domestic law to claim the legal high ground or assert Chinese interests. It can be used to thwart an opponent's operational freedom and shape the operational space. It is also used to build international support and manage possible political repercussions of China's military.[145]

The Chinese approach is sophisticated: the strands can interlink, particularly the last two, as legal warfare is "both a stand-alone military technology and a ready supplier

[142] Dong Wang, *China's Unequal Treaties* (Lexington Books 2005), p128.
[143] Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (Beijing: PLA Literature and Arts Publishing House 1999) Translation of the Chinese text available through www.c4i.org Accessed 23 March 2018.
[144] Stefan Halper, *China: The Three Warfares* (Office of the Secretary of State for Defense, 2013), p19.
[145] Ibid, p19.

of material for media warfare".[146] If the aim is legitimacy, then the quickest way to promulgate the message is through the media, not the law courts: "the belief that whose story wins may be more important than whose army wins. This is especially true if one avoids kinetic engagement altogether."[147] Halper also argues that in China, the law primarily applies to the public not the Party. These views were reflected in Jiang Zemin's 1996 pronouncement that international law can be used as a 'weapon to defend the interests of our state' and also in the PLA operational handbook that advises its readers "not to feel completely bound by the specific articles" of international law.[148]

A more recent Chinese publication on lawfare is the *2015 National Defense University Paper on the Science of Military Strategy.* The paper envisions how lawfare will use all aspects of the law, both international and domestic, as well as the Law of Armed Conflict. Two key objectives are highlighted:

1. To achieve "legal principle superiority" and
2. To "delegitimize an adversary".[149]

These objectives, along with the US definition of China's doctrine on legal warfare, will be referred to throughout when assessing Beijing's actions in the South China Sea, for example in the "utilization of rather tortuous interpretations of international law to oppose the Philippines' position and seek to delegitimize the arbitration process."[150] Another example is the exploitation of the ambiguity of the position of the Chinese militia in law.[151]

The Chinese Legal Argument for the South China Sea: Strategic Pre-conditioning?

Mosquera and Chalanouli have argued that China's approach to lawfare should be

[146] Ibid, p20.
[147] Ibid, p31.
[148] Ibid, p50.
[149] Elsa Kania, 'The PLA's Latest Strategic Thinking on the Three Warfares' (2016) 16 China Brief, jamestownorg, p5.
[150] This will be explored further in Chapter Three.
[151] See Chapter Two.

seen through the lens of “strategic pre-conditioning”.[152] This is achieved through “the issue of formal legal positions and statements, as well as creating *faits accomplis* in certain situations.”[153] Throughout all lawfare activities, there is a common thread of Beijing seeking to emphasise the legitimacy of their position. The target audience for this is both domestic and international. This can be demonstrated when China’s legal positioning regarding the South China Sea is viewed as a timeline.

1985: On 12 June 1985, the Secretary-General received from the Government of China the following statement:

> "The so-called Kalayaan Islands are part of the Nansha Islands, which have always been Chinese territory. The Chinese Government has stated on many occasions that China has indisputable sovereignty over the Nansha Islands and the adjacent waters and resources."[154]

Vietnam was the only State to lodge its views in response. Both in 1987 in response to China’s statement above, and upon ratification of UNCLOS in 1994, Vietnam lodged a declaration stating that it had sovereignty over both the Spratly Islands and the Paracels.[155]

1992: The *Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone,* passed into law on 25 February 1992.[156] This included provisions stating that the territorial waters will be 12 nautical miles in breadth,[157] and foreign ships “for military purposes” require approval before entering the territorial waters.[158]

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[152] Andrés Munoz Mosquera and Nikoleta Chalanouli, ‘China: An Active Practitioner of Legal Warfare’ (*https://sites.duke.edu/lawfire/2020/02/02/guest-post-andres-munoz-mosqueras-and-nikoleta-chalanoulis-essay-china-an-active-practitioner-of-legal-warfare/*, 2 February 2020) accessed 28 June 2020.
[153] Ibid.
[154] United Nations Treaty Collection Depositary (*United Nations,* <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019
[155] Ibid.
[156] Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone 1992 available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf Accessed 19 September 2019.
[157] Article 3, People’s Republic of China Law on the Territorial Sea and the Contiguous Zone 1992.
[158] Ibid, Article 6.

The legislation was also used to assert Beijing's claim over all the island groups within the Nine-Dash Line, on the basis that these waters are China's sovereign waters. The islands are described as part of the "land territory" of the People's Republic of China.[159] This is in contradiction to the UNCLOS provision regarding the inadmissibility of claims based on historic use under Articles 10 or 15, however, at this stage, China has yet to ratify the treaty.

May 1996: China made a declaration to the United Nations regarding baselines. This included the statement (with corresponding co-ordinates) that the baselines around the Paracel Islands are straight baselines.[160] The timing, seeing what occurred the next month, would seem notable.

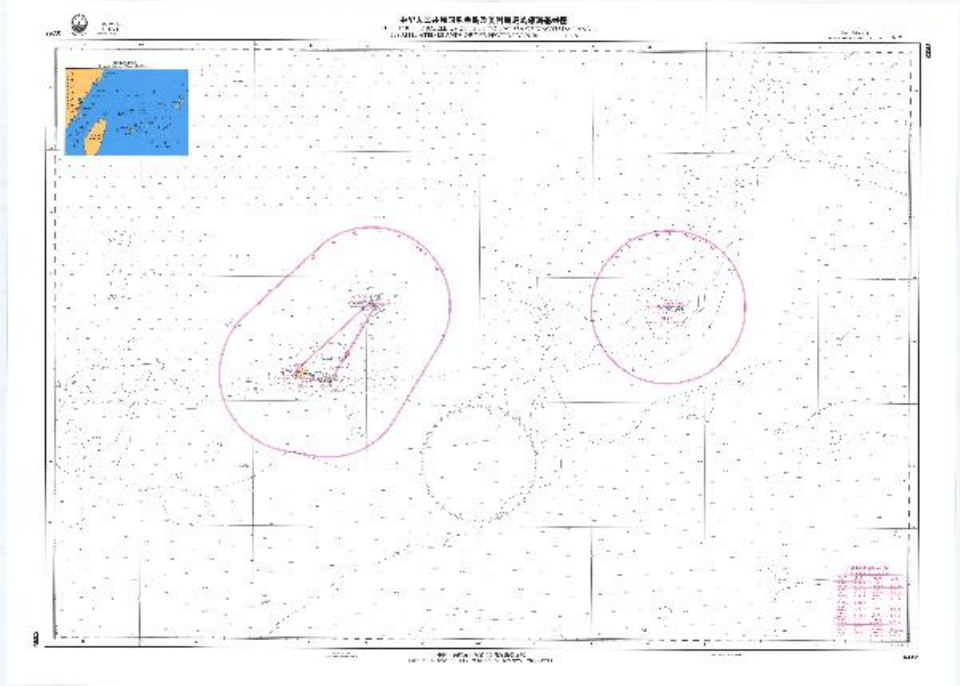

Figure 5: Chart submitted by China as part of its declaration of straight baselines around the Paracel Islands.[161]

7 June 1996: Two major developments occurred on 7 June 1996. The first was that Vietnam wrote to the UN**,** objecting to China's declaration regarding straight baselines.

[159] Ibid, Article 2.
[160] Article 2, Declaration of the Government of the People's Republic of China on the Baselines of the Territorial Sea of the People's Republic of China, 15 May 1996.
[161] https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/chn_mzn89_2012.jpg Accessed 20 October 2019.

It was declared to be a "serious violation of sovereignty" and noted that [b]y so drawing, the People's Republic of China has turned a considerable sea area into its internal water which obstructs the rights and freedom of international navigation".[162] Second, China ratified UNCLOS. As part of the ratification process, the following declaration was made regarding Article 298:

> "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."[163]

Under the Vienna Convention on the Law of Treaties (VCLT), States may make declarations with regards to provisions of a treaty, the application of which they wish to exclude or modify in relation to themselves.[164] Any such reservation can be made, unless the reservation is prohibited by the treaty, or the treaty provided only specified reservations can be made which do not include the reservation in question, or the reservation is incompatible with the object and purpose of the treaty.[165] Other States may lodge objections to these reservations, however if no objections are made within 12 months, then the reservation is deemed to be accepted between signatories.[166]

In the case of China's declaration regarding Article 298, no objections were raised. The net result of this declaration therefore is that China would not participate in claims involving maritime boundary limitation, as outlined in paragraph 1(a). This was to have an important impact on the case brought by the Philippines 10 years later (see below). It is worth highlighting that China is not the only State to do this. Several States have lodged similar declarations regarding Article 298, one example being Algeria. Indeed, Algeria has also stated that it does not consider it bound by any submissions to the

[162]UN Treaty Collection, available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec Accessed 20 May 20. Vietnam's declaration is available at fn 16 on the page.
[163]United Nations Treaty Collection Depositary (*United Nations,* <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019.
[164] Vienna Convention on the Law of Treaties 1969, Article 2(1)(d).
[165] Ibid, Article 19.
[166] Ibid, Article 20(5).

International Court of Justice, available as one of the dispute resolution mechanisms in Article 287.[167]

China's declaration also contained reference to Article 298 (b) and (c). These aspects of the declaration have yet to be tested or scrutinised. Paragraph 1(b) refers to disputes "concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service"; and paragraph 1(c) refers to disputes "in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations".[168] In both these cases, China has future-proofed itself. Should there be international concern about the military activity of the PLA(N), then China has absolved itself from the jurisdiction of any dispute resolution mechanism as detailed in Article 287.[169] It has done so in accordance with the provisions of the treaty, and so has acted within the object and purpose of it. Further, should China itself have concerns about the military activities of other nations (the innocent passage of warships through territorial seas being a very live example), then again, China has absolved itself from the requirement to seek recourse through the dispute resolution process as provided for in Article 287. The same view could be taken of the refusal by China to accept the terms of paragraph (c). A dispute involving the Security Council is one likely to involve increased tensions in the region. Should another State wish to try and defuse those tensions, China has openly stated that it will not accede to any of the mechanisms provided within Article 287.

1998: The *Law of the People's Republic of China on Exclusive Economic Zone and Continental Shelf* was passed.[170] This asserts China's right to claim an EEZ from all Chinese territory. Thus, one can see the thread. The 1992 legislation lays out the claim

[167] United Nations Treaty Collection Depositary (*United Nations,* <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 25 June 2020. UNCLOS Article 287 provides the four different means by which a State may choose for the settlement of disputes: a) the International Tribunal for the Law of the Sea under Annex VI b) the International Court of Justice, c) an arbitral tribunal in accordance with Annex VII and d) a special arbitral tribunal in accordance with Annex VIII.
[168] UNCLOS Article 298 (1)(b) and (c).
[169] See fn 146.
[170] Law of the People's Republic of China on Exclusive Economic Zone and Continental Shelf 1998 available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf Accessed 19 September 2019.

of sovereignty over all the land features in the South China Sea. From there, then the 1998 legislation establishes the EEZ. China's view on the EEZ was stated as part of the ratification process for UNCLOS.

2002: The *Declaration of Conduct of Parties in the South China Sea* was signed in November 2002 with the Philippines. The text states that the two nations will:

> "undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign States directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea."[171]

This declaration was later used by China as one of the arguments for not needing to revert to the jurisdiction of the Arbitral Tribunal, but instead, the dispute over the South China Sea should be resolved by other means.[172]

2006: in August 2006, China deposited the following declaration regarding UNCLOS:

> "1. In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy **sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles** and the continental shelf.
>
> 2. The People's Republic of China will effect, **through consultations**, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability.
>
> 3. The People's Republic of China **reaffirms its sovereignty over**

[171] Paragraph 4. ASEAN, 'Declaration on the Conduct of Parties in the South China Sea' (*Association of South East Asian Nations*, 4 November 2002) <https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2> accessed 4 October 2020.

[172] gov.cn, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' (*Ministry of Foreign Affairs of the People's Republic of China*, 7 December 2014) <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm> accessed 5 February 2018.

all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, which was promulgated on 25 February 1992.

4. The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of warships through the territorial sea of the coastal State."[173]

The sections highlighted in bold above can all be seen to be playing a relevant role in the dispute in the South China Sea. The second point, for example, re-emphasises China's position that they consider matters relating to maritime boundary limitation are not to be referred to an arbitral tribunal convened under Annex VII UNCLOS, or indeed any of the other mechanisms provided for in Article 287; a position maintained by China when the Philippines made its submissions throughout the case in 2016. The third point asserts China's claim that all the islands within the Nine-Dash Line belong to China. The key timing point to note is that the domestic legal position is established prior to the ratification of UNCLOS.

The timeline above shows that the approach taken by China has several layers. There is combination of claims, with a synergistic effect, ranging from grand strategic (the entire South China Sea has historically always belonged to China) to the more tactical (sovereignty over the Spratly and Paracel Islands has generated an entitlement to maritime zones, and thus jurisdiction over activities within those zones). It also achieves the aim of strategically pre-conditioning the international political community: Beijing has built up an incremental legal argument, which even if other States do not follow, there is at least no chance of claiming it was a surprise. The interweaving of domestic and international law therefore serves to enhance China's principled stance on the international stage: "the actual interest and objective is not the law itself, but to

[173] United Nations Treaty Collection Depositary (United Nations, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019 (emphasis added).

control and manipulate the internal and external public opinions to serve China's own interests. China's efforts are focusing upon the perceptual domain, and are aimed to precondition the political."[174] This view is both endorsed and encouraged in Chinese academia: "[s]tepping up the control over disputed waters through domestic legislation would not only highlight China's sovereign rights and jurisdiction over related areas but also have an effect on international laws and increase China's discursive power in the international arena."[175]

The use of the legal process on both an international and domestic scale means that in Beijing's eyes at least, "legal principle superiority" has been achieved. All claims made by Beijing regarding the South China Sea are backed up in domestic law. Crucially, they are also in place before any obligation to international agreements such as UNCLOS is made. China is therefore able to argue, should it wish, that any legal objections raised regarding the South China Sea are made on the basis of long-standing domestic views.

Further, the "de-legitimising" of the adversary, in this case the Philippines, has been achieved through China's consistent argument that there is no need to use an arbitral tribunal convened under Annex VII of UNCLOS to determine the dispute. China's 2006 declaration regarding Article 298 had a direct impact on both the Philippines' approach to its submissions, and the convened Tribunal's approach to the decision. Starting with the Tribunal, it noted the declaration made by China and stated: "Accordingly, the Tribunal has not been asked to, and does not purport to, delimit any maritime boundary between the Parties or involving any other State bordering on the South China Sea."[176] Perhaps more significant is the fact that the Philippines actually modified its demands, to take into account China's position: "[t]he Philippines is conscious of China's Declaration of 25 August 2006 under Article 298 of UNCLOS, and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction."[177]

[174] Mosquera and Chalanouli, see fn 132.
[175] Zhao Qinghai, 'US Maritime Threats to China and Thoughts on China's Countermeasures' (2015) 51 China International Studies 80, p92.
[176] *The South China Sea Arbitration* Para 6.
[177] Ibid, para 28.

An example of lawfare at sea: archipelagic baselines

On 31 August 2018, *HMS Albion*, the Royal Navy's amphibious assault ship, sailed within the close vicinity of the Paracel Islands. She was tailed by a People's Liberation Army (Navy) (PLA(N)) frigate, and overflown by two Chinese fast jets. The response from the UK Ministry of Defence has been to state that *Albion* was sailing in "international waters", whereas China has claimed that the ship was within the territorial limits.[178] The area of water is clearly disputed, however that dispute dates back much further than 2018.

In 1996, China declared a series of straight baselines around the Paracel Islands.[179] This not only had the effect of extending the geographical area by which China may claim a territorial sea, contiguous zone and EEZ, but also had an impact on the innocent passage of warships through that area..[180] The declaration made by China subsequently in 2006 when ratifying UNCLOS states that warships are to seek permission before entering territorial seas.[181] Therefore, China's position is that firstly, warships may not conduct innocent passage without prior warning, and secondly, owing to the extension of the baselines, this enlarges the area of water impacted, even if more than the more usual 12 nautical miles from land.

When considering China's declaration in the context of the UNCLOS provisions, its daring is almost breath-taking. Part IV of the Treaty deals with archipelagic baselines, and the very first provision states: "Archipelagic state" means a State constituted wholly by one or more archipelagos and may include other islands…"[182] This is not a description that would fit the country of China. Both the Philippines and Vietnam have

[178] bbc.co.uk, 'British navy's HMS Albion warned over South China Sea 'provocation'' (*BBC News*, 6 September 2018) <https://www.bbc.co.uk/news/uk-45433153> accessed 20 October 2019.
[179] un.org, 'Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996' (*un.org*, 15 May 1996) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf > accessed 3 February 2019.
[180] UNCLOS Article 48. This of course would only be deemed as a valid action if it were accepted that China had sovereignty over the Paracel Islands.
[181] United Nations Treaty Collection Depositary (*United Nations*, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019..
[182] UNCLOS, Article 46 (a).

raised objections in response to China's claim; the US too raised detailed legal objections, despite being a non-signatory to the Convention. The US has argued that this provision within UNCLOS means that a coastal State such as China cannot use straight baselines to connect the islands of an offshore archipelago.[183] The issue was examined by the Arbitral Tribunal, and it was found that China "is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State."[184]

Article 47 of UNCLOS goes on to provide that an archipelagic State may draw straight archipelagic baselines under specific mathematical conditions, namely:

> "1. …the ratio of the area of water to the area of land… is between 1:1 and 9:1.
> 2. The length of the baselines shall not exceed 100 nautical miles, except up to 3 per cent of the total number of baselines…up to a maximum length of 125 nautical miles."[185]

China's baselines around the Paracels, which of course were drawn *before* the *South China Sea Arbitration* confirmed that it did not have the status of an archipelagic State*,* do meet the criteria for Article 47(2). Even with the extensive amount of dredging and landfill that has taken place, the area of land in the Paracels does not exceed 9.11 square kilometres. The ratio however, is another example of China's ambition: the baselines enclose 17, 290 square kilometres of water, with a ratio of 1,898 to 1.[186] By way of comparison, the ratio of land to water in the claims from Indonesia and the Philippines as two archipelagic States meeting the UNCLOS definition, is 1:1.2 and 1:1.8 respectively.[187] It is not just a matter of ratios however: if the straight baselines were accepted by the international community, and then fully enforced by China, the

[183] USA, *Limits in the Seas: Straight Baseline Claim - China* (Bureau of Oceans and International and Scientific Affairs, United States Department of State, 1996).
[184] *The South China Sea Arbitration*, para 573.
[185] UNCLOS, Article 47 (1) and (2).
[186] AMTI, 'Reading Between the Lines: The Next Spratly Legal Dispute' (*https://amti.csis.org/reading-between-lines-next-spratly-dispute/*, 2019) accessed 20 April 2019.
[187] R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Third Edition edn, Manchester University Press 1999), p123.

area of territorial seas and the exclusive economic zone subsequently generated would be enormous.

The very strict conditions under Article 47 were again examined in the *South China Sea Arbitration*, and it was made clear that in the Tribunal's view, UNCLOS excludes the possibility of employing straight archipelagic baselines in other circumstances than allowed for within the Convention.[188] This reads badly for China, and implies there is a blatant disregard for the provisions of UNCLOS. There is, however, an alternative view: what if China was not disregarding UNCLOS, but in fact highlighting a gap in it?

China took its seat at the UN in 1971, and so was able to participate in the drafting of UNCLOS throughout the Third UN Conference on the Law of the Sea (UNCLOS III) which ran from 1972 to 1982. During this time, China advanced a few legal positions, such as questioning whether warships had the right of innocent passage through the territorial seas. It also made a proposal regarding archipelagic baselines, namely: "an archipelago or an island chain consisting of islands close to each other may be taken as an integral whole in defining the limits of the territorial sea around it".[189]

It briefly looked as though China had succeeded in 1975 when a draft provision was proposed at UNCLOS III stating that archipelagic States were "without prejudice to the status of oceanic archipelagos which form an integral part of the territory of a continental State".[190] However, the article fails to appear in later work, and was clearly omitted from the final version of the treaty. Consequently, Guilfoyle proposes that there are two notable aspects about Chinese participation in UNCLOS III: no special status for the South China Sea was ever advocated, and the claims regarding rules applicable to the outlying continental archipelagos were dropped. Indeed, the only aspect the Chinese appeared to insist on was that the right of innocent passage was not available to warships.[191]

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[188] *The South China Sea Arbitration*, para 574.
[189] Working Paper on the Sea Area within the Limits of National Jurisdiction, submitted by the Chinese delegation (16 July 1973) UN Doc A/AC.138/SC.II/L.34, quoted in Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing 2014).
[190] Part VII, Section 2, UN, 'Third United Nations Conference on the Law of the Sea, Informal Negotiating Text' (Montego Bay, Jamaica, 10 December 1982).
[191] Douglas Guilfoyle, 'The Rule of Law and Maritime Security: understanding lawfare in the South China Sea' (2019) 95 International Affairs, p1007.

To follow China's current legal position on the Paracels, one first has to accept that those features do indeed belong to China, and thus Beijing has the right to draw the baselines in the first place. Assuming that these arguments were to be accepted, from there, some Chinese academics have argued that UNCLOS is lacking: the "Convention does not give clear provision regarding mid-ocean archipelagos of continental countries."[192] In other words, the argument for China declaring such baselines appears to rest on them being a *sui generis* case applicable only to the offshore, or mid-oceanic archipelagos of coastal States. UNCLOS does provide that "where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in the immediate vicinity, the method of straight baselines may be employed…".[193] The weakness in that line is that China does not match the criteria of UNCLOS Article 7 either: the Paracels cannot be described as a "fringe of islands along the coast in the immediate vicinity". The islands are in fact, roughly equidistant between the coastlines of Vietnam and China, not to mention nowhere near the coast of either.

The more likely argument therefore is that the Paracels are a mid-oceanic archipelago, which belong to China *de facto* as a coastal state. China is not an archipelagic state (as per Article 46), nor are the Paracels sufficiently close to the coastline to merit an argument based on Article 7. Arguably, there is a delta between explicit provisions for archipelagic States, and equally explicit provisions for the use of straight baselines on heavily indented coastlines, and yet no explicit provisions for coastal States with mid-oceanic archipelagos. Further, there are examples of States in this position as well as China: Denmark (with the Faroes), Norway (Svalbard) and Ecuador (the Galapagos Islands).

If one accepts China's argument that the historical claim to sovereignty over the Paracel Islands is valid, then it can also be added to the list of being one of these mainland States. Such States cannot draw archipelagic baselines and will not always have the justification for straight baselines. Churchill and Lowe, in a twist of prophetic

[192] Jiang Li and Zhang Jie, 'A Preliminary Analysis of the Application of Archipelagic Regime and the Delimitation of the South China Sea' [2010] China Oceans Law Review 167, p170.
[193] UNCLOS, Article 7.

irony, argue that “this seems an unnecessary and unreasonable restriction: the reason for it appears to have been a fear that extending the archipelagic regime to non-coastal archipelagos of mainland States would lead to a proliferation of claims.”[194]

China is ostensibly relying on this delta to then develop what is being viewed (by Beijing) as customary international law, as shown in articles authored by Chinese lawyers: “The Convention has no explicit provision on whether the coastal continental countries have the right to delimitate straight baselines for the mid ocean archipelagos... Therefore, the main factor that determines the legal status of the mid ocean archipelagos of the continental countries is customary international law.”[195] The line of argument being followed is that straight base lines, drawn on an archipelago belonging to a coastal state, are acceptable, and in support of China’s view are the claims made by Denmark over the Faroes, and Ecuador with the Galapagos.[196] By way of example, Denmark’s claim over the Faroe Islands appears to have been recognised by the EC, Norway and the former USSR.[197] It has been argued that such claims “represent a trend and a direction of how to draw territorial sea baselines to the mid-ocean archipelagos” and therefore, China may do the same.[198] Whether these limited examples are sufficient to be viewed as a basis for customary international law remains to be seen, but currently, it looks unlikely.[199]

Thus far, China has yet to declare straight baselines around the Spratly Islands, but it is anticipated. The 1996 declaration ended with: “The Government of the People’s

[194] Churchill and Lowe, p120.
[195] Li and Jie, p177.
[196] For the Faroese legislation, see Order No. 598 of 21 December 1976 on the Fishing Territories of the Faroes, and Order No. 599 of 21 December 1976 on the Boundary of the Sea Territory of the Faroes. For the Galapagos, see Ecuador Supreme Decree No 959-A of 28 June 1971 proscribing Straight Baselines for the Measurement of the Territorial Sea. All are available through www.un/org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES
[197] Churchill and Lowe, p121.
[198] Li and Jie, p180.
[199] Article 38(1)(b) of the Statute of the International Court of Justice 1945 refers to "international custom" as a source of international law, which it defines as a "general practice accepted as law”. The jurisprudence of the ICJ and the work of the International Law Commission (ILC) confirm that two elements must be established for CIL to form. First, State practice of the rule in question; and second, the requirement that this practice is accepted by States as law (*opinio juris*). See *Nicaragua,* para 207, and also International Law Commission, Report of the International Law Commission: Seventieth Session, U.N. Doc. A/73/10, at 124 (2018): "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)".

Republic of China will announce the remaining baselines of the territorial sea of the People's Republic of China at another time." [200]

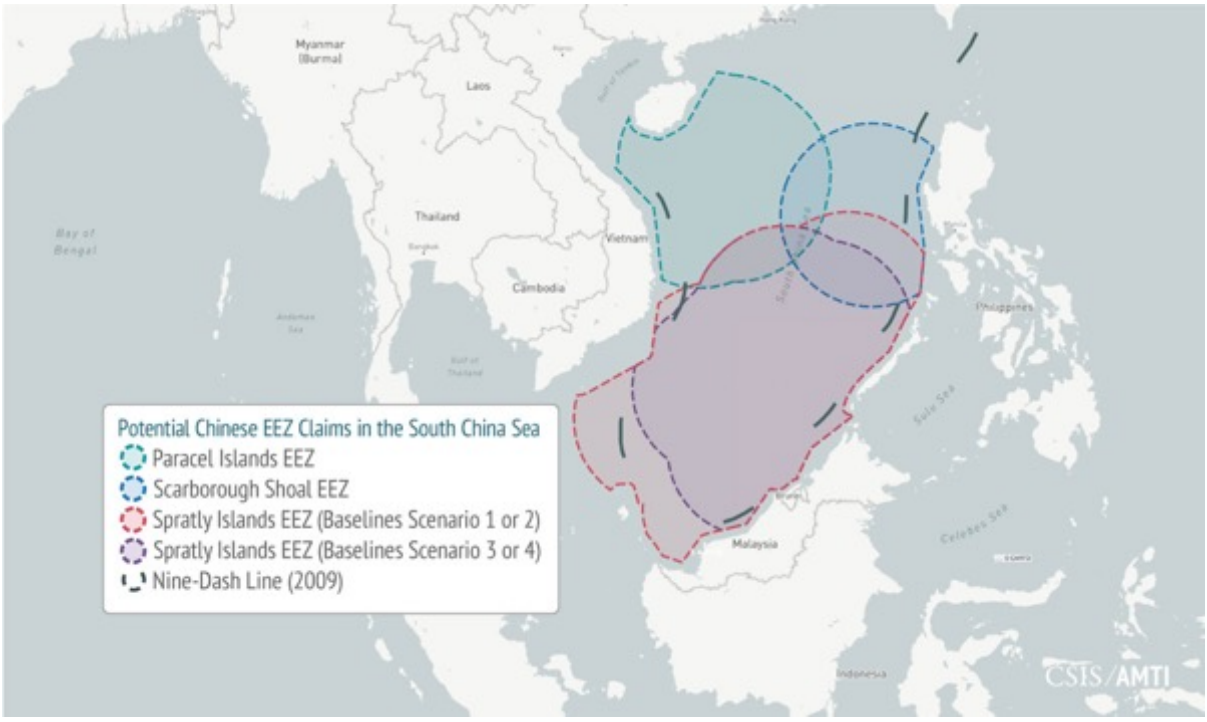

Figure 6: Potential Chinese EEZ Claims in the South China Sea. The claim for the EEZ for the Paracel Islands is based on China's declared straight baselines arounds the islands, and thus highlights just how much natural resources would be obtained if the straight baselines were accepted.[201]

It is submitted that Beijing's approach to the Paracel Islands is a live and practical example of *falu zhan.* The "legal principle superiority" is being pursued through a legal argument based on a national (i.e. Chinese) view that customary international law supports the notion of mid-oceanic baselines, in the absence of an explicit article in UNCLOS. This leads China to then rely on UNCLOS in order to assert its authority over the waters around the Islands, as the Convention provides the basis of the claim that *HMS Albion's* passage was in violation of China's rights. The follow-on consequence is that, in China's view at least, *HMS Albion* is "delegitimised" by her passage through the contested waters.

[200] gov.cn, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines'.
[201] AMTI, 'Reading Between the Lines: The Next Spratly Legal Dispute'.

Conclusion

The competition for dominance in the South China Sea has historic, geographical and economic origins. Yet despite these heavy tensions, there appears to be little appetite to escalate the situation through the use of force, in order to truly assert superiority. Albeit some years ago, the Battle of the Paracels was a very potent example of what China's military could achieve. Since then however, there has been little to no military action which would appear to cross the threshold of constituting a use of force contrary to Article 2(4) of the UN Charter. The status of the region as an economic hub is key here: none of the littoral States, China included, will wish to cause instability that will have a very apparent knock on effect on world trade. China has therefore chosen to assert her superiority by other means, means which can be summed up as grey zone operations.

"For China, law is a key domain through which it seeks to consolidate control over the South China Sea."[202] The reason for the active strategy of *falu zhan* has to be the weight which Beijing places on legitimacy. Put another way, if China was not so worried about legitimacy, it would expend time and effort on justifying its legal basis for claims in the South China Sea. The initial claim made by China – the infamous Nine-Dash Line – was vague. It is not possible to know whether this was intentional at the time, but it can now be seen that the ambiguity has played to China's advantage. By claiming "historic rights" China appears to state that it is claiming rights within the original Nine-Dash Line, although there is no attempt to define the geographic scope of that claim. However, by using historic rights as basis of claim over the islands and surrounding waters, and then supporting that claim with the passage of domestic legislation as well as several declarations to the international community, China has created a mask of legality to assert control over the entire area. The following chapters will examine in detail the role the law is playing in China's grey zone operations, starting with the people actually at sea.

[202] Guilfoyle, p1000.

CHAPTER TWO: PEOPLE

Introduction

"On a summer's evening in the sweltering South China Sea, a coastal steamer of nearly 2,000 tons approaches a Vietnamese fishing fleet in the exclusive economic zone of Vietnam, some 150 miles off that nation's coast. The steamer loiters in the area for an hour or two as night falls. Suddenly from the side of the ship three fast speedboats are deployed, each armed with .50 calibre guns and hand-held rocket launchers. For the next hour, the speedboats attack dozens of fishing craft, spraying them with .50 calibre fire, hitting them with grenades, and shooting at survivors in the water. The surviving fishing boats flee toward the coast, frantically radioing distress calls, which are jammed by small drones operating overhead…"[203]

This is the opening paragraph in Admiral James Stavridis' article, *Maritime Hybrid Warfare is Coming*. The hypothetical scenario set in 2019 goes on to describe how China manipulates the situation, claiming the attack was conducted by "gangsters", and then uses this event to assert the need to protect Chinese vessels in the region: from there it is only a short step to gaining yet more control of the sea. While this is hypothetical, and to date, with the exception of the Battle of the Paracels, nothing as aggressive as this has occurred in the South China Sea, nevertheless there are incidents at sea occurring, and crucially, involving vessels that are clearly not warships. As alluded to in the introduction to this dissertation, much of the recent interest in grey zone operations can be traced back to the "Little Green Men" in the conflict in Ukraine. Here, Admiral Stavridis refers to the "Little Blue Sailors": it is these people that this chapter will examine, and the legal implications of their activities.

In its *Nuclear Weapons Advisory Opinion*, the International Court of Justice described distinction as one of the two "cardinal" principles of the law of armed conflict, the other being avoiding unnecessary suffering (or showing humanity).[204] It is this principle from which drives the law to ensure that those who are entitled to participate in hostilities are recognisable, and are accorded combatant status; and those who do not

[203] James Stavridis, 'Maritime Hybrid Warfare Is Coming' (2016) 142/12/1366 Proceedings Magazine, US Naval Institute.
[204] *Legality of the Use or Threat of Nuclear Weapons: Advisory Opinion* ICJ 8 July 1996, para 78.

participate, such as civilians, are protected.[205] However, as has already been noted, the law of armed conflict does not apply to the dispute in the South China Sea, other than in very isolated circumstances.[206]

If a State's military is used for peace time operations, their status is usually determined as a matter of domestic law.[207] But what is the legal status of those participating, if they are not members of the military at all? What happens if they are, in fact, fishermen? These questions highlight the underlying issue with grey zone operations: the ability to avoid attribution and thus achieve deniability.

This chapter will first outline the key players in the South China Sea dispute, and who is actually at sea. It will then describe two examples of incidents involving the "Little Blue Sailors". An analysis will be conducted into the legal status of the people involved. Finally, these findings will be brought together to demonstrate how the use of the Little Blue Sailors is not only a practical example of grey zone operations in the maritime environment, but also, a live example of lawfare.

Section I: The Key Players

Although the focus of this chapter will be on the "Little Blue Sailors", there are, in fact, 3 separate organisations to take into account.

People's Liberation Army (Navy) (PLA (N)): The maritime armed force of the People's Republic of China, this organisation is clearly an armed force as per the definitions in international law: they are the State's officially organized military forces, under a command that is responsible to a party to the conflict for the conduct of its subordinates, and subject to an internal disciplinary system. They therefore have combatant status in times of conflict, and as such are entitled to participate in hostilities, and will be deemed Prisoners of War if captured during an international

[205] Additional Protocol I Article 44(3) refers specifically to the obligation of combatants to distinguish themselves from civilians.
[206] See Chapter One regarding the Battle of the Paracels in 1974.
[207] For example, the Armed Forces Act 2006 establishes the existence of the regular UK Armed Forces, and the Reserve Forces Act 1996 does the same for the Reserve Forces.

armed conflict.[208] In practical terms, whilst at sea, they are distinguishable by various means, not least their grey-hulled ships, armed with lethal weapon systems, crewed by uniformed personnel under the command of a commissioned officer. As such, their ships meet the UNCLOS definition of a warship, which is not only sovereign immune, but will also be entitled to commit belligerent acts in a time of conflict.[209] As alluded to in the introduction above however, a military force does not only commit to tasking in times of conflict. Therefore, while on peacetime tasking, the PLA(N) will remain subject to domestic law as well as its own internal discipline system.

Figure 7: A warship of the PLA(N) – a Type 054 frigate.[210]

Maritime Law Enforcement agencies: Up until 2013, there was a mixture of law enforcement agencies at work in the maritime environment, and in particular in the South China Sea. The predominant 3 agencies were:

[208] Geneva Convention III Article 4; and Additional Protocol I Article 43(1).
[209] UNCLOS Articles 29, 32 and 9, and *San Remo Manual on International Law Applicable to Armed Conflicts at Sea,* Rule 13g.
[210] Retrieved from http://www.military-today.com/navy/type_054a_class.htm.

China Marine Surveillance (CMS): This was a maritime law enforcement agency within the State Oceanic Administration, with an apparent para-military identity. The vessels had white hulls. They derived their authority from Chinese domestic law.[211]

China Fisheries Law Enforcement (FLE): Notably, the organisation involved in the USS *Impeccable* incident, as described below. A second law enforcement agency, but on a similar model to a coast guard, overseen by the Ministry of Agriculture.[212]

China Maritime Police (CMP): Part of the Chinese Armed Forces, with true police powers (unlike FLE and CMS). The CMP had spent most of its time performing public security and anti-smuggling missions on or near the shore.[213]

In 2013 however, a deliberate move was then made to consolidate the agencies into one organisation under the name of the China Coast Guard (CCG). There has also been a dramatic increase in numbers: from an estimated 27 coast guard cutters in 2006, up to 122 in 2016.[214] Initially it was not indicated by the leadership what kind of organisation it would become: civilian like CMS or military like CMP. Then, as of July 2018, it was announced that the CCG would be put under military command. Despite this change however, Beijing retains the official line that this will not affect the tasking of the Coast Guard. A Ministry of Defence spokesman went as far to say:

> "The transferring of its control and reform of the command and control system will not change [the CGG's] basic mission to protect maritime rights and carry out law enforcement. ….. As always, China is committed to a peaceful resolution of differences through direct consultations with relevant sovereign countries and will continue law enforcement and security cooperation with other countries."[215]

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[211] Ryan Martinson, *Echelon Defense: The Role of Sea Power in Chinese Maritime Dispute Strategy* (CMSI Red Books 15, US Naval War College, 2018), p12
[212] Ibid, p13.
[213] Ibid, p15.
[214] Ibid, p18.
[215] maritime-executive.com, 'China's Coast Guard Now Under Military Leadership' (*martime-executive.com*, 7 May 2018) <https://www.maritime-executive.com/article/china-s-coast-guard-now-under-military-leadership> accessed 5 September 2018.

Of note, despite the new military command chain, the CCG is equipped with white hulled vessels, rather than grey. To the impartial observer therefore, the model of operating looks broadly comparable with the US Coast Guard. The official tasking remains law enforcement activity, and the appearance of the vessels support this view. The crew are armed with personal firearms, water cannon capable of hitting targets at up to 100 metres and sirens, which can reach 153 decibels.[216]

Figure 8: A China Coast Guard ship. This particular ship was commissioned into the Coast Guard in 2014.[217]

Maritime militia: China possesses the largest civilian fleet of fishing vessels and trawlers in the world.[218] This is a vast resource of assets at sea, and one which China has consciously made efforts to use. In June of 2012, He Jianbin, the chief of the State-run Baosha Fishing Corporation in Hainan province, made the following statement:

> "If we put 5,000 Chinese fishing ships in the South China Sea, there will be 100,000 fishermen...And if we make all of them militiamen, give them

[216] Ibid.
[217] Retrieved from http://www.globaltimes.cn/content/838991.shtml. Accessed 25 Sep 18.
[218] FAO, *The State of the World Fisheries and Aquaculture* (Food and Agriculture Organisation of the United Nations, 2014).

> weapons, we will have a military force stronger than all the combined forces of all the countries in the South China Sea…Every year, between May and August, when fishing activities are in recess, we should train these fishermen/militiamen to gain skills in fishing, production and military operations, making them a reserve force on the sea, and using them to solve our South Sea problems."[219]

This apparent request to provide the resources for a militia force appears to have been embraced as a concept by Beijing. In China's 2013 White Defence paper, the militia were described "as an assistant and back up force of the PLA".[220] Indeed, it is now posited that the militia is a "key component of China's Armed Forces and part of what it calls the "People's Armed Forces System" with an estimated total of 3, 720 personnel and 310 vessels.[221] This vast assemblage of personnel is "an armed mass organisation primarily comprising mariners working in the civilian economy who are trained and can be mobilised to defend and advance China's territorial claims, protect "maritime rights and interests""[222]

Members will typically keep their original employment of fishing going, while fulfilling training requirements and services for "state-sponsored activities".[223] An article in the Chinese press described them as "putting on military uniforms [they] qualify as solders, taking off uniforms they qualify as citizens". Alongside this quote is a photo of non-uniformed personnel being inspected by local officials.[224] It is also worth noting that while the militia may look to be a reserve force, they are not the actual Reserves for the PLA(N), who would be entitled to full combatant status as per the PLA(N) proper when they are on duty.[225]

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[219] Miles Yu, 'Inside China: Armed fishermen' (*The Washington Times*, 18 July 2012) <https://www.washingtontimes.com/news/2012/jul/18/inside-china-armed-fishermen/> accessed 18 June 2018.
[220] Quoted in Kennedy, Andrew Erickson, *China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA* (China Maritime Studies Institute, US Naval War College, Newport, Rhode Island, 2017), p2.
[221] Ibid, p2.
[222] Ibid, p2.
[223] Ibid, p2.
[224] Reproduced in Martinson, p15.
[225] Additional Protocol I, Article 43. As a member of a Reserve force, while on duty an individual is under a command responsible to the State for the conduct of its forces and is subject to an internal disciplinary system. That individual therefore has combatant status. For the difference in status between the Reserves for the PLA(N) and the militia, see Erickson, China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA, p2 and fn 5.

In order to join the militia, a fishing vessel has to meet certain capability requirements, such as having the communication equipment required to stay in contact with the PLA(N).[226] In the case of the Sansha City Maritime Militia based on the Paracels' Woody Island, many of their newest vessels come equipped with reinforced hulls, collision absorbing rails and water cannons: hardly the normal equipment for the protection of fishing vessels.[227] In addition, some of the new ships have been reported to have a "weapons and equipment room" and an "ammunition store".[228] It is evidence such as this which indicates that despite its name, the Sansha City Fisheries Development Company, just as one example, has been "established to be a professional paramilitary force first and foremost, with fishing a secondary mission at best".[229]

Figure 9: Examples of fishing vessels from the Maritime Militia.[230]

Despite not being a formal part of the PLA(N), the militia are in fact commanded by the PLA's local military commands, known as the People's Armed Forces Department

[226] Kennedy, Erickson, p9
[227] Ibid, p10.
[228] Andrew Erickson, 'China Open Source Example: Shipyard details Sansha Maritime Militia vessel with "Weapons and Equipment Room" and "Ammunition Store".' (*andrewerickson.com*, 24 March 2017) <https://www.andrewerickson.com/2017/03/china-open-source-example-shipyard-details-sansha-maritime-militia-vessel-with-weapons-and-equipment-room-and-ammunition-store/> accessed 5 June 2018.
[229] Erickson, *China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA*, p10.
[230] Retrieved from https://www.maritime-executive.com/editorials/shedding-light-on-chinas-maritime-militia. Accessed 25 September 2018.

(PAFD). These are manned by civilian cadres and paid for by local government. The chain of command is referred to as a "dual responsibility" system: the local provincial governments levy the forces for the militia and pay their salaries. Mobilisation and mission orders come from the county-level PAFDs, manned by PLA personnel. Below county level, at grass roots level PAFD, civilian cadres act as the interface between the militia and the PLA. The training is provided by a mixture of PLA(N) and MLE agencies such as the Coast Guard.[231] There is therefore a clear link to a military command and control network, which, as will be examined further on, has an implication on attribution in the eyes of the law.

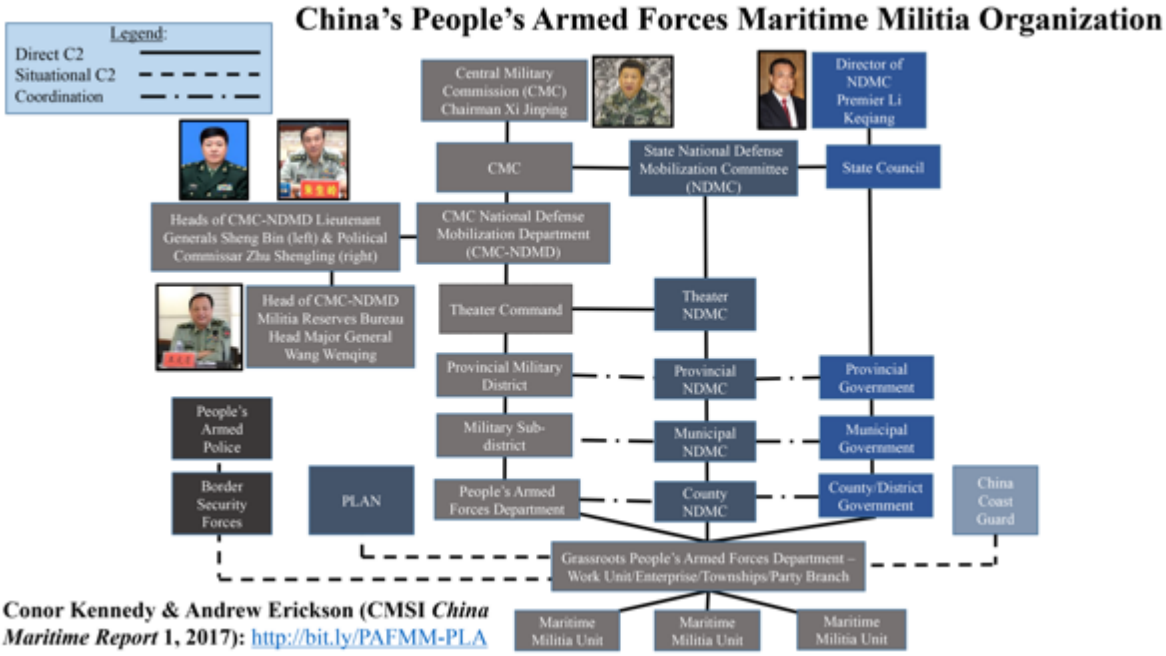

Figure 10: A Command and Control diagram showing the links between the maritime militia and the PLA(N).[232]

[231] Erickson, *China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA*, p3
[232] Ibid, p6.

Section II: The Militia's Activities at Sea

Case Study 1

In March 2009, the USNS *Impeccable* was conducting undersea intelligence collection in the South China Sea, within the Chinese claimed EEZ, south of Hainan province. The US consider that m"ilitary surveys" may be conducted in the EEZ of another State without prior permission, as opposed to Marine Scientific Research (MSR) for which coastal State permission is required first.[233] It is presumed the US Navy was therefore conducting military surveys at the time. On 8 March, the *Impeccable* was surrounded by five vessels: three PLA(N) ships and two fishing trawlers. The US ship was forced to take evasive action as the Chinese fishing vessels tried to interfere with the towed array sonar and dropped obstacles in the path of the US vessel, as well as stopping directly in front of it. The *Impeccable* eventually left the area and returned with a US destroyer as an escort in the following days.[234]

The crew on the *Impeccable* took a video of some of the incident, which was then broadcast to the world on CNN, from which there are a few points worth highlighting.[235] Firstly, the fishing vessels themselves are very clearly just that: the Chinese flag can be seen, but there is nothing visible that can be viewed as military insignia, and the crew themselves do not appear to be wearing uniform. Secondly, the trawlers come very close to the *Impeccable:* at one point only approximately 25 yards away. They also approach the *Impeccable* by driving their bows at a 90-degree angle to the starboard side of the US ship: in other words, very deliberate, and confrontational, manoeuvres. As a result, the US crew felt compelled to man the fire hoses in response, and although not shown on the video, at one point spray the hoses onto the crew of the fishing trawler.[236] Thirdly, while the *Impeccable* has her towed array sonar

[233] UNCLOS Article 56(b)(ii). For the US position on military surveys as opposed to MSR, see United States Navy (ed) *The Commander's Handbook on the Law of Naval Operations, vol NWP 1-14M* (Department of the Navy, Department of Homeland Security 2014) paras 2.6.2.1-2.

[234] Michael Green and others, 'Counter-coercion series: Harassment of the USNS IMPECCABLE' (*Asia Maritime Transparency Initiative*, 9 May 2017) <https://amti.csis.org/counter-co-harassment-usns-impeccable/> accessed 3 October 2018.

[235] See https://www.youtube.com/watch?v=hQvQjwAE4w4 for a video of the harassment conducted by the 2 fishing trawlers. Accessed 17 Aug 18.

[236] Green and others, 'Counter-coercion series: Harassment of the USNS IMPECCABLE'.

in the water, she is very restricted in her ability to manoeuvre. Rule 3 of the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) states:

> *"*Restricted in ability to manoeuvre means a vessel which from the nature of her work is restricted in her ability to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel. The term "vessels restricted in their ability to manoeuvre" shall include but not be limited to:..(ii). a vessel engaged in dredging, surveying or underwater operations;"[237]

Further, Rule 18 states: "A power-driven vessel underway shall keep out of the way of:……. a vessel restricted in her ability to manoeuvre."[238] This means that regardless of the intention of the actual manoeuvres conducted by the Chinese vessels, then as a basic principle under the COLREGs, the Chinese vessels should have stayed out of her way.

The final point to note, and perhaps most importantly for the purposes of examining this incident within the context of grey zone operations, is that it is abundantly clear that the harassing action is being conducted by the fishing trawlers, and not the PLA(N) ships: these can be seen hanging back, at approximately a mile's distance from the US ship, but not getting involved.

[237] International Regulations for Preventing Collisions at Sea 1972, Rule 3. Both China and the US are signatories to the COLREGS, see IMO, 'Status of Conventions' (International Maritime Organisation, current) https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx accessed 12 April 2021.
[238] Ibid, Rule 18.

Figure 11: A photo taken by the crew of the USS Impeccable of one of the fishing trawlers harassing the US ship. From Impeccable's guardrails showing in the foreground it is possible to see not only how close the trawler is, but also how it has driven towards the side of the Impeccable virtually at a right angle.[239]

Case Study 2

Clearly, had the incident with the *Impeccable* been a one off, then it is highly likely that the actions of the militia would not have garnered such international attention. There have however, been numerous examples, and since 2009, of their confrontational activities, including the use of the water cannon.[240] One such example was mentioned before the Arbitral Tribunal in *The South China Sea Arbitration*.[241]

On 26 May 2012, MCS 3008, a Philippines Bureau of Fisheries and Aquatic Resources vessel, approached Scarborough Shoal for the purpose of resupplying BRP *Corregidor,* a ship of the Philippine Coast Guard.[242] Having come within seven nautical

[239] Green M and others, Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence (https://wwwcsisorg/analysis/countering-coercion-maritime-asia, 2017), p52

[240] dailymail.co.uk, 'Philippines, China trade accusations over sea threats' (*The Daily Mail*, 25 April 2015) <https://www.dailymail.co.uk/wires/ap/article-3054861/Philippines-China-trade-accusations-sea-threats.html> accessed 27 September 2018.

[241] Some video footage of the incidents described is available at https://www.youtube.com/watch?v=ZklZcEmk3IA Accessed 10 September 18.

[242] See *The South China Sea Arbitration Award 12 July 2016* paras 1050-1058 for a more detailed version of this incident.

miles of Scarborough Shoal, MCS 3008 was approached by CMS 71 – a Chinese Coast Guard vessel.[243] According to the report of the Philippine Coast Guard officers, CMS 71 increased speed and then, at a distance of less than 100 yards, attempted to cross the Philippine vessel's bow. MCS 3008 took dramatic evasive action, increasing speed to 20 knots and altering course to starboard, in order to avoid a collision.[244] That was not however, the end of the incident, and the MCS 3008 reported that the Chinese vessel again attempted to cross its bows at close range, necessitating another high-speed manoeuvre to avoid collision.[245] It was at this point that another Chinese vessel approached, FLEC 303, and again appeared to drive towards MCS 3008, yet again requiring her to take evasive manoeuvres.[246]

Having dealt with these incidents, MCS 3008 continued towards BRP *Corregidor*. During this time, MCS 3008 was pursued by now three Chinese vessels: FLEC 303, CMS 71, and CMS 84. While MCS 3008 was alongside BRP *Corregidor*, CMS 84 passed by at a distance of 100 yards. MCS 3008 proceeded towards the entrance to the lagoon of Scarborough Shoal. As MCS 3008 pulled away from BRP *Corregidor*, CMS 84 again began to chase. Sensing that the CMS 84 was again aiming to cross the bows of MCS 3008, the Philippine vessel increased speed which eventually caused the Chinese vessel to be left behind by a few yards.[247]

As MCS 3008 continued toward the lagoon entrance, three Chinese vessels, FLEC 303, CMS 71, and FLEC 306 approached it. There then followed a couple more close-quarters encounters, instigated by the Chinese vessels.[248] At the entrance to the lagoon, MCS 3008 encountered FLEC 306, along with three Chinese fishing vessels.[249] MCS 3008 described this incident as follows:

> "On our route towards the basin, this vessel sighted three (3) Chinese fishing vessels and FLEC 306 on a blocking position near the lone entrance inside the shoal. Furthermore, three (3) Chinese service ships were now chasing this unit with CMS 71 joining CMS 84 and FLEC

[243] *The South China Sea Arbitration*, para 1050.
[244] Ibid, para 1051.
[245] Ibid, para 1052.
[246] Ibid, para 1053.
[247] Ibid, para 1054.
[248] Ibid, para 1055.
[249] Ibid, para 1056.

303.[250]

> After being able to position [a] few yards from the entrance of the shoal and reviewing our prepared safe way points, this unit decided to enter the shoal's basin by passing in between the **three (3) Chinese fishing vessels (CFVs)** and FLEC 306 which was fast moving towards our location. ……. However, as this unit was on its way towards the basin, ships **personnel sighted two (2) mooring lines which was planted by CFVs** obviously intended to impede our movement towards the shoal's basin. While this unit stopped engines and then manoeuvred backwards to avoid the lines, crew of the CFV's from which the line came from and FLEC 306 suddenly echoed cheers and clapped hands. At this point, FLEC 306 was already on a blocking position [a] few yards dead ahead of this unit.[251]
>
> **With the lines planted by the CFVs,** FLEC 306 posing a blockade and three (3) Chinese service ships positioned at the rear, it was evident that all efforts by the Chinese vessels were already employed in order to obstruct our entry to the shoal's basin……"[252]

In examining this matter, and any consequent attribution, the Tribunal considered both UNCLOS and the COLREGS. UNCLOS Article 94(3) says that Flag States are to: "take such measures for ships flying its flag as are necessary to ensure safety at sea with regard to, inter alia…..the use of signals, the maintenance of communications and the prevention of collisions".

In addition, Article 94(5) UNCLOS says: "in taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance."

[250] Ibid, para 1058. The quoted text used by the Tribunal was taken from the report by A.A. Arunco, et al; FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of Philippines 28 May 2012.
[251] Ibid, para 1058 (emphasis added).
[252] Ibid, para 1058 (emphasis added).

The Tribunal considered that Article 94 incorporates the COLREGs into the Convention, and as such, they are binding on China.[253] Having examined the expert reports, it was concluded that China had violated Rules 2,6,7,8, 15 and 16 of the COLREGS, namely those relating to keeping a safe speed, avoiding the risk of collision, crossing situations and actions required by the give way vessel; and as a consequence, Article 94 of UNCLOS:

> "……. the Tribunal considers China to have repeatedly violated the Rules of the COLREGS over the course of the interactions described by the crew of the Philippine vessels and as credibly assessed in the two expert reports. Where Chinese vessels were under an obligation to yield, they persisted; where the regulations called for a safe distance, they infringed it. The actions are not suggestive of occasional negligence in failing to adhere to the COLREGS, but rather point to a conscious disregard of what the regulations require."[254]

For the purposes of this dissertation however, the real interest lies in what the Tribunal described as a "preliminary matter":

> "As a preliminary matter, the Tribunal observes that the conduct of each of the Chinese vessels in question—CMS 71, CMS 84, FLEC 303, FLEC 306, and FLEC 310—is attributable to China. All Chinese-flagged vessels involved in the incidents alleged by the Philippines on 28 April and 26 May 2012 belonged to one of two agencies: CMS or the FLEC. Accordingly, because the conduct complained of was committed by vessels falling directly under the command and control of the Chinese Government, the Tribunal considers the vessels' behaviour to constitute official acts of China. Their conduct is automatically attributable to China as such."[255]

The Tribunal therefore found that the organisations involved were state-sponsored. This would be in keeping with Article 4 of the Draft Articles on Responsibility of States

[253] *The South China Sea Arbitration Award 12 July 2016* para 1083.
[254] Ibid, para 1105.
[255] Ibid, para 1091.

for Internationally Wrongful Acts, which states that the conduct of a State organ shall be considered: "an act of that State under international law" regardless of its function, position or character as an organ of that State.[256] As explained above, the Chinese Coast Guard have a clear line of command through up to the government.. They can therefore, be considered a state organ, and as such, "under the command and control of the Chinese Government."[257]

However, the Philippine account of the incident also describes the involvement of Chinese fishing vessels, as well as those related to CMS (CMS 71 and CMS 84) and FLEC (FLEC 303, FLEC 306, FLEC 310). Further, the actions of these fishing vessels, namely the planting of 2 mooring lines so as to stop the Philippine vessel going any further (because the lines would have fouled their propellers), is not then referred to in any of the subsequent analysis. The Tribunal has referred to the CMS and FLEC vessels only. The reference to the actions of the fishing vessels laying mooring lines across the lagoon (highlighted in bold in the text above) provides a tantalising glimpse of the range of threats being faced in the maritime environment – and the potential legal implications. Who is liable for the actions of those fishermen? And have they, by laying lines across the lagoon, committed a breach of international law?

Section III: The Legal Status of the Militia

As referred to above, the legal responsibility of States for acts committed by their citizens is reflected in both judicial decisions and the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[258] Article 1 states: "Every internationally wrongful act of a State entails the international responsibility of that State."[259] This principle has been applied by the ICJ both before and after the writing of the Articles, such as the *Corfu Channel* case,[260] and in *Nicaragua*.[261] More recently, in the *Rainbow Warrior* case, it was highlighted that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility."[262] The Draft Articles on

[256] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 4. Available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.
[257] *The South China Sea Arbitration*, para 1091.
[258] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001. See also "Key Concepts" in James Crawford, *State Responsibility* (Cambridge University Press 2013) p45-92.
[259] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 1.
[260] *United Kingdom v Albania (Corfu Channel)* ICJ, 9 April 1949, p23.
[261] *Nicaragua vs USA*, p142 and 149.
[262] *New Zealand v France (Rainbow Warrior)* Arbitral Tribunal, 30 April 1990, p251.

Responsibility of States for Internationally Wrongful Acts have been adopted by the International Law Commission and commended by the UN General Assembly, and are considered to be customary international law.[263]

The Articles state that an act or omission is "internationally wrongful" when it satisfies two elements:

1. The act or omission is attributable to the State under international law
2. The act or omission constitutes a breach of an international obligation of the State.[264]

To therefore determine the legal implications of the actions of the fishermen, it is necessary to ask firstly: is the act of laying fishing lines across the entrance to the lagoon attributable to the state of China? And then secondly: has the act of laying fishing lines constituted a breach of an international obligation of China?

How can an act be deemed attributable to China? It would have to be an act committed by individuals or groups on behalf of the State. There is, in effect, a spectrum of individuals who can be held responsible. At the one end, there are those where it is relatively simple to determine as being acting on the State's behalf, for example government officials acting in their professional capacity, or the armed forces. At the opposite end of the spectrum are private individuals. The ILC has noted "[a]s a general principle, the conduct of private persons or entities is not attributable to the State under international law."[265]

But in the middle of that spectrum, "there is a significant area of ambiguity, for which the actions of individuals or groups may or may not be attributable to the government of a particular state, such as the PRC."[266] The Draft Articles on Responsibility of States for Internationally Wrongful Acts provide three possible options by which a legal argument could be constructed to show that the actions of the militia could be attributed to China, even if Beijing does not publicly acknowledge responsibility:

[263] UN General Assembly Resolution 68/104, Responsibility of States for Internationally Wrongful Acts
[264] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 2.
[265] Ibid. Commentary, Article 8, para 5.
[266] Odom, J. (2018). "Guerrillas in the Sea Mist: China's Maritime Militia and International Law." Asia-Pacific Journal of Ocean Law and Policy 3: 31, p38.

1. Conduct by state organisations[267]

2. Conduct by authorised personnel[268]

3. Conduct at the state's instruction, direction or control[269]

Option 1: Conduct by state organisations

Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states:

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the Central Government or of a territorial unit of the State."[270]

Does the maritime militia qualify as an "organ" of the State? The Commentary states that "the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level."[271] Article 4 addresses *de jure* organs, and thus if this article was to apply, the militia would need to have a status in Chinese law.

The evidence to support the assertion that the militia are a state organ is mixed. In support of the argument are factors such as the Chinese Defence White Paper of 2013 which recognises the militia as the "backup force of the PLA".[272] China's Military Service Law also specifies that the militia is part of the Armed Forces of the PRC describing the militia as "an assisting and reserve force for the Chinese

[267] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 Article 4.
[268] Ibid Article 5.
[269] Ibid Article 8.
[270] Ibid, Article 4.
[271] Ibid, Commentary Article 4, para 6.
[272] Erickson, *China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA*, p2.

People's Liberation Army."[273] This argument is weakened when it is considered that the actual militia seen operating today were not originally established by the government, rather they were originally created as fishing companies. The role of being "militia", its activities it has been seen undertaking in the South China Sea, has developed since then.

If it cannot be established with any certainty that the militia is a *de jure* organ for the purposes of Article 4, then it still may be possible to establish them as a *de facto* organ. The matter has been addressed in the jurisprudence, firstly by the ICJ in the *Nicaragua* case.[274] The ICJ held that dependence created a potential for control.[275] It was assessed that in order for an organisation to be considered as a *de facto* organ of a State, the relationship had to be "one of dependence on the one side and control on the other…"[276]. It was held that complete dependence would only be established if the *contra* force been "so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States."[277] This requirement for complete dependence is also known as the "strict control test".[278]

This position was then endorsed and elaborated on in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*[279]. Here it was stated that: "…persons, groups of persons or entities may, for the purposes of state responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State…".[280] The court went on to explain however, that "to equate persons or

[273] Military Service Law of the People's Republic of China 1984 Chapter VI, Article 36. Available at http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21916676.htm
[274] *Nicaragua vs USA.*
[275] Ibid, para 277.
[276] Ibid, para 109.
[277] Ibid, para 111.
[278] Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 International and Comparative Law Quarterly 493. The test is sometimes referred to as the dependence and control test. Indeed, Counsel for Nicaragua referred to "total or predominant control". See *Nicaragua,* ICJ Pleadings, Vol V, p162.
[279] *Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment of 26 Feb 2007, ICJ Rep 2007 Hereafter referred to as *Bosnian Genocide.*
[280] Ibid, para 392.

entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's judgment (i.e. the *Nicaragua* judgment) expressly described as "complete dependence"".[281]

The bar is therefore high. Further, the inference behind "complete' dependence is that it is continuing over time. This raises an interesting issue with the militia: they appear to work part-time for the government and for many, fishing remains the primary employment. The evidence suggests that the militia are indeed given logistical and financial support for their activities conducted on behalf of the government, as well as the necessary training and equipment. Since these same vessels also operate as fishing vessels however, if complete dependence were to be established, then at most it would have to be restricted in time periods, specifically to those periods when the incidents described above occur.

Option 2: Attribution – empowered by law

Article 5 of the Draft Articles on State Responsibility for Internationally Wrongful Acts states:

> "The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."[282]

Therefore, even if we assume that the militia are not a state organ under the auspices of Article 4, their actions can still be deemed attributable to China, if China has empowered the militia to act on its behalf. Indeed, the Commentary even explains that such entities may include "semi-public entities, public agencies of various kinds, and even in special cases, private companies."[283] The fishermen here could be described as both a "semi-public" entity, or even fall under the "private company" description if we take their status as a fishing company at face value. It is also worth

[281] Ibid, para 393.
[282] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 5.
[283] Ibid Commentary, Article 5, para 2.

noting that the conduct itself must "concern governmental activity and not other private or commercial activity".[284]

That said, there still remains the second element to be met: whether the fishermen have been empowered by internal legislation to act on behalf of the State. To date, only two Chinese laws have been highlighted as relating to the militia. The Military Service Law outlines the status of the militia as part of China's armed forces,[285] and the Emergency Response Law requires members of the militia to participate in emergency relief and rescue operations.[286] Notably, neither of these pieces of legislation appear to "empower" the fishermen to act "with governmental authority" in situations other than emergency relief, or, as per the Military Service Law, in times of war. Arguably, putting to one side for a moment the concerns about the methods used, the actions of the fishermen in this instance were part of an overall maritime security operation, not emergency relief. Regardless, without an example of Chinese legislation to provide the empowerment element of Article 5, it is not possible to apply it conclusively.

Option 3: State's Direction or Control

Article 8 of the Draft Articles on State Responsibility for Internationally Wrongful Acts states:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[287]

It is worth noting as a starting point that the terms "instructions", "direction" and "control" are disjunctive: it is deemed sufficient to establish just one of them. For this Article to be engaged, there must be a "specific factual relationship between the

[284] Ibid.
[285] Military Service Law of the People's Republic of China 1984. Available at http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21916676.htm Accessed 21 May 2021.
[286] People's Republic of China Emergency Response Law 2007. Available at http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21899265.htm. Accessed 21 May 2021.
[287] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 8.

person or entity engaging in the conduct and the State."[288] Therefore, rather than a requirement for a specific line of authority between the group engaging in the conduct and the State, the Article "focuses more on the State's intended purpose or use of a group and less on the actual nature of the group."[289] Helpfully, the Commentary even goes on to describe a scenario that could almost be matched to that of the Chinese militia: "Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside of the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries…"[290]

The ICJ has also addressed this matter in the *Nicaragua* case, where in contrast to the standard of "complete dependence", and "strict control", here the *effective* control test is meant to cover situations where a State exercises de facto control on a case-by-case basis over specific acts: "[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[291]

Further amplification was provided in the *Bosnian Genocide* case: "It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or group of persons having committed the violations."[292] Therefore the object of control is not the group of persons, but rather the activities or operations which give rise to the internationally wrongful act. Partial dependency can be inferred from a number of sources, such as financial, logistics and military support, or the supply of intelligence.[293]

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[288] Ibid, Commentary Article 8, para 1.
[289] Odom, J. (2018). "Guerrillas in the Sea Mist: China's Maritime Militia and International Law." Asia-Pacific Journal of Ocean Law and Policy 3: 31, p43.
[290] Draft Articles on Responsibility of States for Internationally Wrongful Acts. Commentary, Article 8, para 2.
[291] *Nicaragua vs USA* para 115.
[292] *Bosnian Genocide* para 400.
[293] *Nicaragua vs USA* para 112. *Bosnian Genocide* paras 241, 388, 394.

Can it be shown that the fishermen were acting on the instructions of the State? Given that a positive acknowledgment from Beijing is going to be highly unlikely, it is necessary to look at the chain of command and what we know about the militia so far. The incident addressed by the Tribunal occurred in 2012, before the re-organisation of the militia – but certainly if it occurred tomorrow, it would be possible to establish a chain of command through the PAFDs. Through this chain of command, specific government instructions could be given.

Even without that re-organisation, the actions of the fishing vessels themselves imply a level of direction being provided. Reading the facts above, they indicate that the fishing vessels were acting in concert with the CMS and FLEC vessels. Even if there was not a sufficiently robust chain of command established for the fishing vessels to receive direction from a State entity back on shore, had they been receiving instructions from the Coast Guard vessels who were acting on behalf of the State, then that link can be established. The alternative is that two fishing vessels, upon seeing their local coast guard involved in some close manoeuvres with Philippine vessels, decided of their own accord to participate and assist by laying cables across the lagoon. It is suggested that while this is not impossible, it is highly unlikely.

Has there been a breach of an international obligation?

Assuming that the actions of the fishermen can be attributed to the State of China under one of the options above, it is now necessary to determine whether a breach has occurred or not. The arguments here differ, depending whether you take China or the Philippines' view. China has not provided a commentary or analysis on this incident, and so the following is an effort to try and view this incident from China's perspective.

China considers that the Scarborough Shoal is an island that belongs to China, and consequently as a State, it "has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."[294] This incident occurred within seven nautical miles of the Scarborough Shoal, and so on the basis of

[294] PRC, *Note Verbale CML/17/2009 - Position Paper on South China Sea*. See fn 44.

the Note Verbale, within the territorial sea.[295]

If it is accepted that the vessels were within China's territorial sea, then the rights of innocent passage would apply under UNCLOS:

> "17. Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.
>
> …
>
> 19 **(**1). Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
>
> (2). Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
>
> (i) any fishing activities;"[296]

On the basis of Article 19 (1)(i) therefore, the Philippine vessels are not adhering to the regime of innocent passage if they are fishing within the territorial waters of China, without permission. Given the reaction of the Chinese fishing vessels to that fishing activity, it can be reasonably assumed that permission had not been given.

Article 25 states: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent."[297] The Chinese argument could be, therefore, that in preventing the Philippines vessels from accessing the lagoon, they were in fact enforcing their right under Article 25 to prevent passage which is not innocent. But what are *necessary* steps? This is not defined in the Convention. Noting however the obligation to ensure safety at sea under UNCLOS Article 94 (3) and the COLREGS, the laying of lines across the lagoon and thereby creating a risk whereby

[295] This in itself is clearly problematic because a shoal is not necessarily an island which generates an entitlement to a territorial sea but will be discussed in further detail in the next chapter.
[296] UNCLOS, Articles 17 and 19.
[297] UNCLOS, Article 25.

the lines could get fouled in the propellers, clearly goes against that obligation. Arguably, a safer course of action would have been to simply use the Chinese fishing vessels to block the entrance of the lagoon, thus forcing the Philippine vessel to turn away.

The Philippines also claim the Scarborough Shoal, and consider it to be within their EEZ. So, from their perspective, the Philippine vessels were entitled to be present for the purpose of fishing. The act by the Chinese fishing vessels in laying a line across the lagoon is an act which not only impedes that right granted in UNCLOS Article 56(1) and but could also be viewed as a breach of Article 94 because of the danger to navigation.

The physical act of laying the lines by the fishermen is itself worthy of discussion, in the context of grey zone operations: remembering that the aim is to remain below the threshold of an armed conflict and thus not create a scenario where other States may be encouraged to enter into a conflict. Within the text of the UN Charter and international jurisprudence, there is no set definition as to whether the nature of the personnel involved qualifies an action as a "use of force" or an "armed attack". Perception is key: "…if the regular armed forces of a state are involved in a particular situation and force is used, then that circumstance could make it more likely for the actions at issue to constitute a "use of force" or an "armed attack". But merely because irregular forces were involved in a situation does not, by that mere fact alone, make it impossible to constitute a "use of force" or "armed attack"".[298] On this basis, had for example, the fishermen fired weapons at the Philippine vessels, then that would arguably qualify as a State-sponsored use of force under Article 2(4) UN Charter, or even an armed attack thus invoking the right to self-defence under Article 51.

But the laying of the lines is less clear cut. It does not for instance meet the threshold of a use of force, if one takes the view that "the term does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed force".[299] It would also therefore not seem to come near what might constitute an armed attack,

[298] Jonathan Odom, 'Guerrillas in the Sea Mist: China's Maritime Militia and International Law' (2018) 3 Asia-Pacific Journal of Ocean Law and Policy 31, p68.
[299] Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (Oxford University Press 2012), p208.

particularly if one applies the reasoning in the *Oil Platforms* case where, for example, the act of mining of a military vessel "might be sufficient" to constitute an armed attack.[300] Thus, while such an act affects the safety of navigation at sea, and could be argued as a breach of international obligations under UNCLOS Article 94, it is suggested it cannot be described as any more than that. The result is the Philippines is limited in its response, and making submissions to the Arbitral Tribunal constituted under UNCLOS Annex VII for a legal ruling is the most practical option, even if it does not appear immediately effective.

Section IV: The Militia and Lawfare

As noted in Chapter One, the Chinese doctrine of lawfare has two main objectives: to achieve "legal principle superiority" and to "delegitimize the adversary".[301] The US definition of lawfare practised by China involves the use of international and domestic law to claim the legal high ground or assert Chinese interests. It can be used to thwart an opponent's operational freedom and shape the operational space. It is also used to build international support and manage possible political repercussions of China's military.[302] The militia, in their operations in the South China Sea, play a part in achieving all of these objectives.

Firstly, there is ambiguity of identification – or rather, plausible deniability, as shown in the Scarborough Shoal example described above. The fact that the Philippine officers distinguish between the "fishing vessels" and the CMS and FLEC vessels, is, in itself, telling. It demonstrates the utility of using a variety of means and organisations to achieve the aim: there is confusion in the identity of the aggressor. The fishing vessels are not named, they are therefore not (immediately) attributable. This is all the more remarkable when one considers the actions that the fishing vessels took: the laying of lines across the path of the Philippine vessels is arguably far more blatant, and confrontational, than high speed manoeuvres. Therefore, while it can be established with reasonable certainty that the Chinese fishing fleet also has a subsidiary role as a state-organised militia, that does not mean that China as a State

[300] *Islamic Republic of Iran v United States of America (Oil Platforms)* ICJ 12 December 1996.
[301] Kania, p5.
[302] Halper, p19.

will automatically own up to any of their more unusual activities. In the international legal system, this creates an extra hurdle to overcome in terms of attribution.

Secondly, there is a presentational win, which ties neatly into the concept of "de-legitimising the adversary". A confrontation between a grey hulled non-Chinese warship and a white or blue hulled Chinese vessel can easily be portrayed through the Chinese media as an aggressive warship overpowering an innocent law enforcement or fishing vessel. It is worth remembering that the audience of such a news story will not only be international: the domestic population of China is as important. Further, the potential political fall-out from another Navy appearing to deliberately target a fishing vessel operating in this manner (be that in the form of kinetic strike or close quarters manoeuvres) could be significant enough to prevent that other navy from even approaching the fishing vessel. By contrast, a confrontation between a Chinese warship and another warship instantly looks more aggressive on both sides and would call into question China's actions.[303]

Thirdly, there is a tactical advantage. The risk of escalation is less if warships are not involved: there is less chance of miscalculation or error between two heavily armed vessels, which can have fatal consequences. Seeing as the premise of grey zone operations is to avoid crossing that threshold into a full-blown conflict, this is essential. This means that during peacetime, "the militia can perform State-sponsored agitation and low-level coercion", without calling on the might of the PLA(N).[304]

Conclusion

If it is possible to deduce this information from purely open source material rather than high grade military intelligence, then presumably the Chinese government will know that the rest of the world knows. Why then, do they put up the charade? Why not embrace, and publicly promote, the concept of a part time military capability? The

[303] For an example as to how this could be viewed in the media see Brad Lendon, 'Photos show how close Chinese warship came to colliding with US destroyer' (*CNN*, 4 October 2018) <https://edition.cnn.com/2018/10/02/politics/us-china-destroyers-confrontation-south-china-sea-intl/index.html> accessed 10 October 2018.
[304] Kraska Monti, 'The Law of Naval Warfare and China's Maritime Militia' 91 International Law Studies 450, p466.

answer, perhaps, is because the use of a fishing fleet in this way goes to the heart of grey zone operations: the ability to act in a confrontational manner without drawing instant international condemnation or repercussions.

Are the fishermen of the South China Seas the Little Blue Sailors? The notion is very appealing, but not perhaps as neat as it could be, owing to the legal nuances in each scenario. In the case of the Little Green Men, it is now widely accepted that they were full time members of the Russian Armed Forces.[305] As has been demonstrated, the Little Blue Sailors here cannot be so neatly categorised. Further, the Little Green Men have been participating in a conflict: here, so far, there is no acknowledgement on either side (Philippines or China), or indeed in the international community, that a state of conflict exists in the South China Sea, and nor do the facts support that notion.

The combined use of the law enforcement agencies as well as the militia, demonstrates how China is using all resources available to maintain dominance in the South China Sea, without resorting to the use of force. The complexity of the organisational structure involved keeps the other parties guessing. By "[c]loaking its actions in the guise of non-military police and security enforcement [the government of China] creates a very high bar indeed for an opponent to attempt a kinetic response, and an even higher bar for that opponent to receive direct support from any other nation, no matter how egregious the Chinese position on its South China Sea claims."[306] The PLA(N) may be present, but in the background: they do not necessarily participate. One can also see how the *Three Warfares* doctrine comes into play: media (none of the protagonists are grey hulled – it therefore looks less aggressive), psychological (the element of surprise when fishing vessels act in an overly provocative manner) and legal (ambiguity).[307] Having now looked at the people, the following chapter will consider the geographical areas in which the militia, Coast Guard and PLA(N) are all operating.

[305] David Wallace Shane Reeves, 'The Combatant Status of the "Little Green Men" and Other Participants in the Ukraine Conflict' (2015) 91 International Law Studies 361, p393.
[306] Halper, p305.
[307] Ibid, p28.

CHAPTER THREE: PLACES

Introduction

In 1959, a briefing note to Australia's Joint Intelligence Committee stated: "If, in the longer term, the Communist Chinese were to develop the [South China Sea] islands militarily, they could make a nuisance out of themselves on the international shipping and air routes on the pretext of infringements of territorial waters and air space and might even shoot down an aircraft occasionally. Again, there is little the West is likely to do, except protest".[308] This note, written 60 years ago, has proven to be an astonishingly accurate prophecy of the activities of the Chinese Government in the South China Sea. The view taken by Australia in 1959 was not matched around the globe. A cable from the Australian embassy in Washington D.C. said: "United States policy is one of 'let sleeping dogs lie'".[309] An Australian official scribbled on the side of this: "Politically, this is not a very satisfactory outcome."[310] Roll forward 60 years, and indeed, in the face of little to no opposition, China has extensively developed the land features in the South China Sea.

The South China Sea is 3.6 million square km in size.[311] Imagine trying to patrol an area larger than the country of India in several police cars, but without ready access to a petrol station: this is the challenge that China faces in asserting control of the maritime environment. Control over, and access to, the land features is therefore paramount if China is to enforce maritime claims with its vast fleet of ships, if only to provide logistical support. This chapter will discuss how China has used the tactic of artificial island building to assert its dominance. It will consider the legal implications of such activity, and how it has been viewed in the decision handed down by the Arbitral Tribunal in the *South China Sea Arbitration*. I will argue that just as the Australian note has predicted, little has been done, other than "protest" – and as such, China as effectively claimed both territory and vast swathes of ocean, without needing to recourse to conflict. Again, as with the use of the militia in the previous chapter,

[308] Elliot Brennan, *Out of the "Slipstream" of Power? Australian Grand Strategy and the South China Sea Disputes* (Institute for Security and Development Policy, Stockholm, 2017), p19.
[309] Ibid, p20.
[310] Ibid, p20.
[311] Eugene LaFond, 'South China Sea' (*Britannica*, 29 August 2020) <https://www.britannica.com/place/South-China-Sea> accessed 29 August 2020.

China can be seen to increasing its dominance over the region, and asserting its claims, without the requirement to use overt military force.

The chapter will focus on the Spratly Islands, as these were the areas raised in the submissions brought by the Philippines to the Arbitral Tribunal. I will set out the applicable provisions of UNCLOS, the Chinese domestic argument, and the findings of the Tribunal, all which demonstrate how the building of artificial islands is a grey zone operation. Finally, I intend to show that, as with other areas of activity, China is employing lawfare as part of its strategy.

Section I: China and the Spratly Islands

The Spratly Islands is an archipelago of hundreds of small islands, shoals, cays and reefs. There is no indigenous population.[312] China, Taiwan and Vietnam claim sovereignty and jurisdiction over the entire chain and its surrounding waters, while the Philippines, Malaysia and Brunei also assert rights to smaller areas.[313] Vietnam holds the largest number of land features, at twenty-seven.[314] Ironically, given the extensive areas now in play, China actually only has control of eight reefs in the Spratly Island area: Cuarteron Reef, Fiery Cross Reef, Gaven (North and South) Reefs, Hughes Reef, Johnson Reef, Mischief Reef and Subi Reef.[315]

In 2002, China and the ASEAN community signed the Declaration on the Conduct of Parties in the South China Sea, a document that of itself, had taken years of negotiations to achieve. The document is legally non-binding but urges all disputants to "exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited…. features".[316] Since the Code of Conduct was signed,, no claimant has occupied a previously entirely unoccupied land feature.

[312] Karl Pletcher, 'The Spratly Islands' (Britannica, 27 August 2015) <https://www.britannica.com/place/Spratly-Islands accessed 10 June 2021.
[313] AMTI, 'Maritime Claims of the Indo-Pacific' (Asia Maritime Transparency Initiative, 7 October 2020) <https://amti.csis.org/maritime-claims-map/> accessed 7 October 2020
[314] Humphrey Hawksley, Asian Waters: The Struggle over the Asia-Pacific and the Strategy of Chinese Expansion (Duckworth Overlook, 2018), p54.
[315] Ibid, p52.
[316] ASEAN, 'Declaration on the Conduct of Parties in the South China Sea' (asean.org, 17 October 2012) https://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 accessed 5 May 2018

However, China has placed steel posts, construction material and buoys as markers on Amy Douglas Bank, Boxall Reef and Iroquois Reef: all potential candidates for further land reclamation.[317] As this chapter will show, China appears to have ignored that Declaration, pursuing an ambitious programme of both land reclamation and inhabitation of features within the South China Sea. It is however worth noting that China is not the only State who has launched a programme of land reclamation or island building. Vietnam and Taiwan have taken similar action, but it is the scale upon which China has embarked its programme of expansion which is exceptional.[318]

The Philippines initiated arbitration proceedings on 22 January 2013. China then "ramped up land reclamation work around some of its SCS features."[319] In less than three years, 12.8 million square metres of new land was created.[320] By the time the Tribunal had assessed each feature, China had conducted significant amounts of construction on many of them, "essentially turning them from insignificant specks on the in the sea into man-made artificial "islands"."[321]

The Chinese legal argument for the Spratly Islands

China has stated its position regarding the Spratly Islands through a combination of domestic law, Notes Verbales and public statements. The earliest one was on 4 September 1958, when the following declaration was issued by China:

> "The Government of the People's Republic of China declares:
>
> 1. The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the

[317] Erickson and Martinson (eds), p199.
[318] Vietnam has reclaimed land on 8 rocks to build them into artificial islands, Taiwan has reclaimed 8 acres of land on Itu Aba Island. See AMTI, 'Island Tracker' (Asia Maritime Transparency Initiative, current) <https://amti.csis.org/island-tracker/> accessed 29 April 2021
[319] F. Shannon Sweeney, 'Rocks v Islands: Natural Tensions over Artificial Features in the South China Sea' (2017) 31 Temple International and Comparative Law Journal 599, p607.
[320] *The South China Sea Arbitration* para 854.
[321] Sweeney, p19.

> Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas."[322]

The "Nansha Islands" is a literal translation of the Chinese name for the Spratly Islands. Of particular note, here is the inference that China considers the group of features which make up the Spratly Islands as a single entity. This declaration was then affirmed in the passing of the Law on the Territorial Sea and the Contiguous Zone in 1992, with Article 2 confirming that the Nansha Islands were to be considered as part of the "land territory" of the People's Republic of China.[323] Then in June 1996, this position was confirmed as part of the country's ratification of UNCLOS:

> "3. The People's Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone which was promulgated on 25 February 1992."[324]

Finally, in 1998, China enacted the Law on the Exclusive Economic Zone and the Continental Shelf, which stated in Article 14: "[the] provisions in this Law shall not affect the rights that the People's Republic of China has been enjoying since the days of the past."[325]

Since then, there have been several Notes Verbales and statements made by officials to affirm the "rights" of the "days of the past" or, historic rights.[326] There have also been references to the "indisputable sovereignty over the islands in the South China Sea".[327]

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[322] People's Republic of China Declaration on the Territorial Sea 1958. Available at http://www.eapasi.com/uploads/5/5/8/6/55860615/appendix_18_--_prcs_declaration_on_the_territorial_sea__1958___.pdf accessed 12 May 2021.
[323] People's Republic of China Law on the Territorial Sea and the Contiguous Zone 1992. See fn 155.
[324] United Nations Treaty Collection Depositary (United Nations, <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019.
[325] People's Republic of China Law on the Exclusive Economic Zone and Continental Shelf 1998. See fn 168.
[326] *The South China Sea Arbitration* paras 181-185.
[327] PRC, *Note Verbale CML/17/2009 - Position Paper on South China Sea*. See fn 44.

For the purposes of the Spratly Islands and this chapter, the most relevant and detailed statement made by China was in response to Philippines' submission objecting to the Nine-Dash Line in 2009. China stated:

> "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence…Since 1930s, the Chinese Government has given publicly several times the geographical scope of China's Nansha Islands and the names of its components. China's Nansha Islands is therefore clearly defined. In addition, under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."[328]

A number of points can be drawn from this statement. Firstly, as was commented on by the Arbitral Tribunal and will be explored in more detail further on, China has never expressly clarified the nature or scope of those historic rights.[329] All that can be said with certainty is that China claims sovereignty of the islands. However, the two concepts are not necessarily linked.

Although, as will be explored later, China did not participate in the proceedings of the *South China Sea Arbitration*, there was some correspondence between the Chinese government and the Tribunal. For example, in response to the original submissions made by the Philippines:

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[328] PRC, *Note Verbale CML/8/2011 - Sovereignty over islands in the South China Sea* (2011). See fn 110.
[329] *The South China Sea Arbitration*, para 180.

> "China has indisputable sovereignty over the Nansha Islands and their adjacent waters. And it is an indisputable fact that the Xisha [Paracel] Islands are an integral part of China's territory. As early as 1948, the Chinese government published an official map which displayed "the dotted line" in the South China Sea. China's sovereignty over the South China Sea and its claims to the relevant rights have been formed over a long course of history. They are solidly grounded in international law and have been consistently upheld by successive Chinese governments."[330]

In one of these exchanges with the Tribunal, in relation to the Philippines' submissions made over the status of some features in the Spratly Islands, China stated: "China has indisputable sovereignty over the Nansha Islands and its adjacent waters, including Taiping Dao [Itu Aba]. China has, based on the Nansha Islands as a whole, territorial sea, exclusive economic zone and continental shelf."[331]

This statement is of particular interest as it appears to be the first time that China has explicitly stated that it views the Spratly Islands as one entity from which a territorial sea, EEZ and continental Shelf can be derived. Also, of note, at no point in any of these statements, has China attempted to claim *extended* maritime zones as a result of the artificial islands.

Section II: UNCLOS and the difference between a rock, an island and a low-tide elevation

UNCLOS provides the definitions of the various land features in the Spratly Islands. The three relevant types of land mass are: islands, rocks and low tide elevations. UNCLOS describes an island as:

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[330] Hong Lei, 'Ministry of Foreign Affairs, People's Republic of China, Foreign Ministry Spokesperson Hong Lei's Remarks on Vietnam's Statement on the Chinese Government's Position Paper on Rejecting the Jurisdiction of the Arbitral Tribunal Established at the Request of the Philippines for the South China Sea Arbitration (12 December 2014)' (*fmprc.gov.cn*, 12 December 2014) <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1218756.shtml> accessed 18 November 2018.

[331] Hua Chunying, 'Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao' (*fmprc.gov.cn*, 3 June 2016) <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1369188.shtml> accessed 2 March 2020.

> "1. … a naturally formed area of land, surrounded by water, which is above water at high tide.
>
> 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory." [332]

Paragraph 3 of the same Article provides the limitations regarding the maritime zones which can be claimed from a rock: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." [333]

The third type of land mass, a low tide elevation, is defined in Article 13:

> "1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own." [334]

Below are pictorial representations of how UNCLOS works in practice at sea:[335]

[332] UNCLOS, Article 121.
[333] Ibid, Article 121 (3).
[334] Ibid, Article 13.
[335] Reproduced from Freund, see fn 31.

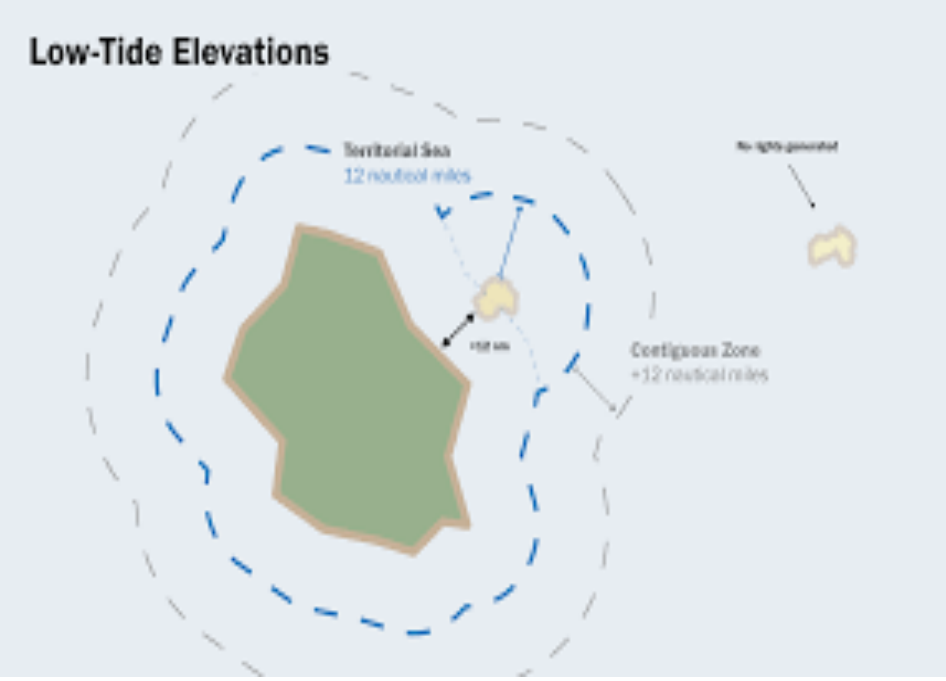

Figure 12: Low Tide Elevations

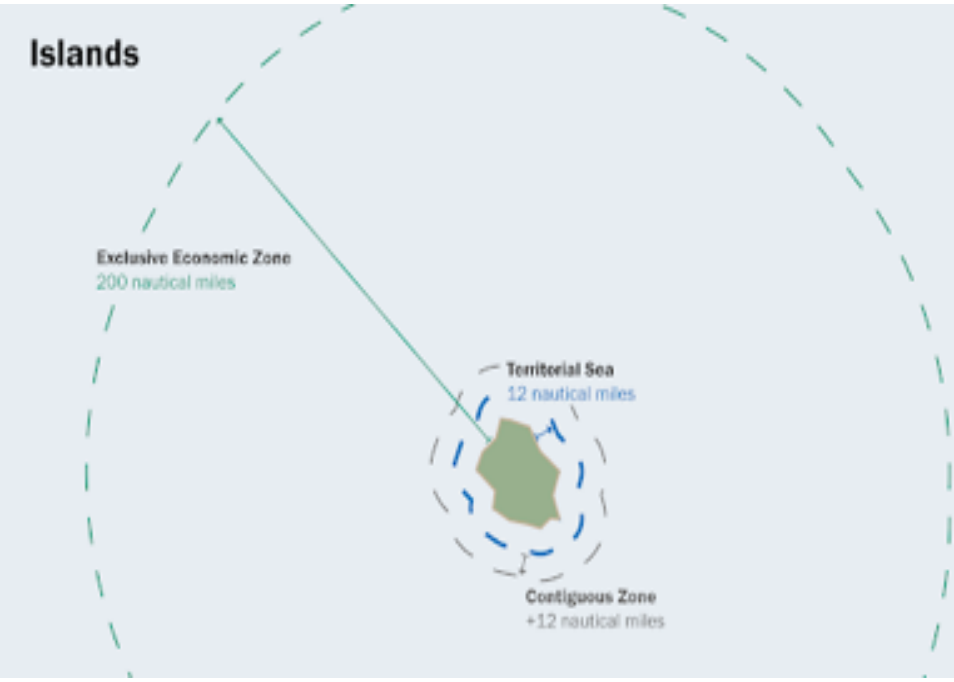

Figure 13: Islands

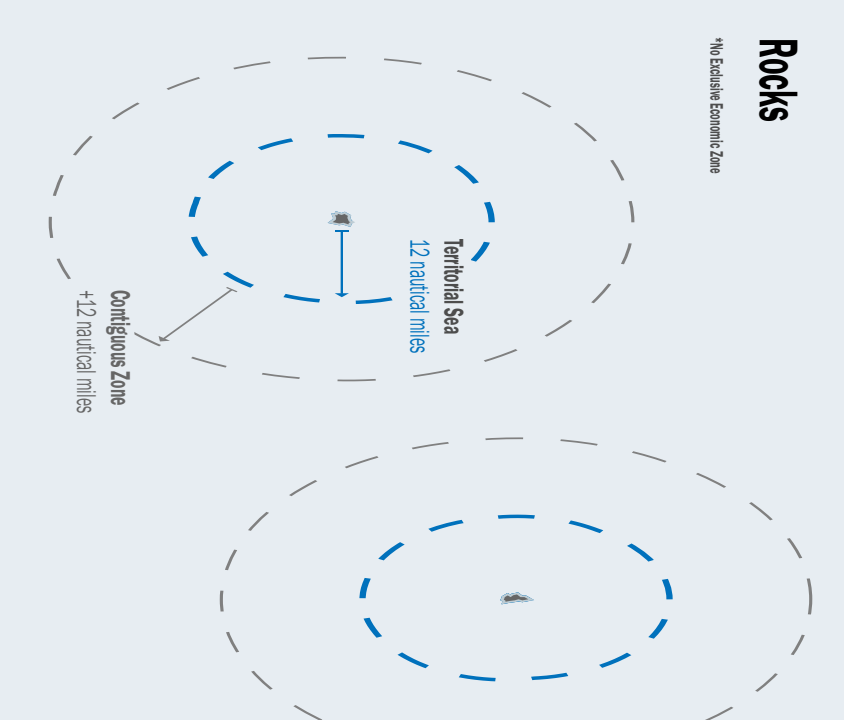

Figure 14: Rocks

The different maritime zones which can be claimed from the different types of land features can be translated into economic gains such as access to natural resources as well as international trade routes, and military advantage viacontrol and access to huge areas of ocean. These advantages have been the subjected to attempted exploitation by other States. By way of a comparator, the islet of Rockall in the North Atlantic has been in the news relatively recently owing to the competing claims between the UK and Ireland, driven by access to fishing rights. This is a long running dispute, and has flared up again because of Brexit, but the origins are far more military in nature.[336] Rockall is a large granite piece of rock, 21 metres high, approximately 160nm from the Scottish island of St Kilda. It is therefore within the UK EEZ of 200 nautical miles. It was formally claimed by the UK in 1955 and has the dubious distinction of being the final example of British territorial expansion. The motivation for making a formal claim, however, was not to guarantee fishing rights, as is the topic of debate now. Rather, the UK was preparing to conduct a test firing of the first guided nuclear weapon, with an intention to launch it from South Uist and test it over the North Atlantic. The Ministry of Defence was concerned that the Soviet Union would use the

[336] bbc.co.uk, 'Rockall Q&A: Fishing dispute between Scotland and Ireland' (*BBC News*, 15 June 2019) <https://www.bbc.co.uk/news/world-europe-48580227> accessed 11 August 2019.

islet as an outpost for observers, and so staked a claim of sovereignty.[337] As with China in the South China Sea therefore, what the UK wanted was control of the sea.

From the definitions in UNCLOS provided above, for an island to be defined as such, it must be able to "sustain human habitation or economic life". This will be examined further on in this chapter with regards to the Spratly Islands, but Rockall also provides a useful example to consider when determining this prerequisite. There have been a number of attempts to stay on Rockall, with the record being 45 days. The key to note here is that while it is clear that people can *survive* on Rockall, it is not the same as *sustain*. The current record holder, Nick Hancock, took all his own food and water with him.[338]

Figure 15: Fiery Cross, 2006

[337] bbc.co.uk, '1955: Britain claims Rockall' (*bbc.co.uk*) <http://news.bbc.co.uk/onthisday/hi/dates/stories/september/21/newsid_4582000/4582327.stm> accessed 11 August 2019.
[338] Nichola Rutherford, 'Rockall: The adventurers who lived on a craggy outcrop' (*BBC News*, 11 June 2019) <https://www.bbc.co.uk/news/uk-scotland-48582267> accessed 11 August 2019.

Figure 16: Fiery Cross, 2018

But what about *artificial* islands or new installations, such as the changes to Fiery Cross as shown above? UNCLOS states the following:

> "1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
>
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
>
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
>
> 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to

customs, fiscal, health, safety and immigration laws and regulations." [339]

The Chinese argument (or at least the public narrative) is that firstly these land features are islands, and secondly, China has historic rights to them. If those arguments were to be accepted, then Beijing would be entitled to build further artificial islands and installations within the Exclusive Economic Zone of each feature.

Article 60 goes on to say:

> "4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.
>
> ….
>
> 8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf." [340]

Herein is the link to control: these provisions allow China to deny and limit access in the relevant zones, in the interests of "safety". It should however, be no more than that. An artificial island does not generate a territorial sea.

Is it possible to define the work conducted by the Chinese as anything else? There are examples of harbour installations visible in Figure 16, for example. UNCLOS Article 11 states:

> "For the purposes of delimiting the territorial sea, the outermost permanent harbour works which form an integral harbour system are regarded as forming part of the coast. Offshore installations and artificial islands are not considered as permanent harbour works."[341]

[339] UNCLOS, Article 60.
[340] Ibid.
[341] Ibid, Article 11.

Here, it is worth noting that no distinction is made between installations and artificial islands; instead UNCLOS treats both equally as distinct structures from permanent harbour works.

Therefore, the Chinese argument *could* be that their outermost permanent harbour works do count as the start of the territorial sea. However, this could be rebuffed: while there are doubtless "permanent" harbour works in place, the Chinese would only be able to argue this in the locations that were already deemed to be islands. As will be seen from the *South China Sea Arbitration*, this is not always the case.

Section III: *The South China Sea Arbitration*

The case brought by the Philippines had fifteen separate submissions, some of which have been addressed elsewhere in this dissertation.[342] For the purposes of this chapter, the key submissions are 3, 4, 5, 6 and 7, which address the overarching questions of: how to decide whether a feature is a low tide elevation or a high tide elevation; and whether certain high tide elevations within the Spratly Island area are "rocks" or "islands" under UNCLOS.[343]

The second question is of considerable importance in the context of grey zone operations, as the answer would confirm exactly what maritime zones were generated from each of the land features. This in turn clearly has implications on control over the sea, and thus dominance in the region. Just as a starting point, the case highlights China's ambition: this was not a dispute over competing claims between neighbouring States with overlapping maritime zones. China and the Philippines are at opposite ends of the South China Sea, and of all the disputed features mentioned, the closest one to the China mainland is the Scarborough Shoal, which is still over 400 nautical miles away.[344]

[342] See Chapter Two.
[343] *The South China Sea Arbitration*, para 112.
[344] Ibid para 284.

The Tribunal was clear that it would not address the issue of which State owned what features. In its Award on jurisdiction, the following clarification was provided:

> "This is not a dispute concerning sovereignty over the features, notwithstanding any possible question concerning whether low-tide elevations may be subjected to a claim of territorial sovereignty. Nor is this a dispute concerning sea boundary delimitation: the status of a feature as a "low-tide elevation", "island", or a "rock" relates to the entitlement to maritime zones generated by that feature, not to the delimitation of such entitlements in the event that they overlap."[345]

The Tribunal did, however, consider it had the requisite jurisdiction to determine possible ownerships rights in the past, in other words, China's claim of historic rights.[346]

What are "historic rights"?

As has been briefly alluded to in Chapter One, the appearance of the Nine-Dash Line on the international stage, was quite simply, just that: an appearance. There has been no provision by China of any other charts or indeed legal documentation, to support either the existence of the Nine-Dash Line, or even the precise co-ordinates of each "dash" that appeared on the respective charts, purporting to show areas of water over which China claims sovereignty.[347] "While it is beyond doubt that the recurring references to "historic rights" or "historical rights" are aimed at emphasizing China's long-standing claim to the area as the determining factor in establishing its sovereignty, the meaning and legal relevance that China attributes to such language remain obscure."[348] Consequently, "the relation between the map and historic rights is unclear": in other words, they do not conclusively provide evidence of title in international law.[349]

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[345] *The Republic of Philippines v The People's Republic of China (Award on Jurisdiction and Admissibility)*, para 403.
[346] *The South China Sea Arbitration,* para 225.
[347] See fn 38 and Figures 3 and 4.
[348] Dupuy and Dupuy, p131.
[349] Ibid, p132.

However, as shown above, the Law on the Exclusive Economic Zone and Continental Shelf 1998 provides that "the provisions of this Act shall not affect the historical rights of the People's Republic of China"; arguably enshrining the "historic" claim of the Nine-Dash Line into domestic law, albeit somewhat after the event.[350] This is significant, because it adds to the legitimacy of China's argument to a domestic audience. Indeed, the "historic" basis of China's claims in the South China Sea is supported in academic articles written by Chinese legal scholars, with arguments such as: "[t]he islands in the South China Sea have belonged to China since ancient times."[351]

Several phrases have been used to cover the topic of historic rights, including "historic title" and "historic waters" and finally, "historic bays". This was addressed in part in the ICJ ruling in the *Continental Shelf (Tunisia/Libya)* case:

> "It seems clear that the matter continues to be governed by general international law which does not provide for a single "regime" for "historic waters" or "historic bays". It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal regimes in customary international law. The first regime is based on acquisition and occupation, while the second is based on the existence of rights "ipso facto and ab initio".[352]

One can see how the reasoning regarding acquisition and occupation would appeal to China, as this is precisely what has occurred with the Spratly Islands.

There are only two provisions in UNCLOS which refer to "historic" claims. Article 10provides that: "The foregoing provisions do not apply to so called "historic" bays…."[353] Article 15, regarding the delimitation of territorial sea between States with opposite or adjacent coasts, states: "…The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

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[350] People's Republic of China Law on the Exclusive Economic Zone and Continental Shelf 1998 Article 14. See fn 168.
[351] Li and Jie, p3.
[352] *Tunisia v Libya (Continental Shelf)* ICJ, 24 February 1982, para 100.
[353] UNCLOS, Article 10(6).

The Tribunal addressed the issue as part of their determination, and presented the following definitions:

Historic rights: "general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances...may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty."[354]

Historic title: in contrast to the above, this phrase "is used specifically to refer to historic sovereignty to land or maritime areas."[355]

Historic waters: "simply a term for historic title over maritime areas, typically exercised either as a claim to internal waters or as a claim to the territorial sea", noting that the *Continental Shelf (Tunisia/Libya)* does not provide a particular regime for each of the concrete, recognised cases of 'historic waters' or 'historic bays'.[356]

Historic bay: a bay in which a State claims historic waters.[357]

Crucially, the Tribunal noted that while China's terminology has not always been consistent, it was considered that China's claims were being made with reference to historic *rights* (and therefore short of historic title), and as such the Tribunal had the jurisdiction to go onto make a determination on those claims. Any claims to historic *title* were exempt from the jurisdiction of the Tribunal.[358] Further, the rights considered were related to the maritime environment only. It was also noted that "nothing in the Convention expressly provides for or permits a State to maintain historic rights over the living and non-living resources of the continental shelf, the high seas, or the Area. The question for the Tribunal was therefore whether the Convention nevertheless intended the continued operation of such historic rights, such that China's claims should not be considered incompatible with the Convention."[359] It was held that "the

[354] *The South China Sea Arbitration* para 225.
[355] Ibid, para 225.
[356] Ibid, para 225.
[357] Ibid, para 225.
[358] Ibid, para 229 and UNCLOS Article 298(1)(a)(i).
[359] Ibid, para 239.

Convention defines the scope of maritime entitlements in the South China Sea, which may not extend beyond the limits imposed therein".[360] This means that "China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to…the 'nine-dash line' are contrary to the Convention and without lawful effect" if they extend beyond the territorial sea, exclusive economic zone, and continental shelf to which it is entitled by UNCLOS.[361]

There was a slight indication of a concession towards the Chinese argument: the Tribunal appeared to recognise that prior to the ratification of UNCLOS, China did have historic rights in the maritime environment: "China's ratification of the Convention in June 1996 did not extinguish historic rights in the waters of the South China Sea. Rather, China relinquished the freedom of the high seas that it had previously utilised with respect to the living and non-living resources…..At the same time, China gained a greater degree of control over the maritime zones adjacent to and projecting from its coasts and islands."[362] The Tribunal was however keen to stress that no determination was made on "China's historic claim to the islands", nor that the decision that the rights to resources was not compatible with the Convention limited China's ability to claim maritime zones in accordance with the Convention.[363] Despite these concessions, the response from the Chinese legal community was almost vitriolic, with one commentator referring to the decision as "absurd", and describing the Tribunal as using "deliberate ignorance and malicious distortion" to misrepresent China's position.[364]

The difference between a rock and an island

For the purpose of identifying the nature of the features in the South China Sea, the Tribunal relied upon a combination of satellite imagery, direct surveys that had been carried out, by navies or otherwise, in the area, and charts. They chose an average tidal height to maintain uniformity across the features.[365] In determining the status of

[360] Ibid, para 278.
[361] Ibid, para 279.
[362] Ibid, para 271.
[363] Ibid, para 272.
[364] Kuen-Chen Fu, 'Misattribution of China's Historic Rights to the South China Sea by the 2016 South China Sea Arbitration (Part 1)' (2019) 3 China Oceans Law Review 14, p16.
[365] *The South China Sea Arbitration*, paras 310-318.

the features and their respective entitlements, analysis was based on the natural status of the features *before* any man-made enhancements were made: "[a]s a matter of law, human modification cannot change the sea bed into a low tide elevation, or a low tide elevation into an island. A low tide elevation will remain a low tide elevation under the Convention, regardless of the scale of the island or installation built atop it."[366] Throughout the case, the Philippines provided submissions on its position regarding each feature, and also satellite imagery.[367] Owing to China's refusal to participate in the proceedings, a detailed submission for each land feature was not provided to support Beijing's views. Instead, the Tribunal relied upon publicly available material such as government statements and Chinese navigation manuals and charts, to ensure China's view was as accurately reflected as possible.[368]

Noting that the difference between a rock and an island is that a rock "cannot sustain human habitation", the judgment was also crucial in providing a more detailed definition. The Tribunal held that "cannot sustain" should be read to mean "cannot, *without artificial addition*, sustain".[369] The criterion of human habitation was not considered to be met by the temporary inhabitation of the Spratly Islands by fishermen, even for extended periods. Rather human habitation was to be the non-transient inhabitation of a feature by a stable community of people for whom the feature constitutes a home and on which they can remain.[370] Importantly when considering this case in the context of grey zone operations, it was held that military presence also did not count:

> "Military or other governmental personnel are deployed to the Spratly Islands in an effort to support the various claims to sovereignty that have been advanced. Even where the current human presence in the Spratly Islands includes civilians, as is the case on at least Thitu and (very recently) Itu Aba, the Tribunal considers that their presence there is

[366] Ibid para 305.
[367] Ibid, para 291 et seq.
[368] Ibid, para 298 et seq.
[369] Ibid, para 510.
[370] Ibid, para 619.

> motivated by official considerations and would not have occurred, but for the disputed claims to sovereignty over these features..."[371]

The Tribunal held that five of the eleven features examined in the case were in fact low tide elevations, and therefore had no maritime entitlement.[372] The remaining six features were assessed as high tide elevations (and so the equivalent of rocks) and therefore warranted 12 nautical mile territorial sea entitlements, but not, as China would wish, as islands with a 200 nautical mile EEZ. A number of key conclusions can be drawn from these findings.

Firstly, despite China's insistence on the word "island" in domestic legislation and diplomatic correspondence, the Chinese navigational manuals and charts used by the Tribunal told a different story. Indeed, none of the publicly available, Chinese sponsored evidence that the Tribunal examined supported the claims China had made regarding the Spratly Islands; if anything, they contradicted them.[373] Secondly, in the case of Gaven Reef (North), China appears to have gained a larger maritime entitlement than claimed. Having declared through navigational charts that it was a low tide elevation (a description that the Philippines agreed with), the Tribunal found it was actually a high tide elevation, or rock. It therefore went from having no entitlement to a maritime zone, to being entitled to a territorial sea and contiguous zone. 24 nautical miles may not seem as much as 200, but it is still significant area of water.[374]

Thirdly, Itu Aba stands out, as of all the high tide features, and indeed any of the Spratly Island features referred to in the Philippine submissions, it is the only one where China made a formal, and unambiguous statement as to their views of its status. As part of its correspondence with the Tribunal, China stated:

> "China has indisputable sovereignty over the Nansha Islands and its adjacent waters, including Taiping Dao [Itu Aba]..... Over the history, Chinese fishermen have resided on Taiping Dao [Itu Aba] for years, working and living there, carrying out fishing activities, digging wells for

[371] Ibid, para 620.
[372] Ibid, para 474 and Appendix A.
[373] Ibid, paras 299-301, and for particular examples of where Chinese navigation manuals have contradicted the public narrative regarding "islands" in the South China Sea, see paras 333, 339, 377.
[374] *The South China Sea Arbitration*, para 566.

> fresh water, cultivating land and farming, building huts and temples, and raising livestock. … The working and living practice of Chinese people on Taiping Dao fully proves that Taiping Dao is an "island" which is completely capable of sustaining human habitation or economic life of its own."[375]

China's desire to be so explicit in this one case can probably be attributed to two reasons. Firstly, Itu Aba is currently under the control of Taiwan: China may have felt a need to pass a message to Taiwan as well as the Philippines. Secondly, the specific location of Itu Aba is important. Had Itu Aba been ruled as an island generating an EEZ of 200 nautical miles, then the area created would have covered many of the other contested features within the Spratly Islands, and also a large section encompassed by the Nine-Dash Line. "By ruling that Itu Aba…is not an island, the Tribunal eliminated that possibility and destroyed China's ability to justify its expansive claims…"[376]

Section IV: Artificial islands and grey zone operations

China's island building activities in the South China Sea are clear examples of grey zone activity. Taking the CSIS definition from the introduction to this dissertation:

> "An effort or series of efforts intended to advance one's security objectives at the expense of a rival using means beyond those associated with routine statecraft and below means associated with direct military conflict between rivals. In engaging in a gray zone approach, an actor seeks to avoid crossing a threshold that results in open war." [377]

The advantages to this expansion are clear: China can control vast swathes of water, both in terms of resource allocation, namely access to fishing rights and oil exploration, but also in asserting military dominance. The nature of the construction work is telling: many of the installations are military in nature, to the extent that in "completing the construction of runways on Fiery Cross, Subi and Mischief Reefs and deploying

[375] Chunying, see fn 278
[376] Mira Rapp-Hooper, 'Parting the South China Sea: How to Uphold the Rule of Law' (2016) 95 Foreign Affairs, p79.
[377] Hicks and others, see fn 8.

advanced surveillance or early warning radar facilities on Chinese-occupied land features, China has greatly improved its maritime domain awareness and achieved the capability to operate over nearly the entire South China Sea."[378]

A useful case study at this point is the aptly named Mischief Reef. China's island building activity has been described as the "clearest effort to undermine international law."[379] It is Mischief Reef that is the most blatant example of this, both because of its location and the construction work completed there. From the photos below, it is clear that reef has been turned into a harbour and airstrip. As such, it was the topic of a submission of its own (submission 12).

Figure 17: Mischief Reef, 24 January 2012.

[378] Erickson and Martinson (eds), p201.
[379] Kathleen Hicks, Joseph Federici and Connor Akiyama, *China in the Grey Zone* (European Centre of Excellence for Countering Hybrid Threats, 2019), p3.

Figure 18: Mischief Reef, 31 March 2017.[380]

The Tribunal determined that Mischief Reef is a low tide elevation, with no entitlement to a maritime zone.[381] That legal determination, however, belies its importance as a land feature. The reef is located within the Philippines' EEZ, also confirmed by the Tribunal, and yet is occupied by China.[382] Regardless of the ruling, China has maintained control of Mischief Reef, and without resorting to overt military activity, or the use of force. Comments in the ruling are instructive here, notably the concluding remarks as to the different findings made by the Tribunal.

> "4) FINDS that China's land reclamation and/or construction of artificial islands, installations, and structures at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef **do not constitute "military activities",** within the meaning of Article 298(1)(b) of the Convention…"[383]

Of note, in coming to the determination that the activities on Mischief Reef were not

[380] Both images retrieved from https://amti.csis.org/mischief-reef/ Accessed 25 March 2019.
[381] *The South China Sea Arbitration,* para 1025.
[382] Ibid.
[383] Ibid, para 494 (emphasis added).

military, the Tribunal accepted "China's repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the dramatic alterations on Mischief Reef".[384] This may be so, but the reality at sea is that it is also no longer a reef, but rather a fully functioning base, which *could* be used for military basing in the future. China has therefore advanced its own security objectives by establishing a long-range outpost, and owing to its location, this is clearly at the expense of the Philippines.

This determination did mean that because it was not considered that China's activities were military in nature, it was therefore found that the Tribunal had jurisdiction: arguably not what China would have wished. Indeed, if anything, China is being held to its word regarding the "civilian" use of Mischief Reef. However, perhaps this was the better option for China. To have used military force to dominate and control the islands, rocks and low-tide elevations would have potentially led to a complaint to the UN by the Philippines (and others) under the auspices of the UN Charter. Instead, China has had to deal with the embarrassment of being told by the Tribunal that the "islands" are not that, but no more. Yet the overall strategic gain, more usually gained through military means, is very real. China has maintained dominance in a stretch of water hundreds of miles from the mainland, a dominance that is bolstered by access to basing and resources on Mischief Reef.

Looking at China's island building in the round, the ruling in the *South China Sea Arbitration* does not provide such a clear-cut defeat as a first look would infer, for two reasons. Firstly, China has never at any point tried to claim that as a result of building the artificial islands, they then intend to claim larger maritime zones. It is difficult to establish the precise co-ordinates of what is claimed as these have not been announced. However, there is no suggestion that as a result of the artificial installations Beijing considers the baselines of the land features to have moved further out to sea. This I propose, is different to claiming that the features are all islands. As can be seen with the statement made about Itu Aba, the Chinese government relied on the evidence relating to Itu Aba's natural state, and therefore its suitability to sustain human habitation and have an economic life of its own, and **not** the benefits of any enhanced features. Nevertheless, the Tribunal clearly felt the need to head off any

[384] Ibid, para 1028.

potential argument regarding the maritime zones (or not) related to artificial islands. It was articulated that the purpose of Article 121(3) (which provides the limitations on maritime claims that can be derived from rocks) is to dissuade States from taking action to extend their maritime zones. It prevents "excessive and unfair claims" which might "compel their citizens to live on features that would be uninhabitable without outside support", in order to stake a claim.[385] So, while the Tribunal has made it explicitly clear that artificial installations will not be taken into account when considering the maritime zone entitlement of a land feature, that does not counter any of the narrative from China.

Secondly, the construction of artificial islands is not contrary to international law: UNCLOS provides for their existence. Further, entirely in accord with UNCLOS, China's domestic law supports the UNCLOS provisions regarding the building of artificial islands. Article 8 of the Law on the Exclusive Economic Zone 1998 states:

> "The People's Republic of China shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures in its exclusive economic zone and on its continental shelf. The People's Republic of China shall have exclusive jurisdiction over the artificial islands, installations and structures in its exclusive economic zone and on its continental shelf, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations…."[386]

It therefore all comes back to a question of sovereignty, and historic title. Until such a matter is determined, China considers itself as the owner of the Spratly Islands, and from there, claims the surrounding maritime zones.. The areas of water to be claimed are themselves reduced from the vast expanse within the Nine-Dash Line, thanks to the Tribunal's findings (should China choose to adhere to the judgment), but they are still of a significant size.

[385] *The South China Sea Arbitration* paras 509, 550 and 624.
[386] See fn 168.

The role of lawfare

The influence of lawfare or *falu zhan* can be seen throughout the issues surrounding the land features in the South China Sea. There are two distinct examples: non-participation in the *South China Sea Arbitration* on the international scene, and then from a domestic perspective, use of national law to support the overriding narrative.

China used non-participation in the case brought by the Philippines as a means to undermine the legitimacy of the proceedings and decision: "Throughout the proceedings, the Chinese Embassy has…reiterated that it will "neither accept nor participate in the arbitration unilaterally initiated by the Philippines.""[387] However, China did appear to try and to get the best of both worlds by issuing a position paper to the public. As has been shown, this paper was then considered by the Tribunal. China therefore managed to both not participate *and* ensure that its arguments were put across in the public domain. Non-participation arguably made it easier to ignore any subsequent decision given by the Tribunal. UNCLOS Art 296 states that any decision made by the court *having jurisdiction* shall be complied with by all parties to the dispute. China, in making clear that it does not accept the jurisdiction of the Arbitral Tribunal from the start, has also declared it will not accept any consequent decision. This argument is stronger when considered in the context of determining the status of the Spratly Islands, and more importantly, who owns them. The Tribunal acknowledged that it did not have the jurisdiction to determine sovereignty. However, the Beijing approach is less credible in the other matters considered by the Tribunal, such as the behaviour of the PLA(N) and militia, or indeed the environmental impact of building the artificial islands.

In fairness to China, this is not the first time a State has refused to participate in the UNCLOS dispute resolution process. In the *Arctic Sunrise* case, Russia rejected an arbitration brought against it by the Netherlands.[388] The Russians had arrested the Dutch-flag Greenpeace boat and crew for "hooliganism and piracy" in September 2013. Russia maintained the position that the Tribunal lacked jurisdiction and refused

[387] Ibid, para 31.
[388] *Kingdom of the Netherlands v Russian Federation (The "Arctic Sunrise" Case)* ITLOS, 22 November 2013.

to respect the decision. However, in contrast to China with the Philippines, Russia nevertheless released the crew and ship, as the award had required, citing Russian domestic law.[389] Scale is important here: to release a ship and its crew has arguably far less national consequences than to relinquish several islands (real or artificial). China has also continually argued for the desire to settle the dispute through negotiation. They have a track record for achieving this: a maritime boundary dispute with Vietnam regarding the Gulf of Tonkin was settled in 2000.[390] This in turn, arguably "de-legitimises the adversary": China's narrative is that the Philippines, in in seeking dispute resolution through proceedings using an arbitral tribunal constituted in accordance with UNCLOS Annex VII, have gone a step too far over an issue which could be resolved through negotiation.

Secondly, domestic law has been used to chime with the international narrative that China wishes to promulgate regarding its claims in the South China Sea. No room for doubt is allowed – the phrase "undisputed" is used consistently. This, in effect, is "legal principle superiority" at its strongest: if the matter is undisputed, how can China be expected to debate it?

Conclusion

China's programme of land reclamation and artificial island building demonstrates a number of aspects of grey zone operations, and the importance of the legal basis behind such actions. Firstly, the building of artificial islands has helped the Chinese achieve dominance in a huge area of ocean. An area so large in fact, that in the case of Mischief Reef, it is encroaching upon the resources of another State. All this has been achieved without a resort to the use of armed force.

Secondly, the building of artificial islands is a lawful activity in itself, provided that the provisions of UNCLOS are met. It is the scale and ambition which make China's activities stand out. It has been suggested that China may have had the plans for

[389] John Vidal, 'Arctic 30: Russia releases Greenpeace ship' (*The Guardian*, 6 June 2014) <https://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship> accessed 9 March 2020.

[390] Isaac Kardon, 'The Other Gulf of Tonkin Incident: China's Forgotten Maritime Compromise.' (*Asia Maritime Transparency Initiative*, 21 October 2015) <https://amti.csis.org/the-other-gulf-of-tonkin-incident-chinas-forgotten-maritime-compromise/> accessed 9 March 2020.

reclamation lying dormant for some time, and it was only once the situation in the South China Sea was deemed to deteriorate, that the plans were put into action.[391] Noting the immediate upscale in activity following the Philippines' initiation of arbitral proceedings, this would certainly seem logical.

Third, as stated in UNCLOS, and made clear by the *South China Sea Arbitration*, the building of an artificial island does not generate an entitlement to larger maritime zonal claims. The installations do clearly help ensure access to resources and basing for logistical support, and therefore control. Crucially though, China has never tried to claim that the edge of an artificial island counts as the baseline from which to enlarge a maritime claim.

Fourth, it follows that this all goes back to historic title, or sovereignty. While the Arbitral Tribunal has determined the legal status, and ensuing entitlements of various outcrops, reefs and rocks within the South China Sea, it has not determined who owns them.

Fifth, the most apparent breach of international law is the activity on Mischief Reef, because of its location within the Philippines' EEZ. In determining that China had relinquished its historic rights to maritime entitlements in the ratification of UNCLOS, the implication must surely be that China has also lost any rights it may have considered to have had in the possession of Mischief Reef. The time to have laid a formal claim would have been at ratification, but none was made. In this case in particular, the definition of grey zone activity has been met. China, through its land reclamation and positioning of personnel, has achieved both a land, and a maritime, grab.

Sixth, China has used lawfare to bolster its claims. This has been through a combination of tactics. In particular, the non-participation of China in the case brought by the Philippines has given Beijing a basis upon which to justify non-compliance with the subsequent ruling. At the same time, by releasing the Chinese argument through various diplomatic statements and Note Verbales, China has ensured its views are

[391] Green and others, *Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence*, p255.

made public, and yet difficult to counter because no representative will engage in an actual discussion. Further, by stating that the entire dispute is centred on sovereignty, China has delayed the argument for another day. The question is: will anyone take China on?

Parallel to the legal debate on the international scene, China has ensured that its domestic legislation supports its own national argument, thus reinforcing the legitimacy of its own claims. Key to this has been the consistency of the argument, such as the continued use of the word "undisputed", and references to the Spratly Islands as a single entity, combined with credible references and repetitions of the key provisions in UNCLOS.

It is important to remember that China is not the only nation who is conducting land reclamation activities in the South China Sea, and consequently their actions are "no more illegal than those of the other claimants".[392] But, the sheer size of the Chinese Armed Forces acting as a "coercive backdrop", as well as the resources available to the Chinese government, are both valuable enablers.[393] There is a palpable lack of willingness of any of the neighbouring States, or their international partners, to use force to try and prevent the island building and land reclamation. Again, this ties into the utility of grey zone operations: China has achieved much, and maintains control of the South China Sea, through a patient strategy which deliberately avoids the use of force.

[392] Ibid, p255.
[393] Erickson and Martinson (eds), p258.

CHAPTER FOUR: POSSIBLE RESPONSES TO CHINA'S GREY ZONE OPERATIONS IN THE SOUTH CHINA SEA

Introduction

The dissertation so far has examined the legal issues and questions that arise out of the grey zone operations conducted by China in the South China Sea. This chapter will now focus on potential responses to those operations. First, I will discuss why the decision in the *South China Sea Arbitration* has not had a noticeable effect: as this is why different responses are now required. I will set out the UK's objectives with regards to the region, from which it will be possible to measure the potential effects of each proposed response. The proposed responses themselves are broken into three broad categories: unilateral on the part of the UK, unilateral on the part of a regional State (e.g. the Philippines) and multilateral. They are not by any means the only options available, but the ones which I consider deal most directly with the issues covered in the preceding chapters. I will show that despite the relatively recent focus on grey zone operations, many of the solutions to counter them have always existed: the difficulty is more the political will to assert them.

Section I: The effect of *The South China Sea Arbitration*[394]

As shown in Chapters Two and Three, the decisions made in this case were overwhelmingly in the Philippines' favour, and yet, the situation at sea has changed little. It has been assessed that of the eleven parts of the ruling which found against China, Beijing is only in compliance with two: allowing Philippine fishermen access to fishing rights at Scarborough Shoal, and the cessation of artificial island building, although arguably this is simply due to the lack of new locations to use.[395]

At the very end of the judgment, the Tribunal addressed a request made by the Philippines that China shall respect the rights and freedoms of the Philippines and

[394] *The South China Sea Arbitration*, see fn 24.
[395] AMTI, 'Failing or Incomplete? Grading the South China Sea Arbitration' (*Asia Maritime Transparency Initiative*, 11 July 2019) <https://amti.csis.org/failing-or-incomplete-grading-the-south-china-sea-arbitration/> accessed 5 May 2020.

comply with its duties under UNCLOS. The response was to consider the matter from the perspective of intent:

> "The root of the disputes presented by the Philippines in this arbitration lies not in any intention on the part of China or the Philippines to infringe on the legal rights of the other, but rather—as has been apparent throughout these proceedings—in fundamentally different understandings of their respective rights under the Convention in the waters of the South China Sea."[396]

The Tribunal went on to consider the duties of the two States, given their status as signatories to UNCLOS. It was held that in light of Article 26 of the VCLT, namely: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith", that in fact, Philippines was asking for a declaration to be made on something China was already expected to do.[397] Instead:

> "The Tribunal considers it beyond dispute that both Parties are obliged to comply with the Convention, including its provisions regarding the resolution of disputes, and to respect the rights and freedoms of other States under the Convention. Neither Party contests this, and the Tribunal is therefore not persuaded that it is necessary or appropriate for it to make any further declaration."[398]

Herein lies both the problem, and ironically, the solution, to grey zone operations in the maritime environment. The very fact that China ratified the treaty should be enough, and therefore also ensure that as a State, it complies with the agreement in all regards. The Tribunal has gone as far as it can in the matter by clarifying the legal points under dispute, and now it expects the parties to implement those findings. The assumption that States will comply with the Convention in good faith is in effect, an appeal to the rule of law, and the Tribunal has very little choice other than to make that appeal.

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[396] *The South China Sea Arbitration*, para 1198.
[397] Ibid, para 1191.
[398] Ibid, para 1201.

China was also fortunate in timing in the political sphere. Duterte become President of the Philippines on 30 June 2016, just days before the judgment was issued. He chose to "set aside" the judgment, in favour of warmer economic ties with China.[399] Domestic opinion is shifting however, arguably as time is allowed for the judgment to sink in: 87% of the population would support further enforcement of the ruling.[400] Indeed, two government officials took the bold step in 2019 of filing a case with the International Criminal Court, stating that China was accountable for "the most massive, near permanent and devastating destruction of the environment in humanity's history" through its island building programme.[401] The case was rapidly dismissed however, as China is not a signatory to the Rome Statute.[402]

Enforcement of the findings in the *South China Sea Arbitration* could perhaps be achieved through international pressure, be that diplomatic, economic. Yet, the international response has been mixed. Since the ruling was issued, eight countries have publicly called for it to be respected, 32 have issued generally positive statements noting the verdict but have stopped short of calling for the parties to abide by it, nine have made vague or neutral statements and five have publicly rejected it.[403] This can be explained both by the politics of the various States and their economic relationship with China: of note, within the five openly rejecting the ruling were Russia and Pakistan, who are key trading partners. Amongst those who supported the ruling are Vietnam and Japan: both countries are also in dispute with China over areas in the South China Sea and East China Sea respectively.[404]

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[399] guardian.com, 'Philippines to 'set aside' South China Sea tribunal ruling to avoid imposing on Beijing' (*The Guardian*, 17 December 2016) <https://www.theguardian.com/world/2016/dec/17/philippines-to-set-aside-south-china-sea-tribunal-ruling-to-avoid-imposing-on-beijing> accessed 23 December 2019.
[400] Sofia Tomacruz, '3 years later, 87% of Filipinos want gov't to assert Hague ruling' (*rappler.com*, 12 July 2019) <https://www.rappler.com/nation/filipinos-want-government-assert-hague-ruling-sws-survey-2019> accessed 23 December 2019.
[401] Raul Dancel, 'Two former Philippine ministers file case in ICC against China's island-building in South China Sea' (*The Straits Times*, 21 March 2019) <https://www.straitstimes.com/asia/se-asia/two-former-philippine-ministers-file-case-in-icc-against-chinas-island-building-in> accessed 17 May 2020.
[402] Luis Liwanag, 'International Court Drops Philippine South China Sea Complaint' (*benarnews.org*, 6 December 2019) <https://www.benarnews.org/english/news/philippine/icc-statement-12062019120652.html> accessed 17 May 2020.
[403] AMTI, 'Arbitration Support Tracker' (*Asia Maritime Transparency Initiative*, 16 June 2016) <https://amti.csis.org/arbitration-support-tracker/> accessed 5 May 2020.
[404] Ibid.

There have been some very small changes in China's approach to the issue since the ruling, although it has to be conceded there is little to no evidence to suggest this is because China wishes to respect the Tribunal's findings. By late 2016, in an apparent gesture of goodwill to the Duterte government, China Coast Guard vessels stationed at Scarborough Shoal began to allow Philippine fishing vessels to operate along the outside of the reef, as part of a "friendly understanding" between the two countries, all though notably both still emphasised their claim to the reef. The inference is that this was a sign of economic accord rather than a concession by China towards the Philippines' "resounding victory".[405] This situation still stands today, albeit amid frequent reports of intimidation of Philippine fishermen by the Chinese law enforcement personnel.[406]

Further, Beijing appears to have moved away from referring to the claim of the Nine-Dash Line, and instead argued its claims in the South China Sea are based on the "Four Sha" theory, or the Four Islands Claim.[407] This refers to the 4 groups of land features in the South China Sea: the Pratas, Paracel and Spratly Islands, and Macclesfield Bank. It is not a new claim. The 1992 Law on the Territorial Sea and Contiguous Zone declared that China's land territory included the "Dongsha island group, Xisha island group, Zhongsha island group, [and] Nansha island group."[408] This view was also reiterated in the White Paper issued by China in response to the Philippines filing submissions with the Arbitral Tribunal.[409]

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[405] globalnation.inquirer.net, 'China, PH in 'friendly' understanding on shoal — Esperon' (*Inquirer.net*, 31 October 2016) <https://globalnation.inquirer.net/148417/china-ph-in-friendly-understanding-on-shoal-esperon> accessed 2 May 2021.

[406] Frances Mangosing, 'China still harassing Filipino fishermen in Scarborough Shoal – US Navy official' (*inquirer.net*, 13 February 2019) <https://newsinfo.inquirer.net/1085307/china-still-harassing-filipino-fishermen-in-scarborough-shoal-us-navy-official> accessed 29 May 2020; AMTI, 'Updated: Imagery suggests Philippine fishermen still not entering Scarborough Shoal' (*Asia Maritime Transparency Initiative*, 27 October 2016) <https://amti.csis.org/china-scarborough-fishing/> accessed 29 May 2020.

[407] Julian Ku and Chris Mirasola, 'The South China Sea and China's "Four Sha" Claim: New Legal Theory, Same Bad Argument' (*Lawfare*, 25 September 2017) <https://www.lawfareblog.com/south-china-sea-and-chinas-four-sha-claim-new-legal-theory-same-bad-argument> accessed 26 May 2020.

[408] People's Republic of China Law on the Territorial Sea and the Contiguous Zone 1992 Article 2.

[409] gov.cn, 'White Paper: China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea' (*www.gov.cn*, 13 July 2016) <http://english.www.gov.cn/state_council/ministries/2016/07/13/content_281475392503075.htm> accessed 26 May 2020.

That said, the practical reality of this different form of language is one of minimal difference. If China were to draw straight baselines around the Spratlys, Pratas Islands and Macclesfield Bank in the same way it has claimed for the Paracels, then the maritime claims being made would still cover vast swathes of ocean, and arguably, not much less than that encompassed by the Nine-Dash Line.[410] The change in language does however represent a shift in tactic. The concept of the Nine-Dash line is not only entirely *sui generis* but has been roundly condemned by the Tribunal in its findings.[411] On the international scene therefore, it has become distinctly unpalatable. In contrast, by shifting focus onto the Four Shas claims, and the baseline argument, Beijing is using terminology synonymous with UNCLOS. Such arguments may have weaknesses in the logic and legal reasoning but may be deemed more acceptable globally as they demonstrate a willingness by Beijing to argue the point using a phraseology with which everyone is comfortable.

Internationally, it would appear the ruling has emboldened some to pursue their own claims. Malaysia has made a claim regarding its entitlement to an extended continental shelf and part of the argument relies on the *South China Sea Arbitration* ruling that the land features in the Spratly Islands do not generate their own EEZ and continental shelf. Indeed, sections of the brief are dated as early as 2017, and so it would appear that not much time was wasted after the ruling.[412] The Malaysian claim suggests that other nations are encouraged to assert their national positions. Vietnam is also looking at options as it takes over chairmanship of ASEAN, with high level officials discussing avenues such as mediation and arbitration.[413]

The list of conclusions at the end of the judgment highlight the complexity of grey zone operations: there is a mix of “military” and “non-military” operations, and the Tribunal has bounded its jurisdiction accordingly.[414] It is therefore not possible for one single

[410] Further examination of the legal issues surrounding straight baselines is in Chapter One.
[411] *The South China Sea Arbitration*, para 278.
[412] Nguyen Hong Thao, ‘Malaysia’s New Game in the South China Sea’ (*thediplomat.com*, 21 December 2019) <https://thediplomat.com/2019/12/malaysias-new-game-in-the-south-china-sea/> accessed 17 May 2020; *The South China Sea Arbitration* para 643-648.
[413] Richard Heydarian, ‘Vietnam’s Legal Warfare Against China: Prospects and Challenges’ (*Asia Maritime Transparency Initiative*, 21 November 2019) <https://amti.csis.org/vietnams-legal-warfare-against-china-prospects-and-challenges/> accessed 23 December 2019.

[414] The South China Sea Arbitration, para 1202.

court to address all the issues, because of the blurring of the lines between military and non-military. However, the few positive effects that have been achieved do demonstrate the authority of the Tribunal ruling, albeit on a very limited scale. The political context plays into this: it has suited China to show willing in some limited areas.

Four years on from the handing down of the decision, and the Philippines has finally made a public statement supporting the findings and appealing to China to abide by them.[415] This demonstrates just how much the political landscape has shifted: Duterte has moved from a role of appeasement to one asking for enforcement. It also neatly highlights the risk and reward of seeking such a decision through the courts: it is expensive, time consuming and even if the finding is in your favour, may need to be ignored for political expediency.

Section II: UK Objectives in the South China Sea

In April 2019, the House of Commons Foreign Affairs Committee (FAC) published a report into the UK policy towards China, and its growing dominance, and ambition, on the international scene.[416] The report is scathing however, in the UK's approach, or indeed, the lack thereof: "The current framework of UK policy towards China reflects an unwillingness to face this reality. The UK's approach risks prioritising economic considerations over other interests, values and national security."[417] The FAC makes a "call for the Government to develop a single, detailed, public document defining the UK's China strategy", to be published by spring 2020.[418] At the time of writing, such a strategy has yet to be published, but in its place, a paper produced by The Policy Institute of King's College London has been published, with some suggestions as to how that strategy could be formulated.[419] In it, Parton proposes that the previous approach on economic relations with China has not achieved the aim of convincing

[415] Renato Cruz De Castro, 'After four years, the Philippines acknowledges the 2016 Arbitral Tribunal Award!' (*Asia Maritime Transparency Initiative* 27 July 2020) <https://amti.csis.org/after-four-years-the-philippines-acknowledges-the-2016-arbitral-tribunal-award/> accessed 18 August 2020.
[416] UK, *China and the Rules-Based International System: Committee's Sixteenth Report* (Foreign Affairs Committee, House of Commons, HM Government, 2019).
[417] Ibid, p3.
[418] Ibid, p3.
[419] Charles Parton, *Towards a UK strategy and policies for relations with China* (The Policy Institute, King's College London, June 2020, 2020).

the Chinese Communist Party (CCP) to alter its agenda, and instead "we have to learn a new formula for dealing with authoritarian success and failure."[420]

Despite the lack of publication of an over-arching strategy for the UK, there are nevertheless two points that are notable from these documents. Firstly, both highlight events in the South China Sea as examples of China's assertiveness, and as such, an area which the UK should try to address. The phrase "grey zone operations" is not used, but there is a general agreement there is a real risk of miscalculation: "although the risk of all out conflict over the South China Sea may be low, the possibility of accidental escalation is real."[421] In the National Security Strategy and Strategic Defence and Security Review of 2015 (SDSR 15), the risk of the UK suffering from some form of "hybrid attack" is noted as being of medium risk and medium likelihood.[422] As well as the political and military considerations of China's assertiveness, there are the more practical ones of commerce. It was estimated in 2016 that nearly 12% of the UK's total goods passed through the South China Sea in trade.[423]

Secondly, the UK's role in upholding the Rules Based International Order (RBIO) is emphasised. The SDSR notes that the UK is "at the heart" of the RBIO, owing to its membership of the UN Security Council, NATO, WTO, IMF and the World Bank.[424] China's stance in the South China Sea, and the apparent disregard of the findings made by the Arbitral Tribunal provide real life examples of how grey zone operations in the maritime environment, which if left unchecked, could lead to a gradual fragmentation of the RBIO. "The CCP is intent on exporting its values, including rule *by* law, as opposed to rule *of* law."[425] China will only uphold international law "as long as it does not cut across China's core interests, which it defines in its own image...the South China Sea is the most salient example of the [CCP's] selective approach."[426]

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[420] Ibid, p6.
[421] UK, China and the Rules-Based International System: Committee's Sixteenth Report (Foreign Affairs Committee, House of Commons, HM Government, 2019), p22.
[422] UK, *National Security Strategy and Strategic Defence and Security Review 2015* (HM Government of United Kingdom, 2015).
[423] https://chinapower.csis.org/much-trade-transits-south-china-sea/ Accessed 21 August 2020.
[424] UK, *National Security Strategy and Strategic Defence and Security Review 2015*.
[425] Parton, p24.
[426] Ibid, p25.

It is therefore very much in the UK's interests to not only maintain access to the critical shipping lanes, but in order to do that, ensure that China adheres to the provisions of UNCLOS. In the words of Admiral Sir Philip Jones GCB ADC DL, Former First Sea Lord: "if you [e.g., the PRC] are going to have a different interpretation of that to the majority of nations then that has to be resisted. Otherwise you could see right around the world nations who will start to make their own interpretations."[427]

Therefore, in the absence of a defined UK strategy, it is possible to identify two objectives that would suit UK interests in the South China Sea:

1. Uphold the Rules Based International Order (RBIO), in particular with reference to UNCLOS and customary international law affecting activities at sea
2. Maintain ready access to the sea lines of communication for the purposes of trade.

Section III: Unilateral Responses for the UK

The following are a list of possible options for the UK to adopt unilaterally. In each case, they will be assessed against the two objectives outlined above.

Countermeasures

The ability for a State to conduct countermeasures is customary international law, and is reflected in the Draft Articles of State Responsibility.[428] A countermeasure involves the "non-compliance by one state with an international obligation owed towards another state, adopted in response to a prior breach of international law by that other state and aimed at inducing it to comply with its obligations of cessation and reparation".[429] As already discussed with regards to the actions of the militia in Chapter Two, States are held responsible for wrongful acts that are attributable to

[427] David Bond, 'Royal Navy chief vows to send ships through South China Sea' (*ft.com*, 22 October 2018) <https://www.ft.com/content/efe13b86-d507-11e8-ab8e-6be0dcf18713> accessed 5 May 2020.
[428] Crawford, Ch 21 para 2.4; Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 22.
[429] Crawford, Ch 21 para 2.4.

them under international law, and specifically where those acts constitute a breach of an international obligation under either customary or treaty law.[430] There are three conditions that must be met for a countermeasure to be viewed as lawful in international law:

1. The countermeasure must be in response to an internationally wrongful act;[431]
2. The countermeasure must be against the State responsible for that internationally wrongful act;[432]
3. The countermeasure shall be taken in such a way as to permit the resumption of the performance of one or some of the international obligations.[433]

This third point drives the type of countermeasure that can be employed. It must be non-forcible, necessary, and proportionate to the breach.[434]

Applying those conditions here: the internationally wrongful act could be the PLA(N)'s response to *HMS Albion* sailing near the Paracel Islands.[435] It has not been announced just how close *Albion* was sailing to the Paracel Islands, so she was either sailing in innocent passage within the 12-nautical mile line, or she was exercising her right to freedom of navigation on the high seas beyond that line. China has declared that it expects all warships to seek permission before sailing within territorial seas contrary to the provision on innocent passage in UNCLOS. China therefore purports to deny the UK the right of innocent passage for warships.[436] Alternatively, China has tried to

[430]Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Articles 1-2.
[431] Ibid, Article 49(1).
[432] Ibid, Article 49(2).
[433] Ibid, Article 49(3).
[434] Ibid Articles 50-51.
[435] See Chapter One and bbc.co.uk, 'British navy's HMS Albion warned over South China Sea 'provocation''.
[436]United Nations Treaty Collection Depositary (*United Nations*), <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019. China made the following declaration on 25 August 2006: "The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state."

restrict the movements of *HMS Albion* while she is sailing on the high seas through the harassment conducted by the PLA(N) frigate: an action that is also in contravention of UNCLOS, as well as potentially COLREGs.[437]

There are several ways of imposing countermeasures, the most common being the suspension of a trade agreement or freezing of assets of key leaders.[438] This has the very definite advantage of being specifically targeted and thus easily turned off or on depending on the level of compliance induced. However, the Commentary cites the case of *US-French Air Services Air Arbitration 1978* as demonstrating that the countermeasures are likely to satisfy the requirements of necessity and proportionality "if they are taken in relation to the same of a closely related obligation."[439] Following this reasoning, there could be an opportunity to conduct countermeasures at sea.

In July 2017, four Chinese warships sailed through the English Channel, on their way to the Baltic. *HMS Richmond* was sent to escort them through.[440] The tasking for the Royal Navy appears to have been simply that: act as an escort, with no attempt to either prevent the Chinese vessels from transit the strait or deter them from coming near UK territorial seas. Nor did the UK protest at the fact that the PLA(N) had not declared their intent to sail in UK waters, because the UK position is that the regime of innocent passage applies to warships.[441] Should the Royal Navy continue to be subjected to harassment when sailing through the South China Sea, then the next time PLA(N) warships approach UK waters, there could be an opportunity to try and physically impede them, as a form of countermeasure. In other words, the UK could temporarily not comply with the regime of allowing innocent passage through its territorial waters. To actually achieve this may also require a temporary suspension of adherence to COLREGs (notably, Rules 6 and 7 regarding safe speed and taking

[437] bbc.co.uk, 'British navy's HMS Albion warned over South China Sea 'provocation''. UNCLOS Article 87 refers to the freedom of navigation on the high seas; for relevant application of COLREGS see Rule 6 (safe speed), Rule 7 (risk of collision), Rule 13 (overtaking).
[438] Crawford, Ch 21 para 2.4.4.
[439] Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 Commentary, p129.
[440] George Allison, 'HMS Richmond escorts Chinese warships through the Channel' (*ukdefencejournal.org.uk*, 19 July 2017) <https://ukdefencejournal.org.uk/hms-richmond-escorts-chinese-warships-channel/> accessed 21 August 2020.
[441] United Nations Treaty Collection Depositary (*United Nations*), <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019. The UK has not made any specific declaration stating it had concerns with the regime of innocent passage.

all measures to avoid a collision).

Assessment: The use of countermeasures in the form of physical action at sea clearly has the potential to be both high risk and more escalatory than imposing economic countermeasures. The use of a UK warship to deny a Chinese warship access to UK territorial waters is just "short of coercion or the use of force to induce compliance".[442] It is not entirely unforeseeable that with at least 2 warships vying for space, there is always a risk of miscalculation and escalation. For safety reasons, such actions would need to occur outside the English Channel, so as not to endanger any other vessels in the shipping lane.

Countermeasures in any form would send a very powerful message to Beijing about the UK's commitment to upholding the RBIO, thus meeting the first objective. It would not necessarily do much to protect the UK's trade routes however, and there is a risk that in response China would try to block such access.

Freedom of Navigation Operations (FONOPs)

A FONOP is an operation usually conducted by a State sponsored organisation such as a Navy, aimed to support the freedom of navigation by "protesting and challenging attempts by coastal States to unlawfully restrict access to the seas."[443] A FONOP contains three key elements: an excessive maritime claim made by a State, as a result of that excessive claim, a legal entitlement for another State has been infringed and finally, naval assets are used to act upon that legal entitlement. FONOPs are therefore a methodology by which a State can make an objection to the excessive claims made by Beijing in relation to the land features in the South China Sea. The US has a formally established Freedom of Navigation Program, which has been running since 1979.[444] The program is described as a method by which to demonstrate "resistance to excessive maritime claims" through a "two-pronged, complementary strategy to support the global mobility of US forces and the unimpeded traffic of lawful

[442] James Kraska, *The Struggle for Law in the South China Sea* (Statement before the Seapower and Projection Forces Sub-committee Hearing on Seapower and Projection Forces in the South China Sea, 21 September 2016, 2016).
[443] USA, *Annual Freedom of Navigation Report Fiscal Year 2017*, page 2.
[444] Ibid, page 2.

commerce."[445] In 2018, the US conducted FONOPs to challenge the claim of straight baselines around the Paracel Islands, the declaration made by China that warships must have prior permission for innocent passage (in the vicinity of both the Paracel and the Spratly Islands), as well as the claim of territorial seas around low-tide elevations in the vicinity of the Spratly Islands.[446] More recently, the UK has conducted FONOPs with two Royal Navy vessels, the actions of *HMS Albion* being the most prominent in the press.[447]

It has been argued that "to dissuade the PRC from seeking to further unilaterally revise the rules-based system, the UK should adopt its own Freedom of Navigation Policy."[448] This suggestion has been elaborated upon to suggest two different types of operation under the umbrella of a FONOP: one which challenges jurisdiction, and one which challenges a territorial claim.[449] In the first instance, a Navy may challenge the excessive jurisdictional powers that have been claimed, the simplest example being the insistence that warships "obtain advance approval from or give prior notification to" China before conducting innocent passage through territorial waters.[450] A warship would simply need to sail within 12 nautical miles of a land feature claimed by China which generates a territorial sea, without seeking permission first, ensuring that at all times it was conducting innocent passage in accordance with the provisions of UNCLOS Article 19.

The second form of FONOP, challenging a stated excessive maritime claim, is arguably more overt in its posture, and thus, at times riskier. An example here would

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[445] Ibid, page 2.
[446] USA, *Annual Freedom of Navigation Report Fiscal Year 2018* (Department of Defense Report to Congress 31 December 2018), page 3
[447] bbc.co.uk, 'British navy's HMS Albion warned over South China Sea 'provocation'' (BBC News, 6 September 2018) <https://www.bbc.co.uk/news/uk-45433153> accessed 20 October 2019
and gov.uk, 'HMS Sutherland to deploy to Asia Pacific, Defence Secretary announces on-board' (gov.uk, 24 November 2017)<https://www.gov.uk/government/news/hms-sutherland-to-deploy-to-asia-pacific-defence-secretary-announces-on-board> accessed 14 March 2020
[448] John Hemmings and James Rogers, *The South China Sea: Why it Matters to "Global Britain"* (Henry Jackson Society, 2019).
[449] John Hemmings, 'Charting Britain's Moves in the South China Sea' (*rusi.org*, 6 February 2019) <https://rusi.org/commentary/charting-britain's-moves-south-china-sea> accessed 25 May 2020.
[450] Reservation lodged with the UN upon ratification of UNCLOS on 25 August 2006, available at United Nations Treaty Collection Depositary (*United Nations*),
<https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019

be to sail within the straight baselines claimed by China around the Paracel Islands, but in a manner that is not consistent with innocent passage, such as pausing briefly to conduct a man overboard drill or launching the helicopter. This kind of FONOP therefore emphasises the right to the freedom of navigation (including in that freedom, the right to launch an aircraft or conduct a military exercise) on the high seas. Although not formally confirmed by the UK Ministry of Defence, this is the most likely form of FONOP that was undertaken by *HMS Albion*. The reactions of the PLA(N) highlight the increased risk of this form of manoeuvre: *Albion* faced the most robust response seen yet by a Royal Navy ship, with a PLA(N) frigate and helicopter tailing her throughout the manoeuvre.[451]

The concept of FONOPs has been criticised as without a clear supporting narrative, they could be seen to actually strengthen the claims being made by Beijing.[452] An example would be if a non-Chinese warship sails within 12 nautical miles of Mischief Reef in the South China Sea, and acts in a manner compliant with the regime of innocent passage.[453] Unless it is made explicitly clear that the claim of a 12 nautical mile territorial sea around Mischief Reef by China is *not* accepted, the simple act of sailing in that water, even without seeking permission, could be read as the government of that warship tacitly accepting that the reef is entitled to a territorial sea and the regime of innocent passage applies. The manoeuvre would therefore affirm the position that a warship has the right sail under the regime of innocent passage without seeking prior permission, and at most only counters China's requirement for a warship to seek permission first. What would *not* be achieved would be the explicit rejection of China's view that Mischief Reef is entitled to a territorial sea in the first place.[454] Indeed, given the Arbitral Tribunal's finding that Mischief Reef was a low tide elevation within the Philippines' EEZ, a warship would be perfectly entitled to sail within 12 nautical miles of the reef, conducting flying operations (i.e. an activity that is not consistent with innocent passage but is consistent with the freedom of navigation on

[451] bbc.co.uk, 'British navy's HMS Albion warned over South China Sea 'provocation''.
[452] For 2 examples in the press, see Mark Valencia, 'Are US FONOPs in the South China Sea Necessary?' (*diplomat.com*, 2017) <https://thediplomat.com/2017/10/are-us-fonops-in-the-south-china-sea-necessary/> accessed 18 January 2018 and Pablo Valerin and others, 'FONOPs: Not the Only Option' (*usni.org*, 1 May 2020) <https://www.usni.org/magazines/proceedings/2020/may/fonops-not-only-option> accessed 18 August 2020.
[453] UNCLOS, Article 19.
[454] A view which is not accepted by the Arbitral Tribunal see *The South China Sea Arbitration*, paras 646-647. See fn 83 for China's stated position in innocent passage.

the high seas).[455] What is necessary therefore, in any FONOP, is to ensure that the purpose of the operation, including the legal principle being challenged, is made clear. The lack of clarity was made painfully obvious by the Foreign Affairs Committee Report into China.[456] Although the Committee was able to refer to activities of both *HMS Sutherland* and *HMS Albion*, it was stated that the precise nature of those operations was not clear: "we are concerned that the Government has not yet constructed a clear strategic narrative for its participation in specific naval operations to uphold freedom of navigation in the South China Sea. The strict, and clearly expressed, purpose of UK operations in the South China Sea should be to uphold international law, rules and norms, in collaboration with allies and like-minded partners."[457] In contrast, the US FONOP conducted by the *USS Dewey* in May 2017 did achieve that clarity. Media reporting highlighted the fact that the ship "conducted a "man overboard" exercise, specifically to show that its passage within 12 nautical miles was not innocent passage".[458] Further, the later US government report on FONOPS confirmed that in the region of the Spratly Islands, operations had been conducted to challenge claims to territorial seas.[459]

The most persuasive criticism of FONOPs is simply that they do not work. The US Navy in particular has been conducting them in the South China Sea for some years: nothing has changed, and there is now a "deadlock".[460] It ultimately becomes a question of who has the most ships and aircraft to send out to the contested area: a competition which in the case of the PLA(N) and the US Navy, could continue for some time owing to the vast amounts of assets available.[461] There is some increased risk here: China may try and portray an increase in FONOPs as an act of aggression. Alternatively, the PLA(N) may escalate the nature of its responses and for example,

[455] UNCLOS, Articles 19, 58 and 87. *The South China Sea Arbitration*, para 647.
[456] UK, *China and the Rules-Based International System: Committee's Sixteenth Report*, p21 in particular para 40.
[457] Ibid, p21.
[458] reuters.com, 'U.S. warship drill meant to defy China's claim over artificial island: officials' (reuters.com, 25 May 2017)<https://www.reuters.com/article/us-usa-southchinasea-navy-idUSKBN18K353> accessed 28 April 2021
[459] United States of America, Annual Freedom of Navigation Report Fiscal Year 2017 (Department of Defense Report to Congress 31 December 2017), p3.
[460] Liu Xiaobo, 'How China Can Resolve the FONOP Deadlock in the South China Sea' (*Asia Maritime Transparency Initiative*, 1 March 2019) <https://amti.csis.org/how-china-can-resolve-fonop-deadlock/> accessed 18 April 2019.
[461] For an assessment of the comparative capabilities of different militaries, see www.globalfirepower.com.

use more robust manoeuvres to try and oust the visiting warships from the Chinese claimed areas. For now, the FONOPS are being described as "routine" by the watching press.[462]

However, such views perhaps miss the point of the FONOPs. It is unrealistic to expect a warship sailing past a reef in the South China Sea to alter the situation on that island, or even convince China to relinquish it. While that one act may not persuade China to change its mind, it could help build alliances with other States, who can then use collective diplomatic efforts to try and persuade China to alter its stance. The aim therefore should be to make a public statement in support of a well-established and internationally recognised legal position. Clearly, the land feature of choice is also key: to conduct a FONOP demonstrating the right to innocent passage around the likes of Mischief Reef, in light of the Tribunal's findings that it does not generate a territorial sea, would be counter-productive.

The aim can be achieved through the use of a clear statement after the operation, rather than an ambiguous reference in international press to a Royal Navy warship having the "right" to sail through these waters.[463] Such a statement would need to include within it: the overall purpose of the FONOP (i.e. uphold international law, in particular the freedom of navigation), identification of the precise legal basis of the operation as defined in UNCLOS, the specific claims being challenged and finally, a reference to the *South China Sea Arbitration* to demonstrate UK support for the findings made. This would lessen the risk of misinterpretation, or indeed any claims from China that the UK is simply sending warships to the region to demonstrate military capability: "We believe that to use the freedom of navigation purely to demonstrate military power, or as a sign of Britain's global presence, would be a mistake."[464] Despite the report from the FAC calling for a more detailed narrative, the Government's response to the report may have missed the point: "We have explained

[462] Ibid.
[463] theaustralian.com, 'Brits to assert right of navigation in claimed sovereign waters off China' (*theaustralian.com.au*, 12 February 2018) <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fforeign-affairs%2Fbrits-to-assert-right-of-navigation-in-claimed-sovereign-waters-off-china%2Fnewsstory%2F1d0f900e894c3c4d98111554f58f826d&memtype=anonymous&mode=premium> accessed 28 May 2020.
[464] UK, *China and the Rules-Based International System: Committee's Sixteenth Report*, p22.

our position in detail to the Chinese Government privately on numerous occasions, including at the annual UK-China Legal and Maritime Affairs Dialogue."[465]

Assessment: Provided a sufficiently detailed narrative was published, an uplift in the number of FONOPs conducted by the Royal Navy would meet both the UK objectives outlined above. The provision of a full reasoning, in conjunction with the operation itself, would demonstrate the UK's resolve to uphold the RBIO. This is turn not only supports the concept of the freedom of navigation, and thus access to trade routes, but also by the mere presence of the Royal Navy warships in the region, reminds China that the UK has a longstanding interest in the area.

Capacity Building with regional navies

The navies of the other States around the South China Sea are overwhelmed by the sheer size of the PLA(N), the Chinese Coast Guard, and of course, the militia. By way of just one example, the PLA(N) has 777 naval assets, to the Philippines' 103.[466] The capacity of the likes of the Philippine Navy can be bolstered however, by support from allies such as the UK and Australia. This can be achieved in a number of ways, such as ship-riding, where personnel from one of the larger navies sails with the Philippine Navy on a mission or training in maritime security operations, through to the sharing of surveillance assets, or at the larger end of the scale, multilateral exercises. All of these options demonstrate posture and presence, and crucially, resolve.

Further, if a regional navy or coast guard could be persuaded or at least aided in the conduct of a FONOP, this would assist in advancing the legal position regarding the freedom of navigation. It has been noted in the US that while there is no actual metric for defining how many FONOPs would satisfy the legal element of state practice, the current number of on average no more than two US FONOPs per year is not likely to be sufficient, noting that China is making daily assertions of sovereignty.[467] The UK

[465] UK, *China and the Rules- Based International System: Government Response to the Committee's Sixteenth Report* (House of Commons, HM Government, 2019) p4.
[466] globalfirepower.com, 'Philippines MIlitary Strength 2020' (*globalfirepower.com*) <https://www.globalfirepower.com/country-military-strength-detail.asp?country_id=philippines> accessed 20 August 2020.
[467] Kraska, p10. Art. 38(1)(b) Statute of the International Court of Justice refers to "international custom, as evidence of a general practice accepted as law". In *Federal Republic of Germany v Denmark*

has conducted even less, with only those of *HMS Sutherland* and *HMS Albion* occurring in the past three years. Bolstering the number of FONOPs with the support of navies *in situ* will not only increase their own operating capacity and thus relieve the burden on the UK, it will strengthen the legal position as well: "state practice by several States or many States reinforces customary international law more powerfully than state practice by a single State."[468]

Assessment: Capacity building has two distinct practical advantages. Firstly, it supports the nascent work in FONOPs that has already been conducted by the Royal Navy. Secondly, while it will be clear to all that the aim is to counter China's stance in the South China Sea, it is not confrontational towards Beijing. In terms of meeting the objectives, the effects would be slower to achieve, but perhaps longer lasting. Assisting other nations to develop their capabilities, including that of FONOPs will uphold the RBIO, with a secondary effect of keeping the trade routes fully accessible.

Section III: Unilateral Responses for Regional States

The proposed objectives for the UK outlined above would not necessarily apply to States in the region. However, it is quite probable that their objectives would be very similar: a desire for China to uphold the RBIO (to ensure any maritime claims are within the bounds of UNCLOS in the first instance) and in the place of access to international trade routes, access to the fishing grounds. Thus, the two objectives for the regional States can be posited as:

1. Uphold the Rules Based International Order (RBIO)
2. Ensure ready access to the natural resources of the South China Sea.

Federal Republic of Germany v Netherlands ICJ 20 February 1969 (*North Sea Continental Shelf*), para 71, the ICJ considered when a treaty rule could pass into customary international law. This would apply here: the treaty rule is the freedom of navigation enshrined in UNCLOS. The Court held that for a rule to pass into customary international law, "State practice, including that of States whose interests are specially affected, should have been extensive and virtually uniform in the sense of provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law of legal obligation is involved."

[468] Kraska, p11.

Take China to the ICJ over the issue of sovereignty

The *South China Sea Arbitration* did not address the issue of sovereignty, a dispute which could arguably resolve the South China Sea issue. As has been mentioned above, there has already been an attempt to take China to the International Criminal Court. The ICJ may be a better alternative, as China is an original signatory of the Statute, and on paper at least, more likely to be willing to participate in any subsequent hearings, compared to a case heard by the Arbitral Tribunal constituted in accordance with Annex VII UNCLOS, a scenario for which China had already lodged declarations to say it would not participate.[469] The Court would therefore have jurisdiction.[470] Proceedings can be initiated in one of four ways. Firstly, there is the option of a notification of a special agreement, where a bilateral document is presented by both parties.[471] Secondly, a unilateral application can be made by an applicant State, in which a respondent State is named, in relation to matters in which treaties and conventions have conferred jurisdiction.[472] Unfortunately, there is no relevant treaty that would apply to the dispute regarding sovereignty in the South China Sea.

Thirdly, Article 36(1)(c) provides for the compulsory jurisdiction in legal disputes. The State parties to the Statute of the Court may "at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court".[473] However, China has not made such a declaration.[474] Finally, provision has been made for an applicant State to make an application, and the respondent State to accept jurisdiction for the purposes of that case alone.[475] Given Beijing's refusal to accept the jurisdiction of the Arbitral Tribunal, it is possible they would not accept the jurisdiction of the ICJ in a further matter regarding the South China Sea.

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[469] United Nations Treaty Collection Depositary (United Nations), <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#EndDec> accessed 2 September 2019.
[470] Statute of the International Court of Justice 1945 Article 36.
[471] Ibid Article 36(1)(a).
[472] Ibid Article 36(1)(b).
[473] Ibid Article 36(2).
[474] icj-cjj.org, 'Declarations recognizing the jurisdiction of the Court as compulsory' (*International Court of Justice*) <https://www.icj-cij.org/en/declarations> accessed 26 May 2020.
[475] Article 38, paragraph 5, Rules of Court (1 July 1978), available at https://www.icj-cij.org/en/rules, accessed 21 May 2021.

Even if Beijing were to accept jurisdiction, there would be likely a further legal impediment to the case proceeding. Article 36 (2) provides that the court's jurisdiction extends to all "legal disputes" that may arise between States party to the Statute having made a declaration under that provision. The existence of a dispute between parties is thus a condition of the court's jurisdiction, and the burden of proving the existence of the dispute falls on the applicant.[476] The ICJ has applied very stringent interpretation to this, as shown in the *Marshall Islands* case. Simply filing the submission for example, is not sufficient. Further, although the case before the Arbitral Tribunal very explicitly did not address the issue of sovereignty, that may not be taken as evidence of a dispute over the matter.[477] This could therefore prove a stumbling block to any aspiring applicant, noting in particular China's continued use of the word "undisputed" in reference to its claims to any of the land features in the South China Sea.[478] Indeed, in my view, it is not unreasonable to consider this as a deliberate use of the term by Beijing, to pre-empt any attempt by another State to invoke the jurisdiction of the ICJ. In other words, it is a small, but potent example of lawfare.

Assessment: This option would provide certainty and some highly sought answers in this dispute, but at some cost. Firstly, if the Philippines were to take this case to the ICJ, it is likely that China would respond against them in some manner in the interim while the case is waiting to be heard, such as influencing trade agreements. As mentioned, Duterte initially pursued a policy of ignoring the findings in the *South China Sea Arbitration*, in the interests of keeping good trade relations with Beijing. Secondly, there is always the risk that the ICJ finds in China's favour and declares the land features of the South China Sea do belong to them. While therefore a determination on sovereignty would be a strong message towards upholding the RBIO, it would require significant political will for the case to be submitted at all. Further, going by China's reaction to the *South China Sea Arbitration*, there is no guarantee that if the finding were in favour of the Philippines, that China would adhere to it.

[476] *Nicaragua v Honduras (Border and Transborder Armed Actions)* ICJ 20 December 1988.
[477] *Marshall Islands v United Kingdom (Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament)* ICJ 5 October 2016 para 53.
[478] Chunying, see fn 278.

Prosecute the Chinese militia under domestic law

The scenario referred to in Chapter Two and discussed at length by the Arbitral Tribunal involved the presence of Chinese fishermen in the Scarborough Shoal. The chapter considered the legal implications of state responsibility, and whether Beijing could be held to account. Such an action is likely to take a huge amount of political will if nothing else. There could be further legal recourse, however, if a different view was taken and the fishermen were considered as individuals, and not organs of the state. Their very presence in Scarborough Shoal and around the Spratly Islands raises a number of questions, namely: do they have the right to be there at all? Do they have permission to fish? Is there a legal basis for prosecuting them if they should not be there?

The Tribunal found that Mischief Reef and Second Thomas Shoal were both within the EEZ of the Philippines.[479] This means that the Philippines has sovereign rights over the natural resources.[480] In order to prosecute any illegal fishing activity within those areas, there would need to be a domestic legal basis. This is provided in the Act Providing for The Development, Management and Conservation of The Fisheries and Aquatic Resources, Integrating All Laws Pertinent Thereto, And for Other Purposes, otherwise known as The Philippine Fisheries Code of 1998.[481]

The Code makes clear that it extends Philippine jurisdiction out to include the EEZ, and any reference to "Philippine waters" includes the EEZ.[482] It then goes on to say that no person is to engage "in any fishery activity in Philippine waters without a license, lease or permit."[483] Notably for the purposes of the Chinese fishing fleet, section 87 states:

> "Poaching in Philippine Waters. It shall be unlawful for any foreign person, corporation or entity to fish or operate any fishing vessel in

[479] *The South China Sea Arbitration*, para 1203B (7).
[480] UNCLOS, Article 56.
[481] The Philippines Fisheries Code 1998, available at https://www.da.gov.ph/wpcontent/uploads/2016/11/fishcode.pdf Accessed 14 September 2019.
[482] Ibid Section 4.
[483] Ibid Section 86.

> Philippine waters. The entry of any foreign fishing vessel in Philippine waters shall constitute a prima facie evidence that the vessel is engaged in fishing in Philippine waters."[484]

Under amendments made to the legislation in 2014 (predominantly based on enforcing the ban on Illegal, Unauthorised and Unreported (IUU) fishing), not only was the fine for such an offence increased from a maximum of US$100,000 to US$1 million, but provision was made for both an "administrative" finding of culpability, as well as a prosecution in a court of law:

> "Upon a summary finding of administrative liability, any foreign person, corporation or entity in violation of this section shall be punished by an administrative fine of Six hundred thousand US dollars (US$600,000.00) to One million US dollars (US$1,000,000.00) or its equivalent in Philippine currency.
>
> Upon conviction by a court of law, the offender shall be punished with a fine of One million two hundred thousand US dollars (US$1,200,000.00), or its equivalent in Philippine currency, and confiscation of catch, fishing equipment and fishing vessel."[485]

Several government agencies are authorised to act under these provisions, including the Philippine Navy and the Philippine Coast Guard.[486]

The legal basis for the prosecution of illegal fishing therefore does exist in domestic Philippine law. It has not, however, been used in recent years. In May 2014, eleven Chinese fishermen were apprehended by the Philippine authorities near the Spratly Islands. While the precise legislative basis has not been made clear, it is reasonable that it was the one outlined above. Nine of the fishermen were eventually fined 102,000

[484] Ibid, Section 87.
[485] Ibid, Section 87. The 2014 amends to the legislation are available at https://www.lawphil.net/statutes/repacts/ra2015/ra_10654_2015.html. Accessed 21 May 2021.
[486] Ibid Section 124.

US$, each. It is not clear how this was paid, who paid it, or even, if it was ever paid.[487] There was a further group arrest in 2014, however in this instance it occurred much closer to the Philippine coastline. Again, though, the persons arrested were Chinese fishermen operating without licenses in a Philippine controlled maritime zone.[488]

Assessment: While the prosecution of a Chinese fisherman by the Philippine courts would not affect the official government of China *per se,* it would nonetheless be a powerful message, and a useful foil to grey zone operations. Clearly for such cases to happen there needs to be capability within the law enforcement agencies, and political will. It is noticeable that both these cases date back to 2014, in other words, before the Philippine initiated arbitral proceedings, but also, pre-Duterte. This would be a very targeted and niche response and would not have the dramatic effect on the international scene that an ICJ judgment would have. However, it comes with lower risk, and is less confrontational. It is also cheaper, and possibly quicker. It would therefore be a way for the Philippines to demonstrate control over the contested areas of sea.

Section IV: Multilateral Responses

The following responses are considered from the perspective of a collective international effort. In this case, it is harder to establish precise objectives. However, it is reasonable to assume that upholding the RBIO is an objective of the international community. Further, the very existence of organisations like the UN points to an overriding desire to avoid an escalation in hostilities and conflict. Therefore, the two objectives that the following options are assessed against are:

1. Uphold the RBIO.
2. Prevent an armed conflict occurring in the South China Sea.

[487] reuters.com, 'Philippines detains 25 Chinese fishermen for suspected poaching' (*reuters.com*, 17 May 2016) <https://www.reuters.com/article/us-philippines-china/philippines-detains-25-chinese-fishermen-for-suspected-poaching-idUSKCN0Y80VF> accessed 27 May 2020.
[488] Shannon Tiezzi, 'Philippine Court Sentences 12 Chinese Fishermen to Prison' (*thediplomat.com*, 6 August 2014) <https://thediplomat.com/2014/08/philippine-court-sentences-12-chinese-fishermen-to-prison/> accessed 27 May 2020.

Seeking an Advisory Opinion from the ICJ

Although making a case *against* China as a State may not be feasible, that does not rule out the ICJ as an option altogether. A credible alternative would be to seek an Advisory Opinion through the ICJ, on the matter of the sovereignty of the land features in the South China Sea. As the Arbitral Tribunal stated: "There is, indeed, much interesting evidence – from all sides – that could be considered by a tribunal empowered to address the question of sovereignty…."[489] This request would have to be made by a UN organ or one of the listed specialised agencies, the sole criterion to be fulfilled for requesting an advisory opinion is that the request should be a legal question within the scope of the activities of the requesting organ. Although the UN Security Council can request an opinion, this is highly unlikely to happen given China's membership as one of five Permanent Members. The General Assembly by contrast, has been the most prolific of UN organs in seeking the views of the ICJ.[490]

There would be a number of advantages to this course of action. Firstly, because this route cannot be followed by a State, and instead must be requested by a UN organ or specialised agency, it is arguably less confrontational, and if anything, may unite some nations in seeking a consensus on an issue together. The ICJ has so far laid down 27 advisory opinions.[491] They are not legally binding but do carry substantial legal weight and moral authority: "if the Court advises…that a certain obligation exists, the State upon which it is said to rest …will be in a weak position if it seeks to argue that the considered opinion of the Court does not represent a correct view of the law.".[492] Thus, they have the potential to contribute towards the clarification of matters of international law, without those States involved needing to revert to more aggressive means to get an answer.

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[489] *The South China Sea Arbitration*, para 264.

[490] For a listing of all Advisory Opinions sought from the ICJ, see icj-cjj.org, 'Judgments, Advisory Opinions and Orders' (*International Court of Justice*) <https://www.icj-cij.org/en/decisions> accessed 29 May 2020.

[491] Ibid, and Charter of the United Nations 1945 Article 96, and Statute of the International Court of Justice Articles 65-68. Cf Article 59 of the Statute of the International Court of Justice in respect of the procedure for disputes: "The decision of the Court has no binding force except between the parties and in respect of a particular case", with the articles on advisory opinions, including Article 67 which states that advisory opinions shall be delivered in open court, with no reference to any form of binding effect.

[492] Thirlway, *The International Court of Justice,* available in Evans (ed), *International Law* p587.

The opinions themselves also lay down a path for potential future courses of action. Here, should the ICJ find against China in the matter of sovereignty, it could assist the General Assembly to pass resolutions condemning the actions of China in asserting dominance in the South China Sea. Other nations may feel more empowered to take action, perhaps in the economic and diplomatic spheres. Secondly, in previous findings, the ICJ observed that victims could be provided with reparations.[493] Drawing the same analogy, China could be informed in an Advisory Opinion of the need to compensate the Philippines for losses to the Philippine fishing industry.

This area was explored to a certain extent by the Arbitral Tribunal, who found that there were traditional fishing rights connected to Scarborough Shoal. It was emphasized that this was not a decision regarding sovereignty over Scarborough Shoal, but it was found that China had violated its duty to respect the traditional fishing rights of Philippine fishermen by halting access to the Shoal after May 2012. It was also noted however, that the same conclusion could be met with respect to the traditional fishing rights of Chinese fishermen if the Philippines were to prevent fishing by Chinese nationals at Scarborough Shoal.[494] The third and most distinct advantage of seeking an advisory opinion is that every State with an interest in the issue is provided with an opportunity to submit evidence. Should China wish to engage therefore, it would be able to submit its own arguments and evidence regarding sovereignty.[495]

The huge disadvantage to this option is that it is non-binding. It is not the role of the ICJ to settle the dispute, rather it is there to advise on the law behind that dispute. It therefore, again, comes down to a willingness to adhere to the international rules based system. It is not uncommon for the ICJ's Advisory Opinions to be noted, but not followed, as shownin the very recent example of the Advisory Opinion given regarding the Chagos Archipelago, which has been publicly rejected by the UK government.[496]

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[493] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion* ICJ 9 July 2004, para 153: "Israel is accordingly under an obligation to return the land….seized from any natural or legal person for the purposes of the construction of the wall…In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered."

[494] *The South China Sea Arbitration* para 814 et seq.

[495] Statute of the International Court of Justice, Article 66(2) and (4).

[496] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965: Advisory Opinion* ICJ 25 February 2019; and Alan Duncan, 'British Indian Ocean Territory: Statement made on

Indeed, the UK government shows no sign of wishing to relinquish its strategic base in the middle of the Indian Ocean: a position with which China can probably empathise.

This particular case regarding the Chagos Archipelago highlights another possible weakness for this proposed course of action. In the UK Written Statement, it was argued that the giving of an Advisory Opinion would have "the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[497] Clearly, in the case of the Chagos Archipelago Advisory Opinion, the UK's argument was not accepted, and the Court held that in giving an Advisory Opinion, it was not circumventing that principle.[498] It is not unreasonable however, to anticipate that China may raise a similar argument, and particularly if the request for an Advisory Opinion deals directly with the issue of sovereignty, such an argument may be more successful.

Assessment: There is a legitimacy that comes with a State seeking a legal opinion on a matter for which it is not a direct victim. Indeed, it could be construed as a form of lawfare of itself. Taking the Chinese definitions, an Advisory Opinion allows for an organisation (e.g. UN General Assembly) to achieve legal principle superiority (by seeking a formal position on an area of law), whilst at the same time de-legitimising the adversary (whoever that may be – the ICJ could after all, find in favour of China). It is also a method by which international support may be garnered, even if only for that first step of getting a number of States to agree that a formal answer should be sought. In the same way, there is some evidence to show that the findings in the *South China Sea Arbitration* have encouraged other States such as Malaysia to step forward, then perhaps also may an Advisory Opinion on the sovereignty of for example, the Spratly Islands will encourage States to seek resolution through the law

30 April 2019' (*Sir Alan Duncan, Minister of State for Europe and the Americas*, 30 April 2019) <https://members.parliament.uk/member/343/career> accessed 29 May 2020.

[497] Written Statement of the United Kingdom submitted 27 February 2018 in preparation for *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*: Advisory Opinion ICJ 25 February 2019, available at https://www.icj-cij.org/en/case/169/written-proceedings. Accessed 7 June 2021.

[498] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965:* Advisory Opinion ICJ 25 February 2019, paras 86, 89-90. The Court held that the questions put to it by the General Assembly were with regards to decolonisation not sovereignty (para 86), and that "the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute." (para 89)

courts. This in turn would support the RBIO, and in a non-confrontational manner. For individual States who rely on economic ties with China in particular, it poses less risk to any alliances that are in place. It would also be a way of seeking some degree of certainty on the issue, without recourse to armed force.

UN General Assembly Resolutions

Whilst the more attractive option may be a UN Security Council Resolution under Chapter VII, which would be binding upon the Member States, it is not realistic.[499] In order to pass a resolution there needs to be nine affirmative votes from the members, including no vetoes from the permanent five members.[500] Given China's status as a permanent member, this is highly unlikely to happen.

UN General Assembly resolutions on the other hand, while they do not derive the same authority from the UN Charter as a Security Council resolutions, are influential statements of international law, as they require a larger consensus to pass. Every Member State has an equal vote, unlike in the UN Security Council.[501] By way of example, in 1961, the General Assembly passed the resolution on the Peaceful Use of Outer Space, formally reasserted two years later in a General Assembly declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.[502] Within less than two decades, a further four treaties were signed, all starting with adoption by the General Assembly.[503]

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[499] Charter of the United Nations and Statue of the International Court of Justice 1945. Article 25 states that members of the UN "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

[500] Ibid, Article 39 gives the Security Council the authority to "make recommendations, or decide what measures shall be taken" with regards to any threat to the peace, breach of the peace or act of aggression. With regards to the voting procedure, Article 27 (2) states: "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members", and for "all other matters" under Article 27(3), "the affirmative vote of nine members including the concurring votes of the permanent members". See also Sievers and Daws, *The Procedure of the UN Security Council,* p297 with updates on recent voting made available by the authors at www.scprocedure.org. Specifically, with regards to use of the veto under Chapter VII action: Gray, *International Law and the Use of Force*, p 255.

[501] Ibid, Article 18.

[502] UN General Assembly Resolution 2222: Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

[503] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968, Convention on Registration of Objects Launched into Outer Space 1976, Convention in International Liability for Damage Caused by Space Objects 1972, Agreement Governing Activities on the Moon and Other Celestial Bodies 1984.

Articles 11 and 14 of the UN Charter establish that the UN General Assembly should discuss and make recommendations on issues affecting international peace and security.[504] There would still be significant political obstacles to overcome. Any Member State trying to bring the resolution would need to overcome the concerns of fellow Member States regarding their own relationship with China. Previous examples which have had significant impact include resolutions declaring Jerusalem's status as the capital of Israel as "null and void", or a resolution commissioning investigations into alleged war crimes in Syria.[505] Clearly, if a General Assembly resolution were to be passed regarding the South China Sea, it would not have the immediate impact that a UNSCR may have. But, a resolution that for example, calls on China to allow the Philippines, Vietnam and Malaysia full access to the fishing areas until such a time as sovereignty has been determined, would be a "potent option".[506]

Assessment: This option has a higher chance of success than the one above. A General Assembly resolution which supports the findings of the Tribunal in the *South China Sea Arbitration* would be a strong message in support of the RBIO. It is also less escalatory in nature, because of the level of collective support required. China may well still try to ignore such a resolution, but arguably, a declaration of this kind with the backing of the international community behind it would be harder to disregard than the findings of the Tribunal, made in a case in which China refused to even participate.

International recognition that the militia are part of the Chinese Armed Forces

Chapter Two examined the status of the militia used by Beijing in its efforts to maintain control of the South China Sea. There is clear evidence that there is a direct chain of command up to the government of China and so the Articles of State Responsibility

[504] Charter of the United Nations and Statute of the International Court of Justice 1945, Articles 11 and 14.
[505] UN General Assembly Resolution 73/22: Jerusalem; UN General Assembly Resolution 71/48: International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.
[506] Pham Ngoc Minh Trang, 'Should Vietnam bring the South China Sea to the United Nations?' (*Asia Maritime Transparency Initiative*, 24 September 2019) <https://amti.csis.org/should-vietnam-bring-the-south-china-sea-to-the-united-nations/> accessed 27 May 2020.

can be invoked. China acknowledges that the militia are part of state security construct through Article 36 of the Military Service Law of 1984, which calls for the militia "to undertake the duties related to preparations against war, defend the frontiers and maintain public order; and be always ready to join the armed forces to take part in war, resist aggression and defend the motherland."[507]

However, there is still ambiguity and debate on the international scene as to who, and what, they are. They are variously described as maritime militia, a fishing militia,[508] or even a "hidden Navy".[509] The US has endorsed the findings of the Naval War College in its 2018 Pentagon Report to Congress, where it formally states that the Maritime Militia are considered to be part of the Armed Forces of China.[510] With the caveat that any opposing armed force would need to be very clear that an engagement with a militia vessel is indeed just that, not a fishing vessel which has got in the way, this does allow some clarity for both the US government and military in their dealings at sea.

A formal recognition by other nations, particularly those with navies with global reach such as the UK and Australia, would both support the US view, provide clarity to those operating at sea, and also reinforce the message to Beijing that as a government, it will be held accountable for the actions of all its armed forces under international law. The language would need to be precise: "A combatant is a combatant is the message, and the CNO (Chief of Naval Operations) is in the right place to warn China early and often" says Admiral Stavridis.[511] It is unfortunately, not so simple: it has been shown that the members of the militia can be working part time in the execution of their duties.

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[507] Military Service Law of the People's Republic of China 1984, available at http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21916676.htm.

[508] Derek Grossman and Logan Ma, 'A Short History of China's Fishing Militia and What It May Tell Us' (*rand.org*, 6 April 2020) <https://www.rand.org/blog/2020/04/a-short-history-of-chinas-fishing-militia-and-what.html> accessed 29 May 2020.

[509] Gregory Poling, 'China's Hidden Navy' (*foreignpolicy.com*, 25 June 2019) <https://foreignpolicy.com/2019/06/25/chinas-secret-navy-spratlys-southchinasea-chinesenavy-maritimemilitia/> accessed 29 May 2020.

[510] USSecDef, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2018* (Arlington, VA, 2018) P84.

[511] Andrew Erickson, 'U.S. won't treat China's Coastguard or Maritime Militia Differently from Navy' (*andrewerickson.com*, 29 April 2019) <https://www.andrewerickson.com/2019/04/cno-richardson-u-s-wont-treat-chinas-coast-guard-or-maritime-militia-differently-from-navy/> accessed 28 May 2020. Admiral Stavridis is the US Navy officer who coined the phrase: "Little Blue Sailors", see fn201.

Some of them really do fish. The same caveat regarding identification, at the relevant time, therefore applies.

Yet, a statement from other nations, particularly those with global navies such as the UK and Australia that at least acknowledges that the militia are state controlled, and as such considered as an organ of the PRC, would be a step forward. Noting that the dispute in the South China Sea has not escalated into an armed conflict, the practical effects would be limited for those at sea. Other vessels would remain bound by COLREGS and UNCLOS in terms of how they operate, and interact, with the militia. It could induce China to be consider carefully how the militia are tasked. There is however, a clear psychological advantage in place currently: a "fisherman" seen breaching COLREGS, or even laying lines across a lagoon as described in Chapter Two, is far less likely to provoke a robust response from another nation than if a warship was seen acting in that manner. China is therefore able to act in flagrant disregard of the international peacetime rules of the use of the sea. Categorisation of the militia as being state-sponsored members of the armed forces may induce them to act with more caution.

Assessment: This is a relatively low risk option, and simple to enforce. The effects are likely to be small and could only be measured over a significant period of time, but it would nonetheless be a way of asking China to uphold the RBIO. This would not only make it easier for China to be held to account for the militia's actions (such as the incident blocking the Scarborough Shoal) but also hopefully reinforce the message to Beijing that the government may be held accountable on an international scale for the actions of the militia, in the same way they are accountable for the actions of the PLA(N). Should the worse happen, and a conflict break out, there is at least a degree of certainty provided as to who, and what, the militia represent.

Support the Association of South Eastern Asian Nations (ASEAN)-led Code of Conduct for the South China Sea

Since 2017 there have been discussions about a Code of Conduct for the South China Sea, aiming to regulate activities at sea. Discussions and drafting proposals have stalled several times. Nevertheless, as an expression of intent, a Code of Conduct

which reinforced the principles of UNCLOS and supports the freedom of navigation, would be a positive step. Vietnam has the chair of ASEAN for 2020, and like the Philippines, has large competing claims with China over some of the land features in the region, and thus the motivation to drive this process on.

A "first reading of the text" was conducted in July 2019, with China publicly acknowledging this progress. There are three main principles:

1. To establish a rules-based framework containing a set of norms to guide the conduct of parties and promote maritime cooperation in the South China Sea.
2. To promote mutual trust, cooperation and confidence, prevent incidents, manage incidents should they occur, and create a favourable environment for the peaceful settlement of the disputes.
3. To ensure maritime security and safety and freedom of navigation and overflight.[512]

Amongst the principles cited, there includes a commitment to uphold the provisions of UNCLOS, and a statement to say that the Code will not be used to settle sovereignty or territorial disputes.[513] Of particular note, the draft refers to a "rules-based framework", rather than saying it will be legally binding. While this may not be ideal, given China's reaction to the case brought by the Philippines, it is perhaps more likely that Beijing will sign a non-legally binding Code of Conduct than a binding one. It does of course mean that the practical effect is very limited: China is likely to claim that by very virtue of the fact that the agreement is signed shows they are acting in all times in good faith.

Assessment: The ASEAN Code of Conduct, if signed, would be a strong message, but will only be valid for as long as China (and indeed the other parties) adhere to it. Beijing does not seem too keen on upholding the principles of UNCLOS now: it would require a change of mind set if those principles were to be upheld after the Code of

[512] Storey, p4.
[513] Ibid, p4.

Conduct was signed. While therefore international support for the Code of Conduct would uphold the RBIO, and probably avoid diplomatic tensions with China at the same time, the practical effects are likely to be minimal.

Conclusion

The options can be imagined on a sliding scale where most potent equals most unlikely, a UNSCR being the most obvious example. It is therefore necessary to look at more wide-ranging alternatives, in terms of both implementation and effect. No one solution provides the answer, and this is to be expected. The very nature of grey zone operations is that a variety of tools are used: military, political, diplomatic and legal. A variety of responses is required, and yet, the mechanisms for many of those responses are already in place. All of the options above already have a place in the international legal system.

By far the greatest difficulty, and a common theme to all options, is achieving political consensus. The policy followed by President Duterte is an example of just how much politics can override the findings of an international tribunal. Consensus then needs to translate into action: "expressing support for a rules-based international order in the abstract is not sufficient."[514] Support can be expressed through the means of a GA Resolution, a Code of Conduct or even in acknowledging an Advisory Opinion, but that then needs to be reinforced in all spheres: economic, diplomatic, and military. Use of the military may feel counter-productive in trying to avoid an escalation of hostilities, but as FONOPs show, the military has a key role to play.

[514] Aurel Sari, *Hybrid threats and the law: Concepts, trends and implications* (Hybrid Centre of Excellence, 2020), p24.

CONCLUSION

According to China's Military Strategy published in 2015, "[t]he seas and oceans bear on the enduring peace, lasting stability and sustainable development of China. The traditional mentality that land outweighs sea must be abandoned, and great importance has to be attached to managing the seas and oceans and protecting maritime rights and interests."[515] This dissertation has looked at how China is protecting, managing and even increasing those maritime interests in the South China Sea, as viewed through a legal lens. From this research, a number of lessons have been identified which can be seen to contribute towards China's success in the grey zone of operations at sea. Further, an analysis of the legal aspects behind these activities demonstrates that China is actively pursuing lawfare, or *falu zhan* as part of its strategy.

Lesson Identified No 1: Ambiguity can assist

This has been shown by the operation and extensive use of the militia. Their status is mixed: part time fishermen, part time government operatives, and thus there is an element of ambiguity. If conflict broke out, the militia acting in support of the State would most likely be regarded as combatants.[516] In peace time, however, their position is less clear, which naturally makes the opposing forces more cautious and plays into the stated Chinese aim of delegitimising the adversary.[517] No commanding officer of a warship wishes to face allegations of overreacting to a fisherman who gets in the way. The use of the militia also introduces an element of surprise: although the international community is becoming more aware of their activities and what they look like, nevertheless, if a Chinese fishing vessel approaches a warship, or even a fishing vessel from another State, the commanding officer or master is not going to naturally assume that the Chinese fisherman is planning to lay lines across the navigation track, or try and ride the other vessel off course. There are options available in law for holding the militia to account, but none have been pursued in at least the past five years.[518]

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[515] gov.cn, 'China's Military Strategy' (*Ministry of National Defense, People's Republic of China*, 2015) <http://eng.mod.gov.cn/Database/WhitePapers/> accessed 3 February 2019.
[516] Article 43(2) to 1977 Additional Protocol I to the Geneva Conventions.
[517] Kania, p5. See fn 148.
[518] See Chapter Four regarding the prosecution of Chinese fishermen under domestic law by the Philippines.

The incident at Scarborough Shoal examined by the Arbitral Tribunal demonstrates how little, if at all, that happens. Instead the focus is on the very clearly and overtly State-owned Coast Guard and the PLA(N).

Ambiguity can also be seen in China's approach to its declarations regarding the land features in the South China Sea. Firstly, through non-participation in the proceedings for the *South China Sea Arbitration*: without the detailed arguments to counter the submissions made by the Philippines, the Chinese legal position can be extrapolated and theorised from various documents such as Notes Verbales but it is not confirmed. Likewise, there is a consistent reference to the historic rights that Beijing claim, but they are not necessarily explained or substantiated.[519] The lack of substantial argument put forward by China means there is also a lack of any argument to counter. Opponents are therefore forced to try and anticipate arguments, rather than substantively address them.

Lesson Identified No 2: Maintain a consistent argument, and from there will flow a strong narrative.

Here, it is worth remembering that Beijing's audience is domestic as well as international. China did try to achieve its aims through other means, such as bilateral negotiations, however they "went nowhere because China approached them on the condition that the other party accept Chinese sovereignty before proceeding."[520] This determined approach to never yield in the national narrative is key. By consistently referring to the "undisputed" ownership of the South China Sea "islands", China has ensured that both at home and abroad, the national legal position is resolute. In effect, a narrative has been established which "translates the objective from one that involves aggression to one that is portrayed as national self-defence."[521] Even if this position is not universally upheld or agreed with, there is a synergy between the narrative on the

[519] For a very recent example of this see Ted Regencia, 'China's own records debunk 'historic rights' over disputed seas' (*aljazeera.com*, 16 July 2020) <https://www.aljazeera.com/news/2020/07/16/chinas-own-records-debunk-historic-rights-over-disputed-seas/#:~:text=Experts%20say%20official%20Chinese%20documents,dominance%20in%20South%20China%20Sea.&text=On%20Monday%2C%20the%20US%20raised,seas%20were%20%22completely%20unlawful%22> accessed 3 September 2020.
[520] Erickson and Martinson (eds), p31
[521] Ibid, p33.

international scene and the domestic legislation of China. The domestic legislation backs up the international narrative, creating a sense of legitimacy on a national level, and an impression of firm resolve amongst the international community. This clearly resonates, and even if not deliberate, appears to have had an effect as shown by the latest statement by the US on the South China Sea:

> *As Beijing has failed to put forth a lawful, coherent maritime claim in the South China Sea, the United States rejects any PRC claim to waters* ***beyond a 12-nautical mile territorial sea derived from islands*** *it claims in the Spratly Islands (without prejudice to other States' sovereignty claims over such islands).*[522]

None of the land features in the Spratlys were deemed to be islands as per the UNCLOS definition, while a few were held to be rocks (or high tide elevations).[523] If it were accepted that China has sovereignty and those specific features do belong to them, then that means in accordance with the Tribunal's findings, China can claim both a territorial sea and a contiguous zone. The US use of the word "islands", and the acceptance of a 12 nautical mile territorial sea seems to fall right into the trap of supporting the Chinese narrative.

Further, by the simple fact of refusing to acknowledge there is even a dispute in the first place, China is asserting its "legal principle superiority".[524] Again, the argument may not be followed on the international scene, but it is very hard for another State to bring China to the negotiating table if China refuses to accept there is an issue in the first place. The refusal to accept there is an issue, for the domestic audience at least, can also be seen as a way of delegitimising any State that raises the matter: the message is that China does not even consider the question being asked is worth answering.

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[522] Michael Pompeo, U.S. Position on Maritime Claims in the South China Sea (2020) available at <https://la.usembassy.gov/statement-by-secretary-michael-r-pompeo-u-s-position-on-maritime-claims-in-the-south-china-sea/> accessed 20 May 2021 (emphasis added)
[523] UNCLOS, Article 121.
[524] Kania, p5. See fn 148.

Lesson Identified No 3: Be prepared to push the legal envelope.

In May 2012, the Center for Strategic and International Studies (CSIS) convened a conference to open up a dialogue on the challenge being posed to the US by grey zone actors. As part of the discussions, the panellists highlighted "the importance of standing by Western norms and the rule of law when confronting gray zone challengers."[525] The UK position is firmly entrenched in the principle of upholding the RBIO: "…as global Britain, we are reinvesting in our relationships around the world. We are championing the rules-based system, which has served our interests as a global trading nation and is of vital importance as geopolitics becomes more contested."[526] By way of contrast: "China is a force for order—but not liberal order. China wants rules to be enforced— but not rules which encroach on what it sees as its core interests. …. those interests are inextricably linked with the interests and perceived legitimacy of the Communist Party."[527]

Noting that the PLA (N) officers have been advised to not feel "bound" by aspects of international law, there is a different approach to the law than maybe in the likes of the US and UK.[528] The argument regarding the archipelagic baselines for the Paracel Islands as explored in Chapter One is an example of this. There is a willingness amongst the legal community within China to publish articles with a very strong national sentiment, in an effort to push the legal argument in favour of Beijing's aspirations.[529] Of note, even if other States may not agree with the logic of those arguments, the Paracel Islands being a good example, there has yet to be a formal legal challenge to it. The *South China Sea Arbitration* only addressed the Spratly Islands. This then, is the core concept underlying *falu zhan.* The aim is to *use* the law, not necessarily *uphold* it. The progress made may only be incremental (the Tribunal's

[525] John Schaus and others, *What Works: Countering Grey Zone Coercion* (Center for Strategic and International Studies, wwwcsisorg, 2018), p1.
[526] UK, *National Security Capability Review* (https://assetspublishingservicegovuk/government/uploads/system/uploads/attachment_data/file/705347/64391_CO_National-Security-Review_webpdf, 2018).
[527] UK, *China and the Rules-Based International System: Committee's Sixteenth Report*, p52.
[528] See Chapter One and Halper, p50.
[529] e.g. Kuen-Chen Fu, 'Misattribution of China's Historic Rights to the South China Sea by the 2016 South China Sea Arbitration (Part 1)' (2019) 3 China Oceans Law Review 14 and Zhao Qinghai, 'US Maritime Threats to China and Thoughts on China's Countermeasures' (2015) 51 China International Studies 80.

acknowledgment of Chinese traditional fishing rights at Scarborough Shoal for example), and at times it may not seem like progress at all, but China is willing to be patient, and maintain resolve.[530]

The military aspect

In the background to all of this is the undeniable fact that China has access to huge military resources. In referring to a stand-off at Second Thomas Shoal between a detachment of Philippine Armed Forces, the PLA(N) and China Coast Guard, the Tribunal described it as a "quintessentially military situation"[531] and for this reason, found it had no jurisdiction to consider the matter under the list of exceptions in Article 298 (1) (b) UNCLOS. The military presence and actions of the PLA(N) however, is of clear concern, and not just to the coastal States but also those such as the US, Australia, India and the UK.[532] The building of the artificial islands also affects the operational space: they are a logistics enabler for China to assert control. This is not a use of armed force, but it is a use of armed presence, and sends a powerful message. This in turn affects how any of the potential responses would be implemented.

Responses to Grey Zone Operations

There is ample provision in international law to counter the activities of China, even if they are classed as grey zone operations. While therefore the concept of grey zone operations is relatively recent, that does not necessarily drive a requirement for new law. The "muted" reaction to the findings in the *South China Sea Arbitration* in particular on the part of the Philippines as the victors, demonstrates that States will rarely take collective action against another State, particularly if that State has significant economic influence or military capabilities.[533] The fact that China has, with

[530] *The South China Sea Arbitration,* para 805.
[531] Ibid, para 1161.
[532] Dipanjan Chaudhury, 'Chinese aggression in South China Sea & East China Sea face strong pushback ' (*indiatimes.com*, 24 April 2020) <https://economictimes.indiatimes.com/news/defence/chinese-aggression-in-south-china-sea-east-china-sea-face-strong-pushback/articleshow/75344181.cms?from=mdr> accessed 29 May 2020.
[533] Mong Palatino, 'How the Philippines Reacted to the South China Sea Ruling' (*The Diplomat*, 13 July 2016) <https://thediplomat.com/2016/07/how-the-philippines-reacted-to-the-south-china-sea-ruling/> accessed 11 March 20

the exception of the Battle of the Paracels in 1974, avoided the use of force in its strategy makes the argument for pressing the issue even less palatable.

The principal difficulty therefore in countering grey zone operations lies in finding the collective political will to instigate a formal, and meaningful response. On a strategic level, an ICJ advisory opinion on the sovereignty of the land features in the South China Sea would be powerful. There is of course, no guarantee that China would adhere to it (given their reaction to the *South China Sea Arbitration*, it seems highly unlikely), but it would at least move the legal argument forward, which in turn could assist the likes of the Philippines in garnering international support. At the operational level, capacity building with regional States is the most viable option for countering China's activities. Included in this is FONOPS, but it is not just about the freedom of navigation. Capacity building exercises with regional navies could also assist in boosting their capabilities to conduct maritime security initiatives such as boarding operations to prevent illegal fishing, to counter the activities of the militia.

All of these options take time, and patience. So far, China is succeeding because it has also been willing to exercise patience, and restraint, in the use of both its military force at sea, but also in its approach to the law, on both a domestic and international level. While China is not misusing the law as per the Dunlap definition of lawfare, there is an active exploitation of potential gaps in the law.[534] Thus, the strategic objective of achieving control of the South China Sea is bolstered through means of the law rather than simply using traditional military operations. With the knowledge that there will be no significant military challenge to that approach, and in the absence of a readily enforceable legal challenge, China continues to win without fighting in the South China Sea.

[534] Dunlap, see fn 115.

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