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Maritime Incidents in the South China Sea: Measures of Law Enforcement or Use of Force?

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I. INTRODUCTION

Maritime and territorial disputes in the South China Sea are a source of continued tension in the region. The People's Republic of China (PRC) lays claim to historic rights over vast swathes of the South China Sea and asserts sovereign entitlements over various islands, reefs, and other maritime features.¹ For years, Beijing has vigorously advanced its claims in international fora and on the ground, maintaining a persistent presence in contested waters and asserting its control at the expense of neighboring countries.² For their part, neighboring States have advanced competing maritime and territorial claims. On occasion, they have pushed back against China's presence with assertive actions of their own. As a result, the standoff in the South China Sea has been marked by a long succession of maritime incidents.³

In recent times, encounters between Chinese and foreign vessels have mostly remained at a relatively low level of intensity. For example, in 2019, China deployed a geological survey ship and two coast guard escorts into Vietnam's exclusive economic zone (EEZ), prompting a week-long confrontation between Chinese and Vietnamese vessels that involved various threatening maneuvers but did not result in any material damage.⁴ However, every now and then, incidents marked by greater levels of intensity do take place. In 2020, a China Coast Guard vessel rammed and sunk a Vietnamese fishing

1. See Office of the Staff Judge Advocate, U.S. Indo-Pacific Command, *China's Excessive Maritime Claims*, 97 INTERNATIONAL LAW STUDIES 18 (2021); Feng Zhu & Lingqun Li, *China's South China Sea Policies*, in ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA 167 (Keyuan Zou ed., 2021); Jacques deLisle, *Troubled Waters: China's Claims and the South China Sea*, 56 ORBIS 608 (2012). See also M. Taylor Fravel, *China's Strategy in the South China Sea*, 33 CONTEMPORARY SOUTHEAST ASIA 292 (2011).

2. NEHGINPAO KIPGEN, THE POLITICS OF SOUTH CHINA SEA DISPUTES 34–53 (2020). See also Andrew Chubb, *PRC Assertiveness in the South China Sea: Measuring Continuity and Change, 1970–2015*, 45 INTERNATIONAL SECURITY 79 (2021); RICHARD Q. TURCSÁNYI, CHINESE ASSERTIVENESS IN THE SOUTH CHINA SEA: POWER SOURCES, DOMESTIC POLITICS, AND REACTIVE FOREIGN POLICY (2018).

3. Stein Tønnesson, *Four Aspects of the Crisis in the South China Sea*, in THE SOUTH CHINA SEA: FROM A REGIONAL MARITIME DISPUTE TO GEO-STRATEGIC COMPETITION 9, 11–12 (Leszek Buszynski & Do Thanh Hai eds., 2019); TURCSÁNYI, *supra* note 2, at 39–54; BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 61–89 (2014).

4. LYE LIANG FOOK & HA HOANG HOP, THE VANGUARD BANK INCIDENT: DEVELOPMENTS AND WHAT NEXT? (2019).

boat near the Paracel Islands.⁵ In 2021, another China Coast Guard vessel blocked and used water cannons against Philippine vessels at the Second Thomas Shoal.⁶ Similar incidents took place in 2023 and again in 2024.⁷

For China's neighbors and third States, such maritime incidents are a source of two related concerns. The first is that China may achieve its strategic goals in the South China Sea incrementally by adopting salami-slicing tactics; that is, by engaging in a series of small-scale actions that may be inconsequential in themselves but that add up to more substantial gains over time.⁸ For this reason, the PRC's activities in the South China Sea are often described as a prime example of grey zone aggression,⁹ referring to competitive encounters that are more intense than what is considered normal in international relations but which still fall below the level of open hostilities.¹⁰ Evidently, adopting such a strategy enables China to advance its interests aggressively without handing its competitors a *casus belli*. This is of particular significance in relation to the Philippines, given that it is party to a mutual

5. Khanh Vu, *Vietnam Protests Beijing's Sinking of South China Sea Boat*, REUTERS (Apr. 4, 2020), <https://www.reuters.com/article/world/vietnam-protests-beijings-sinking-of-south-china-sea-boat-idUSKBN21M07B/>.

6. Karen Lema, *Philippines Tells China to "Back Off" After South China Sea Standoff*, REUTERS (Nov. 18, 2021), <https://www.reuters.com/world/china/philippines-condemns-chinese-coast-guards-action-south-china-sea-2021-11-18/>.

7. Neil Jerome Morales, *Philippines Condemns China's Actions in South China Sea Against Fishing Vessels*, REUTERS (Dec. 9, 2023), <https://www.reuters.com/world/asia-pacific/philippines-condemns-chinas-actions-south-china-sea-against-fishing-vessels-2023-12-09/>; Neil Jerome Morales, *China Coastguard Uses Water Cannons Against Philippine Ships in South China Sea*, REUTERS (Mar. 23, 2024), <https://www.reuters.com/world/asia-pacific/china-coast-guard-says-it-took-measures-against-philippine-vessels-south-china-2024-03-23/>.

8. For a classic discussion of salami-slicing, see THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 66–69 (1966).

9. See, e.g., BONNY LIN ET AL., *COMPETITION IN THE GRAY ZONE: COUNTERING CHINA'S COERCION AGAINST U.S. ALLIES AND PARTNERS IN THE INDO-PACIFIC* (2022); Michael B. Petersen, *The Chinese Maritime Gray Zone: Definitions, Dangers, and Complications of Rights Protection Operations*, in *CHINA'S MARITIME GRAY ZONE OPERATIONS* 15 (Andrew Sven Erickson & Ryan D. Martinson eds., 2019); MICHAEL GREEN ET AL., *COUNTERING COERCION IN MARITIME ASIA: THE THEORY AND PRACTICE OF GRAY ZONE DETERRENCE* (2017).

10. On the notion of grey zone conflict, see Joseph L. Votel et al., *Unconventional Warfare in the Gray Zone*, 80 *JOINT FORCE QUARTERLY* 101 (2016); Philip Kapusta, *The Gray Zone*, 28 *SPECIAL WARFARE* 18 (2015); MICHAEL J. MAZARR, *MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA OF CONFLICT* (2015). For a critical assessment of applying the notion in the present context, see Alessio Patalano, *When Strategy is 'Hybrid' and not 'Grey': Reviewing Chinese Military and Constabulary Coercion at Sea*, 31 *PACIFIC REVIEW* 811, 814–19 (2018).

defense agreement with the United States.¹¹ Tactics such as salami-slicing are difficult to defend against because individual incidents, when seen in isolation, are not sufficiently serious to justify taking a response robust enough to match the severity of the overall situation,¹² while a party that does adopt more robust action in response to a small-scale incident lays itself open to accusations of overreacting.

The second concern raised by maritime incidents is the risk of escalation.¹³ Even if neither China nor its neighbors seek military confrontation deliberately, they may slide into conflict inadvertently. Escalation may take place gradually over time as individual rounds of actions and counteractions become increasingly more serious. Escalation may also come about suddenly through miscalculation, as a particular incident may lead to unforeseen consequences and spiral out of control. This, in turn, could have wider ramifications, for example, if the mutual defense guarantees of the United States were to be engaged. In parallel, freedom of navigation operations undertaken by third countries to push back on exorbitant Chinese maritime claims constitute another source of escalation risk.¹⁴

Against this background, it is worth asking how the rules of international law governing the use of force, as set out in the United Nations Charter, apply to maritime incidents in the South China Sea. Particularly, how they apply to recent encounters between the PRC and the Philippines. Strategic competitors draw red lines to manage the expectations of their adversaries and their allies, signaling what actions are likely to meet with what kind of counteractions. International law draws its own red lines by recognizing that

11. Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, Aug. 30, 1951, 3 U.S.T. 3947, 177 U.N.T.S. 133.

12. See Van Jackson, *Tactics of Strategic Competition: Gray Zones, Redlines, and Conflicts Before War*, NAVAL WAR COLLEGE REVIEW, Summer 2017, at 39, 45.

13. See, e.g., JOSHUA KURLANTZICK, A CHINA-VIETNAM MILITARY CLASH (2015). Cf. ASEAN Foreign Ministers' Statement on Maintaining and Promoting Stability in the Maritime Sphere in Southeast Asia (Dec. 30, 2023), <https://asean.org/wp-content/uploads/2023/12/Final-Draft-ASEAN-FMs-Statement-on-Maintaining-and-Promoting-Stability-in-the-Maritime-Sphere-in-SEA.pdf> (emphasizing self-restraint, the need for trust and confidence, and the duty to resolve disputes peacefully without resorting to the threat or use of force).

14. James W. Houck & Nicole M. Anderson, *The United States, China, and Freedom of Navigation in the South China Sea*, 13 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 441 (2014). See also LOUK FAESEN ET AL., FROM BLURRED LINES TO RED LINES: HOW COUNTERMEASURES AND NORMS SHAPE HYBRID CONFLICT 102–20 (2020); SAM BATEMAN, FREEDOMS OF NAVIGATION IN THE ASIA-PACIFIC REGION: STRATEGIC, POLITICAL AND LEGAL FACTORS (2020).

States subject to an armed attack have an inherent right of individual and collective self-defense.¹⁵ Maritime incidents that rise to the level of an armed attack thus engage the right to employ counterforce in response. States bent on avoiding hostilities in favor of achieving incremental gains below the threshold of open military confrontation may be expected to calibrate their operations to fall below the level of an armed attack so as to prevent triggering the right of self-defense.¹⁶

However, even less intense uses of force that do not amount to an armed attack have practical and normative consequences. Determining that a State has used force creates certainty. China goes to great lengths to portray its activities in the South China Sea as reactive and defensive, suggesting that it engages in acts of law enforcement, rather than displays of coercive power. Were China to use force in contravention of the United Nations Charter, this would undermine its narrative and strengthen the hand of neighboring States. Even though they would not be entitled to employ counterforce in response unless Chinese actions were to cross the threshold of an armed attack, it would move the dial closer to a situation where the right of self-defense may be engaged, with wider implications.

The purpose of this article is to assess whether recent incidents in the South China Sea engage the rules of international law governing the use of force. Part II provides a brief overview of the maritime and territorial disputes in the South China Sea by way of background. Part III turns to the prohibition of the use of force in international relations, with a particular focus on whether it extends to small-scale incidents and what features distinguish the use of force within the meaning of the United Nations Charter from acts of law enforcement. Part IV applies the rules to recent maritime incidents between China and the Philippines at the Second Thomas Shoal. Part V addresses the implications of the findings, with a particular focus on rewards and risks. Part VI offers some concluding thoughts.

II. TERRITORIAL AND MARITIME DISPUTES IN THE SOUTH CHINA SEA

Situated at the crossroads of major international shipping routes, the South China Sea is a region of major economic and strategic significance.¹⁷ It is an area subject to competing territorial and maritime claims by coastal States,

15. U.N. Charter art. 51.

16. See MAZARR, *supra* note 10, at 65–66.

17. Vivian L. Forbes, *The South China Sea: Geographical Overview*, in ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA 9 (Keyuan Zou ed., 2021).

making it a focal point of geopolitical tensions with implications for both regional and global stability.¹⁸ The purpose of this Part is to provide a brief overview of the South China Sea, Chinese ambitions in these waters, and the tactics the PRC employs to assert its interests.

A. *The South China Sea*

The South China Sea is one of the busiest maritime trade routes in the world, connecting major economies in Asia and beyond.¹⁹ By facilitating the movement of goods and raw materials between these markets, it serves as a vital conduit for global commerce, energy transit, and economic exchange. Approximately one-third of global maritime trade, including oil and natural gas shipments, passes through its waters. The South China Sea is also endowed with abundant natural resources, including fisheries and hydrocarbon reserves. Fisheries are a major source of food and livelihood for millions of people in coastal areas.²⁰ At the same time, the discovery of oil and gas reserves over the latter part of the last century has attracted significant investment and exploration activities.²¹

Due to its location, the South China Sea holds strategic significance.²² As a maritime chokepoint, it serves as a gateway between the Indian and Pacific Oceans, facilitating access to major Asian seaports and waterways. Control over these waters provides States with the ability to project power, secure lines of communication, and assert their control in the Asia-Pacific region. The presence of numerous maritime features, such as islands, reefs, and rocks, contributes to the region's significance, as they enable States to establish footholds and enhance their power projection capabilities over large stretches of open water. Critically, States invested with sovereignty over

18. Andrew Scobell, *The Geography of Conflict: South China Sea and US–China Rivalry*, in *US–CHINA COMPETITION AND THE SOUTH CHINA SEA DISPUTES* 29 (Huiyun Feng & Kai He eds., 2018).

19. Sam Bateman, *Sea Lines of Communication and Safety of Navigation*, in *ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA* 46 (Keyuan Zou ed., 2021).

20. Dustin Kuan-Hsiung Wang, *Fisheries Management in the South China Sea*, in *ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA* 243 (Keyuan Zou ed., 2021).

21. HAYTON, *supra* note 3, at 121–50. See also Yen-Chiang Chang, *Governance of Non-Living Resources in the South China Sea*, in *ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA* 262 (Keyuan Zou ed., 2021).

22. Nguyen Thi Lan Anh, *Origins of the South China Sea Dispute*, in *TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS* 15, 26–28 (Jing Huang & Andrew Billo eds., 2015).

some of these formations are entitled to a range of additional rights, such as entitlements pertaining to territorial waters and to establish an EEZ.²³

The South China Sea has been the subject of maritime and territorial disputes among coastal States for some time. Following the end of the Second World War and the collapse of European colonial empires, Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam have all advanced a series of competing claims.²⁴ Territorial claims center around disputed geographical formations.²⁵ The most contentious of these include the disputes over the Spratly Islands, Paracel Islands, and Scarborough Shoal.

The Spratly Islands consist of a group of more than one hundred submerged reefs, rocks, and islets subject to overlapping territorial claims by Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam. China and Taiwan claim sovereignty over the entire Spratly Islands based on historical records and administrative control, while Brunei, Malaysia, the Philippines, and Vietnam assert their own claims based on historical ties and geographical proximity. The Paracel Islands are a group of islands and reefs located to the northwest of the Spratly Islands, claimed by China, Taiwan, and Vietnam. China controls the islands and claims sovereignty based on historical records. The Scarborough Shoal is claimed by China and the Philippines. China asserts sovereignty over the atoll based on historical records, while the Philippines contests these claims and contends that the Scarborough Shoal falls within its EEZ under the United Nations Convention on the Law of the Sea (UNCLOS).²⁶

Maritime claims in the South China Sea revolve mostly around baselines, maritime jurisdiction, and freedom of navigation rights.²⁷ Some of these claims are closely related to the territorial disputes just mentioned. China asserts the most expansive maritime claims based on the Nine-Dash Line, a

23. TURCSÁNYI, *supra* note 2, at 34.

24. See KIPGEN, *supra* note 2, at 17–71; BRUCE ELLEMAN, CHINA'S NAVAL OPERATIONS IN THE SOUTH CHINA SEA: EVALUATING LEGAL, STRATEGIC AND MILITARY FACTORS 1–126 (2017).

25. Ted L. McDorman, *The Territorial Sovereignty Disputes in the South China Sea*, in ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA 91 (Keyuan Zou ed., 2021). For a geographical overview, see JINMING LI, CHINA'S MARITIME BOUNDARIES IN THE SOUTH CHINA SEA: HISTORICAL AND INTERNATIONAL LAW PERSPECTIVES 3–18 (2020).

26. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

27. Clive Schofield, *Competing Maritime Claims and Enduring Disputes in the South China Sea*, in ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA 104 (Keyuan Zou ed., 2021).

demarcation line drawn by the Republic of China in the late 1940s and subsequently adopted, with some modifications, by the PRC.²⁸ The Nine-Dash Line encompasses approximately 90 percent of the South China Sea, including the Spratly Islands, Paracel Islands, and Scarborough Shoal. Neighboring countries base their maritime claims on UNCLOS, which grants coastal States exclusive rights over natural resources within two hundred nautical miles of their coastlines in the form of an EEZ.

B. Chinese Interests and Ambitions

China's approach to the South China Sea is driven by its strategic interests and aspirations.²⁹ These, in turn, are underpinned by economic imperatives and China's broader geopolitical objectives.³⁰

China's economy relies heavily on maritime trade and energy imports, making secure access to sea lanes and resource-rich areas in the South China Sea vital for its economic growth and energy security. The region's natural resources hold significant economic value for China's resource-hungry economy.³¹ China seeks to exploit these resources to meet its domestic energy needs, reduce dependency on foreign imports, and bolster its energy security. The exploitation of offshore oil and gas reserves in the South China Sea has thus become a focal point of China's energy strategy, with State-owned enterprises undertaking extensive exploration activities in disputed waters.

These economic interests are closely intertwined with China's broader geopolitical objective of "national rejuvenation"³² and its efforts to safeguard its territorial sovereignty and national security. China seeks to challenge the

28. Keyuan Zou & Qiang Ye, *The U-Shaped Line and Its Legal Implications*, in ROUTLEDGE HANDBOOK OF THE SOUTH CHINA SEA 123 (Keyuan Zou ed., 2021).

29. Rex Li, *China's Sea Power Aspirations and Strategic Behaviour in the South China Sea from the Theoretical Perspective of Identity Construction*, in POWER POLITICS IN ASIA'S CONTESTED WATERS: TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA 117 (Enrico Fels & Truong-Minh Vu eds., 2016).

30. Nguyen Huu Quyet, *Chinese Strategy in the South China Sea: A Growing Quest for Vital Economic and Strategic Interests*, 186 WORLD AFFAIRS 687 (2023); Liza Tobin, *Beijing's Strategy to Build China into a Maritime Great Power*, NAVAL WAR COLLEGE REVIEW, Spring 2018, at 17; SIGFRIDO BURGOS CÁCERES, CHINA'S STRATEGIC INTERESTS IN THE SOUTH CHINA SEA: POWER AND RESOURCE (2014).

31. Leszek Buszynski & Iskandar Sazlan, *Maritime Claims and Energy Cooperation in the South China Sea*, 29 CONTEMPORARY SOUTHEAST ASIA 143 (2007).

32. ELIZABETH C. ECONOMY, THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE 2–12 (2018). See also ANDREW SCOBELL ET AL., CHINA'S GRAND STRATEGY: TRENDS, TRAJECTORIES, AND LONG-TERM COMPETITION (2020).

existing maritime order dominated by the United States and establish itself as the preeminent maritime nation in the Asia-Pacific region.³³ Control over the South China Sea enables China to assert its status as a great maritime power by projecting force and securing sea lines of communication. The construction of artificial islands, the installation of military facilities, and the regular deployment of various naval assets are key elements of this strategy. The South China Sea also serves as a buffer zone for China's coastal provinces, providing strategic depth and maritime defenses against potential adversaries, while a persistent Chinese military presence in the region helps to deter competitors.

C. Hybrid Tactics

China employs a diverse set of instruments across multiple domains to advance its interests in the South China Sea.³⁴ In doing so, it takes a “small steps” approach aimed at achieving incremental gains through a combination of coercion and persuasion, while avoiding direct military confrontation with neighboring countries.³⁵

Military and paramilitary activities are a key component of China's efforts to gain control over the South China Sea. The People's Liberation Army Navy (PLA(N)) has greatly expanded its presence in the region in recent years, conducting patrols, exercises, and naval deployments to assert China's sovereignty claims and to demonstrate its capabilities.³⁶ As already noted, China has constructed and militarized artificial islands, equipping them with airstrips, radar installations, missile systems, and naval bases. In addition, the PRC regularly employs maritime law enforcement vessels, in particular coast guard ships and maritime militia units. These engage in patrols, surveillance, and law enforcement activities to assert China's claims over disputed waters.

China utilizes economic statecraft to strengthen its maritime position. China's fishing fleets, oil rigs, and exploration vessels operate in disputed

33. Andrew S. Erickson, *China's Maritime Ambitions*, in *THE ROUTLEDGE HANDBOOK OF ASIAN SECURITY STUDIES* 100 (Sumit Ganguly et al. eds., 2017). See also works cited *supra* note 30.

34. Fravel, *supra* note 1, at 299–310.

35. Marc Lanteigne, *The South China Sea in China's Developing Maritime Strategy*, in *POWER POLITICS IN ASIA'S CONTESTED WATERS: TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA* 97, 97 (Enrico Fels & Truong-Minh Vu eds., 2016).

36. Derek Grossman, *Military Build-up in the South China Sea*, in *THE SOUTH CHINA SEA: FROM A REGIONAL MARITIME DISPUTE TO GEO-STRATEGIC COMPETITION* 182 (Leszek Buszynski & Do Thanh Hai eds., 2019).

waters to assert its economic interests and presence. The construction of artificial islands serves not only military purposes, but also economic objectives, as they provide platforms for such activities. China also cultivates economic dependencies through investments and infrastructure projects among littoral States in the South China Sea and further afield.³⁷ Through such investments and projects, China seeks to gain leverage to advance its maritime agenda, secure access to strategic resources, and expand its influence. At the same time, it seeks to diminish the influence of external powers, above all that of the United States.

China employs diplomatic means to manage perceptions and cultivate partnerships in the South China Sea. It engages in bilateral and multilateral diplomacy with neighboring countries, regional organizations, and major powers to promote cooperation and confidence-building measures. In doing so, Beijing emphasizes dialogue and negotiation, while opposing external intervention and interference.³⁸ China also utilizes economic incentives and investments as diplomatic tools to cultivate relationships and expand its influence, in particular infrastructure projects and the Belt and Road Initiative.

Finally, the PRC employs legal means as part of its broader “legal warfare” efforts.³⁹ At home, China has adopted domestic laws and regulations to stake out its territorial and maritime claims in the South China Sea,⁴⁰ implementing its international commitments into domestic law in a manner that

37. Audrye Wong, *How Not to Win Allies and Influence Geopolitics: China's Self-Defeating Economic Statecraft*, FOREIGN AFFAIRS (Apr. 20, 2021), <https://www.foreignaffairs.com/articles/china/2021-04-20/how-not-win-allies-and-influence-geopolitics>.

38. See, e.g., Wang Yi, Ministry of Foreign Affairs of China, Press Conference at NPC and CPPCC Sessions 2024 (Mar. 7, 2024) (“we will take justified actions to defend our rights in accordance with the law . . . [and] [i]n the face of unwarranted provocation, we will respond with prompt and legitimate countermeasures.”), https://www.fmprc.gov.cn/eng/wjdt_665385/zyjh_665391/202403/t20240307_11255512.html.

39. See Orde F. Kittrie, *Lawfare, China, and the Grey Zone*, in HYBRID THREATS AND GREY ZONE CONFLICT: THE CHALLENGE TO LIBERAL DEMOCRACIES 207 (Mitt Regan & Aurel Sari eds., 2024); Lynn Kuok, *China's Legal Diplomacy*, SURVIVAL, Dec. 4, 2023, at 159; Jill I. Goldenziel, *Law as a Battlefield: The U.S., China, and Global Escalation of Lawfare*, 106 CORNELL LAW REVIEW 1085 (2020); DEAN CHENG, WINNING WITHOUT FIGHTING: CHINESE LEGAL WARFARE (2012).

40. Marta Hermez, *Global Commons and the Law of the Sea: China's Lawfare Strategy in the South China Sea*, 22 INTERNATIONAL COMMUNITY LAW REVIEW 559, 577–82 (2020); Dustin E. Wallace, *An Analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL LAW REVIEW 128, 143–48 (2014).

reflects its preferred interpretations of the applicable international rules, including those of UNCLOS.⁴¹ China has also enacted successive domestic laws to create a legal framework for its maritime agencies to assert control over waters it claims fall under Chinese jurisdiction.⁴² Internationally, China advances arguments based on customary international law to claim historic rights in deviation from UNCLOS.⁴³ When these arguments were rejected in 2016 in the *South China Sea Arbitration* proceedings initiated by the Philippines against China,⁴⁴ the PRC declared the arbitral award to be “null and void” and vowed to neither accept nor recognize it.⁴⁵ Both during the proceedings and subsequently, China has engaged in a sustained campaign to delegitimize the arbitration process,⁴⁶ including by conducting what has been described as a “proxy academic war.”⁴⁷

Even a brief overview of the means and tactics employed by China reveals that they form part of an integrated “multielement strategy.”⁴⁸ In other

41. See ISAAC B. KARDON, CHINA’S LAW OF THE SEA: THE NEW RULES OF MARITIME ORDER 50–60 (2023).

42. See, e.g., Raul (Pete) Pedrozo, *China’s Revised Maritime Traffic Safety Law Situations*, 97 INTERNATIONAL LAW STUDIES 956 (2021).

43. Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China’s Historic Rights Claim in the South China Sea*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 124 (2013); Jonathan G. Odom, *A China in the Bull Shop? Comparing the Rhetoric of a Rising China with the Reality of the International Law of the Sea*, 17 OCEAN AND COASTAL LAW JOURNAL 201 (2012). See also Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 98 (2013). See generally KARDON, *supra* note 41.

44. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award (Perm. Ct. Arb. 2016). See generally YOSHIFUMI TANAKA, THE SOUTH CHINA SEA ARBITRATION: TOWARD AN INTERNATIONAL LEGAL ORDER IN THE OCEANS 48–74 (2019).

45. Ministry of Foreign Affairs of the People’s Republic of China, Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (available at *Full Text of Statement of China’s Foreign Ministry on Award of South China Sea Arbitration Initiated by Philippines*, XINHUA (July 12, 2016), http://xinhuanet.com/english/2016-07/12/c_135507744.htm).

46. Goldenziel, *supra* note 39, at 1111–16, 1118–28; Douglas Guilfoyle, *The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea*, 95 INTERNATIONAL AFFAIRS 999, 1013–16 (2019).

47. KARDON, *supra* note 41, at 71. See, e.g., Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, 17 CHINESE JOURNAL OF INTERNATIONAL LAW 207 (2018).

48. RONALD O’ROURKE, CONG. RSCH. SERV., R42784, U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS: BACKGROUND AND ISSUES FOR CONGRESS 9

words they involve a hybrid approach that deliberately combines and synchronizes action across multiple domains to achieve synergistic effects.⁴⁹ Assertive action and the instrumental use of law are critical components of the PRC's strategy. In what amounts to a mutually reinforcing "power and law" approach,⁵⁰ China invokes legal entitlements to justify its naval presence and activities in the South China Sea and, in turn, employs its naval assets to aggressively assert and enforce the legal entitlements it lays claim to.

III. THE USE OF FORCE IN INTERNATIONAL LAW

Before turning to assess whether the PRC's actions in the South China Sea engage the rules of international law governing the use of force, it is useful to briefly review the relevant aspects of those rules. China's salami-slicing tactics raise a basic threshold question: when do small-scale maritime incidents amount to prohibited use of force within the meaning of the United Nations Charter? With this question in mind, this Part focuses on the scope of the prohibition, including the features that distinguish the use of force from maritime law enforcement activities.

A. *The Prohibition to Use Force in International Relations*

The rules governing the use of force are found in customary international law and the United Nations Charter.⁵¹ The central provision is Article 2(4) of the Charter, which directs all member States of the United Nations to "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."⁵²

(2024). Other labels include "total competition." See, e.g., PATRICK M. CRONIN & RYAN NEUHARD, *TOTAL COMPETITION: CHINA'S CHALLENGE IN THE SOUTH CHINA SEA* (2020).

49. See GEORGIOS GIANOPOULOS ET AL., *THE LANDSCAPE OF HYBRID THREATS: A CONCEPTUAL MODEL* 11 (public version 2021), https://www.hybridcoe.fi/wp-content/uploads/2021/02/conceptual_framework-reference-version-shortened-good_cover_-_publication_office.pdf. See also Patalano, *supra* note 10, at 831.

50. Peter A. Dutton, *China's Maritime Disputes in the East and South China Seas*, *NAVAL WAR COLLEGE REVIEW*, Summer 2014, at 7, 12.

51. For a detailed overview, see CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* (2d ed. 2024); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (6th ed. 2017).

52. See Nico Schrijver, *The Ban on the Use of Force in the UN Charter*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 465 (Mark Weller ed., 2015).

The duty not to use force in contravention of Article 2(4) is one of the cornerstones of the Charter system and is widely regarded as a central feature of the international order established at the end of the Second World War.⁵³ The principle has been restated and reconfirmed repeatedly in a range of different instruments and contexts, including the Inter-American Treaty of Reciprocal Assistance,⁵⁴ the North Atlantic Treaty,⁵⁵ the Outer Space Treaty,⁵⁶ the Friendly Relations Declaration,⁵⁷ the Helsinki Final Act,⁵⁸ UNCLOS,⁵⁹ and the Rome Statute of the International Criminal Court.⁶⁰ Many commentators consider the prohibition to have attained the status of a peremptory norm of international law from which no derogation is permitted.⁶¹ Even if this position is not universally shared,⁶² it finds considerable support in State practice.⁶³ In any event, the principle's significance and status as a general rule of international law is not in doubt. As the International Court

53. Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 148 (Dec. 19) [hereinafter Armed Activities].

54. Inter-American Treaty of Reciprocal Assistance Between the United States of America and Other American Republics art. 1, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.

55. North Atlantic Treaty (Washington Treaty) art. 1, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

56. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. III, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

57. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations Declaration] (stating in the first principle “that States shall refrain in their international relations from the threat or use of force”).

58. Conference on Security and Co-operation in Europe: Final Act art. 1(a)(II), Aug. 1, 1975, reprinted in 14 INTERNATIONAL LEGAL MATERIALS 1292 (1975).

59. UNCLOS, *supra* note 26, art. 301.

60. Rome Statute of the International Criminal Court art. 8*bis*(2), July 17, 1998, 2187 U.N.T.S. 90.

61. See, e.g., ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 50 (2006).

62. James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICHIGAN JOURNAL OF INTERNATIONAL LAW 215 (2011).

63. Olivier Corten & Vaïos Koutroulis, *The Jus Cogens Status of the Prohibition on the Use of Force: What Is Its Scope and Why Does It Matter?*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS): DISQUISITIONS AND DISPUTATIONS 629, 639–42 (Dire Tladi ed., 2021).

of Justice noted in the *Nicaragua* case, the prohibition to use force is considered “not only a principle of customary international law, but also a fundamental or cardinal principle of such law.”⁶⁴

While many aspects of the prohibition to use force are well established, not all of them are fully settled. The prohibition applies between States in their international relations. Evidently, this covers situations where the organs of one State take forcible action against the organs of another inside the latter’s territory. It is also well-established that the use of force is prohibited when it is directed against the manifestations of another State present outside its national territory, for example against foreign State aircraft flying over the high seas.⁶⁵

What is less clear, however, is whether forcible action taken by one State against the organs of another inside the first State’s own territory is covered. Shooting down a foreign military aircraft that has intruded into national airspace without authorization offers one obvious example. Some authors suggest that military action taken by States against such intruders within their own national territory falls outside the scope of Article 2(4).⁶⁶ Yet adopting this position without qualification leads to the curious conclusion that offensive force employed by one State on foreign territory comes within the ambit of Article 2(4), yet forcible measures taken by the second State on its own territory in defense would not.⁶⁷ An unauthorized aerial intrusion may amount to the use of force, but shooting down the intruding aircraft would not. In fact, this bizarre position is not the view taken by the majority of these authors. Their real concern is not with geography, but with distinguishing the notion of force from coercive action taken in the enforcement of local laws against intruding vessels, aircraft, or vehicles or action taken in response to purely internal insurgencies or revolts.⁶⁸ In other words, they

64. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 190 (June 27) [hereinafter *Paramilitary Activities*].

65. Cf. Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶ 64, 77 (Nov. 6) [hereinafter *Oil Platforms*] (accepting that U.S. military assets, including helicopters and warships, and U.S.-flagged vessels may, in principle, be victims of the use of force outside national territory and waters).

66. See, e.g., Oliver Dörr & Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 215 (Bruno Simma et al. eds., 2012).

67. See Dietrich Schindler, *Die Grenzen des völkerrechtlichen Gewaltverbots*, 26 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 11, 13–16 (1986).

68. See DINSTEIN, *supra* note 51, at 89–90; CONSTANTINE ANTONOPOULOS, THE UNILATERAL USE OF FORCE BY STATES IN INTERNATIONAL LAW 339–50 (1997); Oscar

seek to distinguish force from small-scale incidents of law enforcement and from clashes taking place below the level of international relations.

What matters for the purposes of Article 2(4), therefore, is the character of the coercive measures and whether they are directed against another State, not whether they are taken by a State on its own territory.⁶⁹ Consistently with this, it is accepted that forcible action taken by States against each other in the context of a territorial dispute, including where the confrontation takes place in territory claimed by both parties, is prohibited by Article 2(4) of the Charter.⁷⁰

B. Means, Effects, and Gravity

Although the United Nations Charter does not qualify the notion of force, the concept evidently includes armed force, that is, acts of physical violence capable of causing material harm. By contrast, proposals to extend the prohibition to include economic and political coercion have been rejected both at the time the Charter was drafted and subsequently.⁷¹ The prohibition to use force is therefore engaged when States employ conventional weapons in their international relations, for example, by firing missiles, carrying out naval bombardments, or launching airstrikes.⁷² However, as the International Court of Justice has pointed out, the Charter provisions “do not refer to specific weapons,” leading the Court to declare that they “apply to any use of force, regardless of the weapons employed.”⁷³ The prohibition to use force thus extends to all types of weapons, including conventional and non-

Schachter, *The Right of States to Use Armed Force*, 82 MICHIGAN LAW REVIEW 1620, 1626 (1984). See also Tom Ruys, *The Meaning of ‘Force’ and the Boundaries of the Jus Ad Bellum: Are ‘Minimal’ Uses of Force Excluded from UN Charter 2(4)?*, 108 AMERICAN JOURNAL OF INTERNATIONAL LAW 159, 178–79 (2014).

69. 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT 253 (Sept. 2009) [hereinafter GEORGIA REPORT]. See Claus Kreß, *The State Conduct Element*, in THE CRIME OF AGGRESSION: A COMMENTARY 412, 432 (Claus Kreß & Stefan Barriga eds., 2016). See also ERIN POBJIE, PROHIBITED FORCE: THE MEANING OF ‘USE OF FORCE’ IN INTERNATIONAL LAW 99 (2024).

70. Partial Award: Jus Ad Bellum-Ethiopia’s Claims 1–8 (Eri. v. Eth.), 26 R.I.A.A. 459, ¶ 10 (Eri.-Eth. Claims Comm’n 2005), reprinted in 45 INTERNATIONAL LEGAL MATERIALS 430, 433 (2006). See OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 149–51 (2nd ed. 2021).

71. HENDERSON, *supra* note 51, at 92–94.

72. LAURIE R. BLANK, INTERNATIONAL CONFLICT AND SECURITY LAW 87 (2023).

73. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 39 (July 8).

conventional ones. In fact, as Yoram Dinstein and other commentators have noted, it is not so much the specific weapons employed that matter, but that the means chosen are capable of bringing about violent effects.⁷⁴

This point is becoming well-established in relation to cyberspace, where a general consensus is now forming among States that cyber operations that cause or are likely to cause physical harm comparable to conventional uses of force are caught by the prohibition in Article 2(4) of the Charter.⁷⁵ For example, New Zealand takes the view that

State cyber activity can amount to a use of force for the purposes of international law. Whether it does in any given context depends on an assessment of the scale and effects of the activity. State cyber activity will amount to a use of force if it results in effects of a scale and nature equivalent to those caused by kinetic activity which constitutes a use of force at international law. Such effects may include death, serious injury to persons, or significant damage to the victim state's objects and/or state functioning. In assessing the scale and effects of malicious state cyber activity, states may take into account both the immediate impacts and the intended or reasonably expected consequential impacts.⁷⁶

The adoption of such an effects-based approach puts the spotlight on the nature of the effects required for forcible measures to qualify as a use of force. In particular, must they involve actual physical destruction, or at least be capable of causing physical damage, or is non-material harm sufficient? Many recognized examples of force within the meaning of the Charter, such as bombardments and airstrikes,⁷⁷ either cause physical damage or are capable of doing so. However, not all do. For example, the General Assembly's definition of aggression, which is a type of force,⁷⁸ includes naval blockades and the presence of foreign armed forces abroad in contravention of the terms and conditions of their invitation by the host State.⁷⁹ Neither of these cases necessarily has to involve actual material harm.⁸⁰ Similarly, in *Nicaragua*,

74. DINSTEIN, *supra* note 51, at 90.

75. For national positions, see NATO Cooperative Cyber Defence Centre of Excellence, *International Law in Practice Interactive Toolkit, Legal Concepts, Use of Force*, https://cyberlaw.ccdcoe.org/wiki/Use_of_force (last visited Sept. 4, 2024).

76. New Zealand Ministry of Foreign Affairs and Trade, *The Application of International Law to State Activity in Cyberspace*, ¶ 7 (Dec. 1, 2020), <https://www.mfat.govt.nz/assets/Peace-Rights-and-Security/International-security/International-Cyber-statement.pdf>.

77. G.A. Res. 3314 (XXIX), Definition of Aggression arts. 3(a), 39(b) (Dec. 14, 1974).

78. *Id.* art. 1.

79. *Id.* arts. 3(c), (e).

80. See Kreß, *supra* note 69, at 443, 445.

the International Court of Justice declared that the arming and training of irregular forces or armed bands by a State may qualify as a use of force.⁸¹ Although this remains a minority position for now, several States have also taken the view that non-destructive cyber operations may violate Article 2(4) where they lead to a “significant impairment of functionality of critical infrastructure”⁸² or “cause widespread economic effects and destabilisation.”⁸³ These points suggest that material destruction is a distinguishing, but not an absolutely essential, element of the use of force.

Closely related to these matters is the question of whether forcible measures must attain a minimum level of intensity to fall within the scope of Article 2(4) of the Charter. The question is subject to debate. Some suggest that such a *de minimis* gravity threshold does exist. For example, the Independent International Fact-Finding Mission on the Conflict in Georgia declared that the “prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity,”⁸⁴ suggesting that the “targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft” falls below that threshold.⁸⁵ Some commentators take a similar approach.⁸⁶ Others, however, deny that a *de minimis* threshold exists.⁸⁷

State practice is inconsistent. There are numerous examples of small-scale forcible incidents that were not characterized as a use of force by the States involved, even where such incidents have caused physical harm, such

81. Paramilitary Activities, *supra* note 64, ¶ 228.

82. Irish Dep’t of Foreign Affairs, Position Paper on the Application of International Law in Cyberspace, ¶ 18 (July 2023), <https://www.dfa.ie/media/dfa/ourrolepolicies/internationallaw/Ireland--National-Position-Paper.pdf>.

83. Norwegian Positions on Selected Questions of International Law Relating to Cyberspace, May 2021, reprinted in Vibeke Musæus, *Norway’s Position Paper on International Law and Cyberspace: Introduction*, 92 NORDIC JOURNAL OF INTERNATIONAL LAW 470, 481 (2023).

84. GEORGIA REPORT, *supra* note 69, at 242.

85. *Id.* at 242 n.49.

86. Mary Ellen O’Connell, *The Prohibition of the Use of Force*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: JUS AD BELLUM, JUS IN BELLO AND JUS POST BELLUM 89, 102–7 (Nigel White & Christian Henderson eds., 2013). For a more nuanced approach, see CORTEN, *supra* note 70, at 66–92.

87. See, e.g., TERRY D. GILL & KINGA TIBORI-SZABÓ, THE USE OF FORCE AND THE INTERNATIONAL LEGAL SYSTEM 63–64 (2023); DINSTEIN, *supra* note 51, at 90–91; Ruys, *supra* note 68.

as the *Rainbow Warrior* affair.⁸⁸ In other situations, States have resorted to the language of Article 2(4) despite the absence of material damage.⁸⁹ Comparable situations seem to be treated differently. Before the International Court of Justice, Pakistan accused India of breaching the prohibition to use force when an Indian military aircraft shot down a Pakistani one in 1999.⁹⁰ By contrast, neither Turkey nor Russia described repeated violations of Turkish airspace by Russian military aircraft or the downing of a Russian fighter by Turkish military planes in response to one such violation as a use of force.⁹¹

What a review of State practice does reveal is that the gravity of an incident, as measured by its scale and effects, is one consideration that feeds into its characterization as a use of force. However, it is not possible to conclude that State practice has established a *de minimis* gravity threshold as a *sine qua non* legal requirement.⁹² Rather, incidents such as the Salisbury poisoning case⁹³ suggest that whether or not forcible action falls within the scope

88. *Rainbow Warrior* (N.Z. v. Fr.), 20 R.I.A.A. 217 (Fr.-N.Z. Arb. Trib. 1990). See Michael Pugh, *Legal Aspects of the Rainbow Warrior Affair*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 655, 658 (2008).

89. See, e.g., Application Instituting Proceedings filed by Spain, at 4, Fisheries Jurisdiction (Spain v. Can.) (I.C.J. Mar. 28, 1995), <https://www.icj-cij.org/sites/default/files/case-related/96/7197.pdf>.

90. Application Instituting Proceedings filed by Pakistan, at 2, Aerial Incident of 10 August 1999 (Pak. v. India) (I.C.J. Sept. 21, 1999), <https://www.icj-cij.org/sites/default/files/case-related/119/7123.pdf>.

91. Letter Dated Nov. 24, 2015 from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council (Nov. 24 2015), <https://twitter.com/wikileaks/status/669204928984915968>; Press Release, Ministry of Foreign Affairs of Turkey, Regarding the Violation of Turkish Airspace by a Russian Federation Aircraft (Oct. 5 2015), https://www.mfa.gov.tr/no_-269_-05-october-2015_-press-release-regarding-the-violation-of-turkish-airspace-by-a-russian-federation-aircraft.en.mfa; Letter Dated Nov. 24, 2015 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2015/906 (Nov. 24, 2015); Letter Dated Feb. 3, 2016 from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2016/108 (Feb. 3, 2016). See Etienne Henry, *The Sukhoi Su-24 Incident Between Russia and Turkey*, 4 RUSSIAN LAW JOURNAL 8, 12–15 (2016).

92. See Ruys, *supra* note 68, for a convincing argument on this point.

93. See POBJIE, *supra* note 69, at 212–15. For further discussion, see Stephen Lewis, *Salisbury, Novichok and International Law on the Use of Force*, RUSI JOURNAL, Oct. 17, 2018, at 10; Tom Ruys, *'License to Kill' in Salisbury: State-sponsored Assassinations and the Jus ad Bellum*, JUST SECURITY (Mar. 15, 2018), <https://www.justsecurity.org/53924/license-kill-salisbury-state-sponsored-assassinations-jus-ad-bellum/>.

of Article 2(4) of the Charter depends on an overall assessment of the relevant factors.⁹⁴

C. Distinguishing Force from Law Enforcement

Matters are further complicated by the fact that States are entitled to take coercive action to enforce their domestic law in a variety of settings, including by using lethal force where unavoidable to protect life.⁹⁵ Several international instruments, such as the Chicago Convention on International Civil Aviation,⁹⁶ confirm and regulate the exercise of such law enforcement powers.

In the maritime context, UNCLOS recognizes a coastal State's right to take certain enforcement measures against foreign merchant vessels and government ships operated for commercial purposes present in its ports and internal waters;⁹⁷ against such vessels exercising the right of innocent passage in its territorial sea;⁹⁸ against ships, other than those entitled to complete immunity, engaged in piracy, the slave trade, or unauthorized broadcasting on the high seas;⁹⁹ and against non-immune vessels to ensure compliance with its laws and regulations relating to living resources and maritime pollution in its EEZ.¹⁰⁰ As Article 301 of UNCLOS underlines, the exercise of these rights is subject to the duty of State parties to refrain from the use of force in contravention of Article 2(4) of the Charter. This confirms that law

94. HENDERSON, *supra* note 51, at 130; POBJIE, *supra* note 69, at 194–99. Accordingly, in the cyber context, the *Tallinn Manual* suggests that States are likely to place weight on seven factors in determining whether forcible action amounts to a use of force within the meaning of the Charter: severity, immediacy, directness, invasiveness, measurability of effects, military character, State involvement, and presumptive legality. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 333–37 (Michael N. Schmitt gen. ed., 2017).

95. U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1, at 112 (Sept. 7, 1990).

96. *See, e.g.*, Convention on International Civil Aviation arts. 3bis, 9(c), 11, 16, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

97. UNCLOS, *supra* note 26, art. 25(2).

98. *Id.* arts. 27, 28.

99. *Id.* arts. 105, 109, 110.

100. *Id.* arts. 73, 216(1)(a), 218(2), 220(6). For greater detail, *see* NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 62–146 (2012).

enforcement and the use of force are two legally distinct categories of forcible action.¹⁰¹ Even so, neither UNCLOS nor other international instruments explain how we should distinguish between them.

International practice suggests that a range of factors must be considered. The *Enrica Lexie* arbitration illustrates the point.¹⁰² The case arose out of the fatal shooting of two Indian fishermen in 2012 by a detachment of Italian marines on board the *Enrica Lexie*, an Italian-flagged oil tanker navigating off the Indian coast. India characterized the actions of the Italian marines as a violation of Article 2(4) of the Charter, while Italy argued that they were measures of law enforcement.¹⁰³ In its award, the arbitral tribunal noted that the use of force is not completely excluded on the high seas and pointed to the provisions of UNCLOS dealing with piracy to suggest that States may take necessary enforcement measures, consistent with the United Nations Charter, to protect their vessels against pirate attacks.¹⁰⁴ Since the Italian marines involved in the incident acted under the apprehension that the *Enrica Lexie* was under a pirate attack, the tribunal found that their actions did not violate Article 88 of UNCLOS, which provides that the high seas shall be reserved for peaceful purposes.¹⁰⁵ In accepting that the marines exercised law enforcement powers consistently with the United Nations Charter, the tribunal was guided by the existence of a recognized legal basis for enforcement action against pirates and the fact that the marines believed themselves to be acting in the exercise of these powers. Although the tribunal did not say so in express terms, the existence of this legal basis and the lack of aggressive intention towards India implies that the incident did not amount to a use of force in Italy's international relations with India. A similar conclusion may be drawn from the *Torrey Canyon* case,¹⁰⁶ an incident that saw the United Kingdom using military aircraft in 1967 to bomb a Liberian-flagged oil tanker that ran aground off the Cornish coast, burning the tanker's cargo to prevent a major ecological disaster.¹⁰⁷

101. HENDERSON, *supra* note 51, at 117.

102. "Enrica Lexie" Incident (It. v. India), Case No 2015-28, Award (Perm. Ct. Arb. 2020). See James G. Devaney & Christian J. Tams, *In re Arbitration Between the Italian Republic and the Republic of India Concerning the "Enrica Lexie" Incident*, 115 AMERICAN JOURNAL OF INTERNATIONAL LAW 513 (2021).

103. "Enrica Lexie" Incident, *supra* note 102, ¶¶ 1046–64.

104. *Id.* ¶¶ 1073–74.

105. *Id.* ¶¶ 1076–77.

106. UK Home Office, The "Torrey Canyon," Cmnd. No. 3246 (Apr. 1967).

107. While the legal basis of the bombing is not immediately clear, it was not treated as a use of force at the time and does not appear to have solicited any protest from the Liberian

Even where the agencies of one State employ excessive or unnecessary force in the exercise of law enforcement powers against foreign vessels, this does not necessarily bring those incidents within the ambit of Article 2(4) of the Charter, as illustrated by the *Red Crusader*¹⁰⁸ incident and the *M/V Saiga (No. 2)* case.¹⁰⁹ However, different considerations apply where a recognized legal basis to take law enforcement action is lacking altogether, or a State's entitlement to exercise enforcement powers is disputed. In the *Fisheries Jurisdiction* case,¹¹⁰ Spain argued that coercive action taken by Canadian government vessels against a Spanish fishing vessel in international waters could not qualify as law enforcement measures but came under Article 2(4), as States do not enjoy the right to enforce their fisheries conservation and management laws on the high seas.¹¹¹ In the absence of a recognized legal basis for law enforcement, Canada's coercive action thus engaged the prohibition of the use of force. Germany seemed to take a similar position in its dispute with Iceland over the latter's unilateral extension of its zone of exclusive fisheries jurisdiction beyond its territorial waters and the subsequent enforcement action Iceland took against German-flagged vessels on the high seas.¹¹² Where force is threatened or used against private vessels in disputed waters, this may make it more likely that such threats or uses of force come

Government. See Roberto Ago (Special Rapporteur), Addendum-Eighth Report on State Responsibility, [1980] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 13, at 28–29.

108. *Red Crusader* (U.K. v. Den.), 29 R.I.A.A. 521 (Mar. 23, 1962).

109. *M/V Saiga (No. 2)* (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 10, ¶¶ 153–59.

110. *Fisheries Jurisdiction Case* (Spain v. Can.), Judgment, 1998 I.C.J. 432 (Dec. 4).

111. *Fisheries Jurisdiction Case* (Spain v. Can.), Oral Proc., CR 98/13 (translation), at 60–61 (June 15, 1998), <https://icj-cij.org/sites/default/files/case-related/96/096-19980615-ORA-01-01-BI.pdf>. The Court did not decide this question. Even if Spain's submission on this point was correct, this did not prevent "boarding, inspection, arrest and minimum use of force" to fall within Canada's reservation to the Court's jurisdiction. See *Fisheries Jurisdiction Case*, *supra* note 110, ¶¶ 78–84.

112. See Verbal Note of the Embassy of the Federal Republic of Germany (Annex K to the Mem'l on the Merits Submitted by Ger., at 277–78), *Fisheries Jurisdiction* (Ger. v. Ice.) (I.C.J. July 20, 1973), <https://icj-cij.org/sites/default/files/case-related/56/9399.pdf>. See also *Fisheries Jurisdiction* (Ger. v. Ice.), Judgment, 1974 I.C.J. 175, 179 (July 25); Oral Arguments on the Merits of the Dispute (Ger. v. Ice.), in 2 INTERNATIONAL COURT OF JUSTICE, FISHERIES JURISDICTION CASES 286, 347 (1975). The Court did not rule on this point.

within the scope of international relations and thus Article 2(4) of the United Nations Charter, as demonstrated by the *Guyana v. Suriname* arbitration.¹¹³

Finally, it is important to underline that warships and other ships owned or operated by their flag State for non-commercial purposes benefit from sovereign immunity under customary international law and UNCLOS.¹¹⁴ Sovereign immunity exempts such vessels from foreign judicial and enforcement proceedings and, in the case of warships, confers a more general immunity from “interference by authorities of States other than the flag State.”¹¹⁵ This means that States may not exercise ordinary law enforcement powers conferred by UNCLOS in relation to vessels benefitting from sovereign immunity.¹¹⁶ The adoption of forcible measures against such ships not only violates their immunity but very likely amounts to a use of force. As the International Tribunal for the Law of the Sea held in the *ARA Libertad* case, “any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States,”¹¹⁷ This reflects the fact that enforcement action taken against warships and other vessels enjoying immunity not only lacks a legal basis, except in certain limited circumstances,¹¹⁸ but involves direct confrontation between the agencies and instrumentalities of States, and for that reason, takes

113. Delimitation of the Maritime Boundary (Guy. v. Surin.), Case No. 2004-04, Award, ¶¶ 425–47, 484 (Perm. Ct. Arb. 2007). See HENDERSON, *supra* note 51, at 122–23; POBJIE, *supra* note 69, at 209.

114. UNCLOS, *supra* note 26, arts. 32, 58(2), 95, 96.

115. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 2.2.2 (2022). See Ted L. McDorman, *Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions*, in JURISDICTION OVER SHIPS: POST-UNCLOS DEVELOPMENTS IN THE LAW OF THE SEA 82, 91–94 (Henrik Ringbom ed., 2015).

116. GILL & TIBORI-SZABÓ, *supra* note 87, at 280; Ruys, *supra* note 68, at 180–81. However, pursuant to Article 25 of UNCLOS, coastal States are entitled to take the necessary steps in their territorial sea to prevent passage by foreign ships that is not innocent, including non-innocent passage by vessels benefitting from immunity. However, it is not clear how the exercise of this right is to be reconciled with sovereign immunity and at what point it may engage Article 2(4) of the Charter. See Richard A. Barnes, *Article 32*, in THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 250, at 251 (Alexander Proelß ed., 2016). See also *infra* Part V.

117. “ARA Libertad” (Arg. v. Ghana), Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, ¶ 97 at 349. See also Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 815 (1984).

118. See *infra* note 237 and accompanying text.

place in their “international relations” within the meaning of Article 2(4) of the Charter.

IV. RECENT INCIDENTS IN THE SOUTH CHINA SEA: AN ASSESSMENT

Maritime incidents in the South China Sea have varied in intensity over time. The 1970s witnessed a significant escalation of disputes as countries in the region began exploring and exploiting offshore oil and gas reserves, leading to clashes over maritime boundaries and resource rights. Among these, the Battle of the Paracel Islands in 1974 and the Johnson South Reef Skirmish in 1988 were the most severe.¹¹⁹ Both incidents took place between Chinese and Vietnamese military units and involved substantial material damage and loss of life. Confrontations have continued across the region since then but at a lower level of intensity. This Part provides a brief account of the standoff between China and the Philippines at the Second Thomas Shoal before assessing whether recent incidents at this major flashpoint engage the rules governing the use of force.

A. Confrontations at the Second Thomas Shoal

The Second Thomas Shoal is a reef forming part of the Spratly Islands.¹²⁰ It is completely submerged at high tide and lies approximately 104 nautical miles northwest from the archipelagic baseline of the Philippines’ Palawan Island and 614 nautical miles southeast from China’s Hainan Island. As such, it falls squarely within the EEZ of the Philippines. However, the PRC asserts sovereignty over the Second Thomas Shoal as part of its broader sovereignty claim over the Spratly Islands.¹²¹

In 1999, the Philippines intentionally ran aground the BRP *Sierra Madre*, a battered transport vessel originally built for the United States Navy, at the Second Thomas Shoal. By grounding the ship, Manila sought to create an

119. On the former, see Toshi Yoshihara, *The 1974 Paracels Sea Battle: A Campaign Appraisal*, NAVAL WAR COLLEGE REVIEW, Spring 2016, at 41. On the latter, see JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 314 (2013).

120. This article refers to the reef as the Second Thomas Shoal, but it should be noted that the PRC uses the name “Ren’ai Jiao” and the Philippines uses “Ayungin Shoal.”

121. Ministry of Foreign Affairs of the People’s Republic of China, *Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea*, 15 CHINESE JOURNAL OF INTERNATIONAL LAW 903 (2016).

outpost capable of sustaining a small military presence at the reef.¹²² This, in turn, was meant to prevent China from establishing a foothold of its own and seizing control of the Second Thomas Shoal in the same way as it had taken control of Mischief Reef earlier.¹²³ A detachment of Philippine marines has been stationed on the BRP *Sierra Madre* on a continuous basis since the ship was grounded, despite the poor state of the vessel and the rudimentary living conditions on board.¹²⁴

China has repeatedly protested the presence of the BRP *Sierra Madre*, condemning it as a grave violation of Chinese territorial sovereignty and demanding that the Philippines remove the ship.¹²⁵ From 2013 onwards, Beijing adopted a more assertive approach to deter the Philippines from maintaining its operations at the Second Thomas Shoal. As Manila was preparing to submit its memorial in the *South China Sea Arbitration* in early 2014, China Coast Guard vessels began to disrupt the regular resupply missions carried out by the Philippine Navy to sustain and rotate the marines on board the BRP *Sierra Madre*.¹²⁶ China claimed that the Philippine supply vessels were carrying construction materials destined to reinforce the BRP *Sierra Madre* in contravention, Beijing argued,¹²⁷ of the 2002 Declaration on the Conduct of

122. Dep't of Foreign Affairs of the Republic of the Philippines, *Response to the Statement of the Chinese Foreign Ministry Spokesperson on 07 August 2023* (Aug. 8, 2023).

123. See SENAN FOX, *MISCHIEF REEF: CHINA, THE PHILIPPINES, AND A DISPUTED ATOLL IN THE SOUTH CHINA SEA* (2021).

124. Jeff Himmelman, *A Game of Shark and Minnow*, NEW YORK TIMES (Oct. 27, 2013), <https://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/index.html>.

125. See Ministry of Foreign Affairs of the People's Republic of China, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, 15 CHINESE JOURNAL OF INTERNATIONAL LAW 909, ¶¶ 94–100 (2016).

126. GREEN, *supra* note 9, at 183–88.

127. Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Qin Gang's Regular Press Conference on March 10, 2014* (Mar. 10, 2014), http://np.china-embassy.gov.cn/eng/fyrth/201403/t20140311_1592506.htm; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on March 17, 2014* (Mar. 17, 2014), http://perth.china-consulate.gov.cn/eng/fyrth/201403/t20140317_174556.htm.

Parties in the South China Sea.¹²⁸ A similar incident took place some weeks later.¹²⁹

Small-scale confrontations have continued in subsequent years. For example, in 2018 Chinese ships deployed a helicopter that reportedly flew “dangerously close” to and harassed a Philippine Navy vessel carrying supplies to the BRP *Sierra Madre*.¹³⁰ In 2021, a China Coast Guard vessel and two Chinese warships intercepted and chased a Philippine boat carrying a news team en route to the Second Thomas Shoal.¹³¹ Later that year, China Coast Guard ships blocked and used their water cannons against two Philippine boats carrying supplies, forcing them to abandon their mission.¹³²

The frequency and intensity of confrontations have increased markedly over the past two years. In February 2023, a China Coast Guard vessel illuminated the BRP *Malapascua*, a Philippine Coast Guard ship, with a laser, temporarily blinding some of its crew.¹³³ The BRP *Malapascua* had to abandon its resupply mission because of these actions and due to what was described as “dangerous maneuvering” by the Chinese vessel. In June 2023, China Coast Guard vessels followed, harassed, and blocked two Philippine Coast Guard ships near the Second Thomas Shoal to discourage them from

128. The Governments of the Member States of ASEAN and the Government of the People’s Republic of China, *Declaration on the Conduct of Parties in the South China Sea*, 2 CHINESE JOURNAL OF INTERNATIONAL LAW 417 (2003) (according to paragraph 5, “The Parties undertake 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 islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner”).

129. GREEN, *supra* note 9, at 189–95.

130. Jim Gomez, *Philippines Says It Protests China ‘Harassment’ of Navy Boat*, ASSOCIATED PRESS (May 30, 2018), <https://apnews.com/general-news-575ca64f275f42f3bbb6ed3ded9821fa>.

131. Sean Quirk, *Water Wars: Chinese Maritime Militia Disperses Amid Political Standoff with the Philippines and the United States*, LAWFARE (Apr. 21, 2021), <https://www.lawfaremedia.org/article/water-wars-chinese-maritime-militia-disperses-amid-political-standoff-philippines-and-united-states>.

132. Jim Gomez, *China Coast Guard Uses Water Cannon Against Philippine Boats*, THE DIPLOMAT (Nov. 18, 2021), <https://thediplomat.com/2021/11/china-coast-guard-uses-water-cannon-against-philippine-boats/>.

133. Jim Gomez, *Philippines Says China Ship Used Laser Against Coast Guard*, ASSOCIATED PRESS (Feb. 13, 2023), <https://apnews.com/article/politics-philippines-government-malaysia-china-8ee5459dcac872b14a49c4a428029259>.

approaching the reef.¹³⁴ In August 2023, Chinese vessels blocked and used water cannons against civilian ships contracted to resupply the BRP *Sierra Madre*.¹³⁵ They also trained their water cannons on the BRP *Cabra*, one of the Philippine Coast Guard escorts. Later that month, China Coast Guard and Chinese maritime militia vessels engaged in aggressive maneuvers to harass another resupply mission. In September and October 2023, Chinese vessels once again harassed and attempted to impede Philippine resupply vessels and their Philippine Coast Guard escorts.¹³⁶ In another incident, a Philippine civilian boat and its coast guard escort both suffered damage after colliding with a China Coast Guard vessel.¹³⁷ Their crews sustained no injuries.

In November 2023, China Coast Guard and Chinese maritime militia vessels conducted aggressive maneuvers to disrupt a resupply mission.¹³⁸ In December 2023, China Coast Guard vessels used their water cannons to damage the resupply vessel M/V *Kalayaan* and its escort BRP *Cabra*, causing the former to lose propulsion.¹³⁹ A second resupply vessel was rammed by Chinese ships. Within days, a civilian-led convoy aborted its plans to deliver supplies to Philippine outposts after being shadowed by Chinese vessels.¹⁴⁰

134. Dzirhan Mahadzir, *Philippine Forces Spot 48 Chinese Fishing Vessels Guarded by Warships in Its EEZ*, USNI NEWS (July 7, 2023), <https://news.usni.org/2023/07/07/philippine-forces-spots-48-chinese-fishing-vessels-guarded-by-warships-in-its-eez>.

135. Enrico Dela Cruz, *Philippines Says China Blocked, Water-cannoned Boat in South China Sea*, REUTERS (Aug. 6, 2023), <https://www.reuters.com/world/asia-pacific/philippines-says-china-blocked-water-cannoned-boat-s-china-sea-2023-08-06/>; Dzirhan Mahadzir, *Video: China Coast Guard Blast Philippine Military Resupply with Water Cannons*, USNI NEWS (Aug. 7, 2023), <https://news.usni.org/2023/08/07/video-china-coast-guard-blast-philippine-military-resupply-with-water-cannons>.

136. Aaron-Matthew Lariosa, *Timeline of Chinese Harassment of Second Thomas Shoal Resupply Missions*, USNI NEWS (Apr. 4, 2024), <https://news.usni.org/2024/04/04/timeline-of-chinese-harassment-of-second-thomas-shoal-resupply-missions>.

137. Dzirhan Mahadzir, *China Coast Guard Vessel Collides with Filipino Supply Ship in South China Sea*, USNI NEWS (Oct. 22, 2023), <https://news.usni.org/2023/10/22/china-coast-guard-vessel-collides-with-filipino-supply-ship-in-south-china-sea>.

138. Lariosa, *supra* note 136.

139. Aaron-Matthew Lariosa, *Chinese Ships Ram Philippine Vessels, Hits Crews with Water Cannons in Series of South China Sea Incidents*, USNI NEWS (Dec. 10, 2023), <https://news.usni.org/2023/12/10/chinese-ships-ram-philippine-vessels-hits-crews-with-water-cannons-in-series-of-south-china-sea-incidents>.

140. Aaron-Matthew Lariosa, *Philippine Christmas Resupply Convoy Canceled After Chinese Warship Harassment*, USNI NEWS (Dec. 11, 2023), <https://news.usni.org/2023/12/11/philippine-christmas-resupply-convoy-canceled-after-chinese-warship-harassment>.

Meanwhile, almost a dozen Chinese maritime militia boats deployed into and around the Second Thomas Shoal.¹⁴¹

In March 2024, China Coast Guard vessels employed their water cannons against the *UnaiꝻab May 4*, a Philippine Navy-operated, civilian chartered resupply boat, shattering its windshield and injuring four Philippine Navy sailors on board.¹⁴² Blocking maneuvers performed by Chinese vessels also caused minor damage to an escort ship. Later that month, the *UnaiꝻab May 4* came under repeated water cannon attack from Chinese Coast Guard vessels while on another resupply run. This time, the high-powered cannons tore through the upper deck level, causing extensive damage and injuring several crew members.¹⁴³ The *UnaiꝻab May 4* could not complete its mission and had to be assisted in its return to port.

Another major incident took place in June 2024 when the China Coast Guard once more interfered with a resupply mission.¹⁴⁴ During the confrontation, Chinese ships deliberately rammed Philippine vessels and used strobe lights and sirens to disorient their crews. Chinese uniformed personnel also used knives and other pointed weapons to puncture the hull of the inflatable boats employed by the Philippine Navy. For the first time, Chinese personnel boarded a Philippine vessel, threatened its crew, seized equipment, including small arms that were stored away, and caused significant damage.¹⁴⁵

141. Aaron-Matthew Lariosa, *Chinese Maritime Militia Swarms Second Thomas Shoal as Manila Mulls Contingency Plans*, USNI NEWS (Dec. 15, 2023), <https://news.usni.org/2023/12/15/chinese-maritime-militia-swarms-second-thomas-shoal-as-manilla-mulls-contingency-plans>.

142. Aaron-Matthew Lariosa, *4 Philippine Sailors Injured, 2 Vessels Damaged in Chinese Attempt to Block Second Thomas Shoal Resupply*, USNI NEWS (Mar. 5, 2024), <https://news.usni.org/2024/03/05/4-philippine-sailors-injured-2-vessels-damaged-in-chinese-attempt-to-block-second-thomas-shoal-resupply>.

143. Aaron-Matthew Lariosa, *China Attacks Philippine Ship, Injures Crew in Latest Escalation of South China Sea Standoff*, USNI NEWS (Mar. 23, 2024), <https://news.usni.org/2024/03/23/china-attacks-philippine-ship-injures-crew-in-latest-escalation-of-south-china-sea-standoff>.

144. Neil Jerome Morales & Karen Lema, *Philippines Accuses China of Using 'Illegal Force' to Deliberately Disrupt Resupply Mission*, REUTERS (June 24, 2024), <https://www.reuters.com/world/asia-pacific/philippines-continue-south-china-sea-resupply-missions-defense-sec-says-2024-06-24/>.

145. Alexa Marquez, *Philippine Navy Faces Armed Chinese Forces with Bare Hands in Ayungin Standoff*, PALAWAN DAILY NEWS (June 20, 2024), <https://palawandailynews.com/uncategorized/philippine-navy-faces-armed-chinese-forces-with-bare-hands-in-ayungin-standoff/>; Aaron-Matthew Lariosa, *China Coast Guard Impounds Philippine Navy Boats, Seizes Firearms in Latest Second Thomas Shoal Incident*, USNI NEWS (June 19, 2024), <https://news.usni.org/2024/06/19/china-coast-guard-impounds-philippine-navy-boats-seizes-firearms-in-latest-second-thomas-shoal-incident>.

Eight Philippine sailors were reported to have suffered injuries, including one who was seriously injured.¹⁴⁶

B. Characterization by the Parties

The Philippines and China have described the incidents at the Second Thomas Shoal in different ways. The Philippines considers the Second Thomas Shoal to be a low-tide elevation falling under Article 13 of UNCLOS,¹⁴⁷ meaning that it is a maritime feature incapable of appropriation and of generating a territorial sea or an EEZ.¹⁴⁸ By contrast, China claims territorial sovereignty over the reef and entitlements to maritime zones in adjacent waters based on historic rights. In its award in the *South China Sea Arbitration*, the arbitral tribunal sided with Manila on these points. Dismissing China's appeal to historic rights as unfounded,¹⁴⁹ it declared the Second Thomas Shoal to be a low-tide elevation, held that there was "no legal basis for any entitlement by China to maritime zones" in the area, and confirmed that the reef formed part of the EEZ and continental shelf of the Philippines.¹⁵⁰

While the two parties hold diametrically opposed views about the status of the Second Thomas Shoal, both have so far treated the actions taken by Chinese vessels in these waters as acts of law enforcement. In China's case, describing its operations as law enforcement measures designed to protect its sovereign rights flows naturally from its claim of territorial sovereignty over the reef.¹⁵¹ The Philippines seemed to take a different approach in some

24/06/19/china-coast-guard-impounds-philippine-navy-boats-seizes-firearms-in-latest-second-thomas-shoal-incident.

146. Aaron-Matthew Lariosa, *Philippine Sailor Severely Injured, Vessels Damaged as Chinese Block South China Sea Mission*, USNI NEWS (June 17, 2024), <https://news.usni.org/2024/06/17/philippine-sailor-severely-injured-vessels-damaged-as-chinese-block-south-china-sea-mission>.

147. *South China Sea Arbitration* (Phil. v. China), Case No. 2013-19, Mem'l of the Philippines of Mar. 30, 2014, vol. I, ¶¶ 5.77–5.82 (Perm. Ct. Arb.). See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bah.), Merits, 2001 I.C.J. 40, ¶¶ 205–7 (Mar. 16).

148. *South China Sea Arbitration*, Mem'l of the Philippines of Mar. 30, 2014, *supra* note 147, vol. I, ¶¶ 5.83–5.87.

149. *South China Sea Arbitration*, Award, *supra* note 44, ¶¶ 263–78.

150. *Id.* ¶¶ 383, 632–33, 647.

151. See, e.g., Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson's Remarks on CCG Lanfully Blocking Philippine Attempt to Send Construction Materials to Its Illegally "Grounded" Warship at Ren'ai Jiao* (Oct. 22, 2023, 9:40 PM), <https://www>.

of its diplomatic correspondence with China when it invoked the language of Article 2(4) of the Charter in reference to Chinese vessels and their activities in and around the Second Thomas Shoal.¹⁵² However, in its submissions to the *South China Sea Arbitration* proceedings, the Philippines drew a distinction between the PRC's threats to forcibly remove the BRP *Sierra Madre* from the reef, which it seemed to imply could implicate Article 2(4),¹⁵³ and the operations of Chinese government vessels. While calling them "aggressive," Manila chose to describe those operations as illegal law enforcement activities in view of their nature and purpose,¹⁵⁴ thereby seeking to avoid the tribunal considering them as military activities for which China has activated an optional reservation under Article 298 of UNCLOS.¹⁵⁵

The Philippines has not formally invoked Article 2(4) of the Charter in its more recent pronouncements either. Instead, official statements describe Chinese operations as "aggressive maneuvers,"¹⁵⁶ "aggressive and harassing"

mfa.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11349825.html; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson's Remarks on the Statement of the US State Department Concerning Ren'ai Jiao* (Aug. 7, 2023, 9:02 PM), https://www.fmprc.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11349793.html. See also Chinese Society of International Law, *supra* note 47, at 554–55.

152. Note Verbale from the Dep't of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1882, June 10, 2013 (*available at* South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Mem'l of the Philippines of Mar. 30, 2014, vol. VI, annex 219, at 3 (Perm. Ct. Arb.)). See also Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-080-2012-S, May 24, 2012 (*available at* South China Sea Arbitration, Mem'l of the Philippines of Mar. 30, 2014, *supra*, vol. VI, annex 81, at 2 (Perm. Ct. Arb.)).

153. South China Sea Arbitration, Mem'l of the Philippines of Mar. 30, 2014, *supra* note 147, vol. I, ¶ 7.76.

154. *Id.* at ¶¶ 7.149–7.152.

155. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶¶ 364–65 (Perm. Ct. Arb. 2015).

156. Press Release, Dep't of Foreign Affairs of the Philippines, PH Protests CN Coast Guard Use of Military-Grade Laser, Dangerous Maneuvers Against PCG Near Ayungin (Feb. 14, 2023), https://mirror.pco.gov.ph/news_releases/ph-protests-cn-coast-guard-use-of-military-grade-laser-dangerous-maneuvers-against-pcg-near-ayungin/.

actions,¹⁵⁷ or as an “illegal exercise of maritime law enforcement powers.”¹⁵⁸ While Philippine President Ferdinand R. Marcos Jr. has referred to the incidents that took place in March 2024 as “illegal, coercive, aggressive, and dangerous attacks”¹⁵⁹ and the National Task Force for the West Philippine Sea spoke of “unprovoked acts of coercion,”¹⁶⁰ the overall tenor of Philippine statements is to characterize Chinese activities as aggressive and unlawful measures of maritime law enforcement, rather than as uses of force.¹⁶¹

Manila’s language has hardened somewhat in response to the boarding incident that took place on June 17, 2024. In a joint statement, the Department of National Defense, the Office of the National Security Adviser, and the Department of Foreign Affairs clarified that they did not treat the incident as a misunderstanding or as an accident, but regarded it as a “deliberate act of the Chinese officialdom” and as an “aggressive and illegal use of force.”¹⁶² The express reference to the use of force marks a definite change in tone, though the statement stops short of invoking Article 2(4) of the United Nations Charter and accusing the PRC of violating that provision.

The majority of third parties have used similarly guarded language in their own statements,¹⁶³ though some have taken a stronger line. For example, the European Union has recalled the prohibition to use force in this

157. Press Release, Dep’t of Foreign Affairs of the Philippines, DFA Summons Chinese Ambassador to Protest Back-to-Back Harassments in the West Philippine Sea (Dec. 12, 2023), <https://dfa.gov.ph/dfa-news/statements-and-advisoriesupdate/33810-dfa-summons-chinese-ambassador-to-protest-back-to-back-harassments-in-the-west-philippine-sea>.

158. Press Release, Dep’t of Foreign Affairs of the Philippines, Statement on the 5 August 2023 Incident on the Ayungin Shoal (Aug. 8, 2023), <https://www.philippine-embassy.org.sg/dfa-statement-on-the-05-august-2023-incident-on-the-ayungin-shoal/>.

159. Office of the President of the Philippines, PBBM on China’s Aggressive, Dangerous Tactics: Filipinos Do Not Yield (Mar. 28, 2024), https://mirror.pco.gov.ph/news_releases/pbbm-on-chinas-aggressive-dangerous-tactics-filipinos-do-not-yield/.

160. Republic of the Philippines, Statement of the National Task Force for the West Philippine Sea (Mar. 5, 2024), <https://mirror.pia.gov.ph/press-releases/2024/03/05/statement-of-the-national-task-force-for-the-west-philippine-sea>.

161. See Republic of the Philippines, DFA Statement on the 05 March 2024 Ayungin Shoal Incident (Mar. 5, 2024), <https://www.philippine-embassy.org.sg/dfa-statement-on-05-march-2024-ayungin-shoal-incident/>.

162. Office of the President of the Philippines, China’s Action in Ayungin was an Aggressive, Illegal Use of Force—Gov’t (June 24, 2024), https://mirror.pco.gov.ph/news_releases/chinas-action-in-ayungin-was-an-aggressive-illegal-use-of-force-govt/.

163. See Office of the President of the Philippines, PH Gets Overwhelming Support From Different Countries After China’s Aggressive, Dangerous Actions in WPS (Mar. 25, 2024), https://mirror.pco.gov.ph/news_releases/ph-gets-overwhelming-support-from-different-countries-after-chinas-aggressive-dangerous-actions-in-wps/.

context.¹⁶⁴ Japan has on several occasions reiterated its opposition to “unilateral attempts to change the status quo by force,”¹⁶⁵ while the United States has reaffirmed that its mutual defense agreement with the Philippines “extends to armed attacks on Philippine armed forces, public vessels, or aircraft—including those of its Coast Guard—anywhere in the South China Sea.”¹⁶⁶ Meanwhile, China has continued to describe its operations at the Second Thomas Shoal as “necessary law enforcement measures,” adding that they are “justified, lawful, professional, restrained, and beyond reproach.”¹⁶⁷

The Philippines’ choice of language during the *South China Sea Arbitration* was clearly motivated by jurisdictional considerations. Manila’s reasons for

164. European Union Action Service, Philippines: Statement by the Spokesperson on Provocative Actions in the South China Sea (Mar. 23, 2024), https://www.eeas.europa.eu/eeas/philippines-statement-spokesperson-provocative-actions-south-china-sea-0_en. *See also* European Union Action Service, Philippines: Statement by the Spokesperson on Provocative Actions in the South China Sea (Dec. 11, 2023), https://www.eeas.europa.eu/eeas/philippines-statement-spokesperson-provocative-actions-south-china-sea_en.

165. Press Release, Ministry of Foreign Affairs of Japan, Recent Surge in Tensions in the South China Sea (June 18, 2024), https://www.mofa.go.jp/press/release/pressite_000001_00377.html; Press Release, Ministry of Foreign Affairs of Japan, Recent Surge in Tensions in the South China Sea (Mar. 25, 2024), https://www.mofa.go.jp/press/release/pressite_000001_00239.html; Press Release, Ministry of Foreign Affairs of Japan, Recent Surge in Tensions in the South China Sea (Mar. 6, 2024), https://www.mofa.go.jp/press/release/pressite_000001_00192.html.

166. Press Statement, Matthew Miller, U.S. Dep’t of State spokesperson, U.S. Support for the Philippines in the South China Sea (Mar. 23, 2024), <https://www.state.gov/u-s-support-for-the-philippines-in-the-south-china-sea-9/>. *See also* Press Statement, Matthew Miller, U.S. Dep’t of State spokesperson, U.S. Support for the Philippines in the South China Sea (June 17, 2024), <https://www.state.gov/u-s-support-for-the-philippines-in-the-south-china-sea-10/>; Press Release, The White House, Readout of National Security Advisor Jake Sullivan’s Call with National Security Advisor Eduardo M. Año of the Philippines (June 27, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/27/readout-of-national-security-advisor-jake-sullivans-call-with-national-security-advisor-eduardo-m-ano-of-the-philippines-3/>.

167. *See, e.g.*, Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Lin Jian’s Regular Press Conference on June 17, 2024* (June 17, 2024), https://www.fmprc.gov.cn/mfa_eng/xw/fyrbt/lxjzh/202407/t20240730_11463240.html; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Lin Jian’s Regular Press Conference on March 25, 2024* (Mar. 25, 2024), https://www.mfa.gov.cn/eng/xw/fyrbt/lxjzh/202405/t20240530_11347723.html; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Mao Ning’s Regular Press Conference on December 11, 2023* (Dec. 11, 2023, 7:55 PM), https://www.mfa.gov.cn/eng/xw/fyrbt/lxjzh/202405/t20240530_11347654.html.

not relying on Article 2(4) of the Charter in response to more recent incidents are less obvious, but most likely form part of its efforts to avoid an escalation in the situation, similar to its decision to employ chartered civilian vessels for resupply missions to the BRP *Sierra Madre* rather than military ships.¹⁶⁸ However, the fact that the Philippines has so far stopped short of describing China's actions as a use of force in express terms is neither determinative nor conclusive of the matter: it does not mean that Article 2(4) could not be engaged or that Manila could not change or clarify its position in response to future developments. Some of its earlier pronouncements and recent statements by third parties leave this option open.¹⁶⁹ Ultimately, however, whether or not China's actions fall within the scope of Article 2(4) depends on an objective assessment of all the relevant factors and not solely on how the parties themselves choose to describe them.¹⁷⁰

C. *Assessment of the Relevant Factors*

As indicated earlier, a number of factors must be considered to determine whether Article 2(4) of the Charter is engaged in the present case. First, neither side has resorted to the use of conventional weapons, such as small arms, missiles, or artillery. Instead, in the majority of incidents, China Coast Guard vessels have repeatedly employed high-output water cannons and, on occasion, rammed or bumped Philippine ships. The question is whether the use of these means and tactics can be equated to the use of conventional weapons. This depends on whether they involve physical violence capable of causing material harm. They evidently do.¹⁷¹ In confrontations with Vietnamese ships, commentators have noted that Chinese Coast Guard water cannons have “demonstrated their ability to inflict damage by breaking porthouse windows, damaging bridge-mounted equipment, forcing water

168. GREEN, *supra* note 9, at 179.

169. Japanese-Philippines Joint Statement, ¶ 31 (Feb. 9, 2023), <https://www.mofa.go.jp/files/100457513.pdf> (“Japan concurred with the Philippines’ long-standing objections to unlawful maritime claims, militarization, coercive activities and threat or use of force in the South China Sea.”).

170. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Provisional Measures, Order of May 25, 2019, ITLOS Rep. 2019, ¶¶ 65–66.

171. On the capabilities of Chinese water cannons, see Stephen Chen, ‘Subdue the Enemy Without Fighting’: How China’s Powerful Water Cannon Will Change the Game in South China Sea, SOUTH CHINA MORNING POST (Apr. 13, 2024, 8:50 PM), <https://www.scmp.com/news/china/science/article/3258772/subdue-enemy-without-fighting-how-chinas-powerful-water-cannon-will-change-game-south-china-sea>.

down exhaust funnels, and breaking bones of crewmembers on Vietnamese vessels.”¹⁷² At the Second Thomas Shoal, the destructive potential of Chinese water cannons has been confirmed by the damage inflicted on the *Unaiḡah May 4* in March 2024.¹⁷³ While ramming incidents have caused only minor damage to Philippine ships so far,¹⁷⁴ the fact that Chinese vessels have managed to sink a Vietnamese fishing boat shows that this tactic is capable of causing significant physical damage to smaller vessels, including total destruction.¹⁷⁵ Accordingly, the use of high-powered water cannons and ramming can be equated to the use of conventional weapons. In the incident on June 17, Chinese personnel also used bladed and pointed weapons in an attempt to puncture the hull of Philippine inflatables. This undoubtedly qualifies as a use of *armed force*.

Second, as noted earlier, it is not necessary for forcible measures to cross a *de minimis* intensity threshold for the purposes of Article 2(4) of the Charter, though the matter remains subject to debate. No material damage was caused in the majority of incidents described in the previous section. However, in December 2023, the M/V *Kalayaan* sustained serious engine damage and lost propulsion after being attacked with a water cannon.¹⁷⁶ Seven Philippine Navy personnel suffered unspecified injuries requiring medical attention in the incidents that took place in March 2024. In the second of those clashes, the Chinese Coast Guard also inflicted heavy damage on the *Unaiḡah May 4*, tearing off part of its roof and trashing the interior of its upper deck, including the pilothouse. The melee on June 17 was also reported to have caused substantial damage. These incidents clearly involved actual material harm, though it is not immediately clear whether this harm would be of sufficient gravity, in terms of its scale and effects, in the eyes of those who insist on the existence of a *de minimis* intensity threshold under Article 2(4) of the

172. Andrew S. Erickson et al., *Surging Second Sea Force: China’s Maritime Law-Enforcement Forces, Capabilities, and Future in the Gray Zone and Beyond*, NAVAL WAR COLLEGE REVIEW, Spring 2019, at 11, 12.

173. See Lariosa, *supra* note 143. See also Aaron-Matthew Lariosa, *Chinese Ships Ram Philippine Vessels, Hits Crews with Water Cannons in Series of South China Sea Incidents*, USNI NEWS (Dec. 10, 2023), <https://news.usni.org/2023/12/10/chinese-ships-ram-philippine-vessels-hits-crews-with-water-cannons-in-series-of-south-china-sea-incidents>.

174. See Mahadzir, *supra* note 137.

175. See Vu, *supra* note 5.

176. Lariosa, *supra* note 139; Mikhail Flores, Colleen Howe & Eve Wu, *Philippines, China Trade Accusations Over South China Sea Collision*, REUTERS (Dec. 10, 2023, 8:29 AM), <https://www.reuters.com/world/asia-pacific/philippines-says-china-rammed-water-cannoned-re-supply-vessels-2023-12-10/>.

Charter. While the harm caused in the most serious incidents is substantial, it is not of the utmost gravity: it involved disabling damage rather than total destruction and injury rather than death. Also, it affected individual vessels and only a limited number of personnel. However, in suggesting that physical force must surpass a minimum level of intensity, the Independent International Fact-Finding Mission on the Conflict in Georgia declared that “only very small incidents lie below this threshold,” offering the “interception of a single aircraft” as one example.¹⁷⁷ Applied in the maritime context, this suggests that the interception of a vessel through blocking maneuvers does not meet this threshold, even where it involves bumping and superficial damage. However, it leaves open the possibility that the severe damage in the December 2023, March 2024, and June 2024 clashes does meet the intensity threshold.¹⁷⁸ Thus, even when measured against a de minimis threshold, the actions of Chinese vessels are of such a nature and intensity as to qualify as a use of force.¹⁷⁹

Third, Beijing has relied heavily on China Coast Guard units in its efforts to disrupt Philippine operations in and around the Second Thomas Shoal. Coast Guard vessels are designed to carry out public functions on behalf of their flag State. The primary responsibility of the PRC’s coast guard agencies is to conduct enforcement operations “in and above the maritime areas under the jurisdiction of the People’s Republic of China.”¹⁸⁰ As such, Chinese

177. GEORGIA REPORT, *supra* note 69, at 242, 242 n.49.

178. It is worth noting that the Independent International Fact-Finding Mission on the Conflict in Georgia cites ROBERT KOLB, INTERNATIONAL LAW ON THE MAINTENANCE OF PEACE: JUS CONTRA BELLUM (2018), in support of its position. In the relevant passages, Kolb argues that force within the meaning of Article 2(4) of the Charter does not “cover simple police operations where the force used is of low intensity,” suggesting that “police operations are to be distinguished from military ones by their very circumscribed objectives, and by the absence of any will to force the other State’s hand.” *Id.* at 336–37. In other words, for Kolb, the intensity of force is one indicator among several that need to be considered to determine whether or not forcible measures should be treated as law enforcement or as a use of force between States in their international relations, meaning that the intensity question has to be approached as part of an overall assessment of all relevant factors.

179. *Cf.* Matt D. Montazzoli & John C. Tramazzo, *International Law and Acoustic Antagonism in East Asian Waters*, 103 INTERNATIONAL LAW STUDIES 112, 126–28 (2024) (arguing that the use of sonar by a PLA(N) destroyer to “ping” divers working to free the HMAS *Toowoomba*, a Royal Australian Navy frigate, from fishing nets in an incident that took place in November 2023 amounted to a use of force within the meaning of the UN Charter, as “there was a clear expectation that pinging divers could result in injury.” *Id.* at 127.).

180. Coast Guard Law of the People’s Republic of China art. 3 (promulgated by Standing Committee, 13th Nat’l People’s Cong., effective Feb. 1, 2021). The functions of the Philippine Coast Guard include law enforcement, maritime safety, search and rescue, and

Coast Guard vessels are a prime example of government ships operated for non-commercial purposes within the meaning of UNCLOS.¹⁸¹ In the present case, there is no doubt that China Coast Guard units have acted in an official capacity and that their activities must be attributed to the PRC,¹⁸² as Chinese government representatives have repeatedly acknowledged.¹⁸³ It is also worth noting that different types of Chinese vessels operate in concert with each other in what has been described as “echelon defense.”¹⁸⁴ Supported by maritime militia units,¹⁸⁵ China Coast Guard vessels serve as front-line assets that bring low-intensity coercive capabilities to bear in “rights protection” operations while maintaining an outward appearance of being engaged in law enforcement duties.¹⁸⁶ Meanwhile, PLA(N) warships form a second line that supports frontline operations from a distance, shows resolve, and discourages escalation by threatening to bring superior capabilities and firepower to bear on adversaries.¹⁸⁷

environmental and maritime security responsibilities, as detailed in Philippine Coast Guard Law of 2009, Republic Act No. 9993, Feb. 12, 2010 (an Act Establishing the Philippines Coast Guard as an Armed and Uniformed Service Attached to the Department of Transportation and Communications, Thereby Repealing Republic Act No. 5173, as Amended, and For Other Purposes).

181. UNCLOS, *supra* note 26, art. 32. See Barnes, *supra* note 116, at 250, 253

182. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, art. 4, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf [hereinafter *Draft Articles on the Responsibility of States*]. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999 I.C.J. 62, ¶ 62 (Apr. 29) (“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State”).

183. Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson's Remarks on the Philippines' Resupply to Ren'ai Jiao* (Mar. 23, 2023, 5:21 PM), https://www.mfa.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11349835.html.

184. RYAN D. MARTINSON, *ECHELON DEFENSE: THE ROLE OF SEA POWER IN CHINESE MARITIME DISPUTE STRATEGY* (2018).

185. See Conor M. Kennedy, *Gray Forces in Blue Territory: The Grammar of Chinese Maritime Militia Gray Zone Operations*, in *CHINA'S MARITIME GRAY ZONE OPERATIONS* 168 (Andrew Sven Erickson & Ryan D. Martinson eds., 2019); Jonathan G. Odom, *Guerrillas in the Sea Mist: China's Maritime Militia and International Law*, 3 *ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY* 31 (2018).

186. MARTINSON, *supra* note 184, at 30–49. See also Hermez, *supra* note 40, at 586.

187. MARTINSON, *supra* note 184, at 30–49.

Fourth, China has interfered with vessels owned or operated by the Philippines. It is a well-established principle,¹⁸⁸ reflected in UNCLOS,¹⁸⁹ that warships, naval auxiliaries, and other vessels owned or operated by a State and used, for the time being, only on government non-commercial service benefit from sovereign immunity.¹⁹⁰ Philippine Coast Guard and other government owned and operated vessels, such as Philippine Bureau of Fisheries and Aquatic Resources ships, clearly fall into this category. The same is true for vessels, such as the *Unaiṣab May 4*, which have been chartered by the Philippine armed forces or other government departments from private parties to transport supplies and personnel to the BRP *Sierra Madre*, provided they are employed exclusively for these non-commercial services. Sovereign immunity exempts these vessels not only from judicial process, but also from enforcement action, including boarding and arrest.¹⁹¹ Since ships benefitting from sovereign immunity fall “outside the legitimate reach of the coastal State’s police power” when on the high seas,¹⁹² there is no legal basis for subjecting them to law enforcement action in those circumstances.¹⁹³ In this context, it must also be recalled that the BRP *Sierra Madre* remains a commissioned warship of the Philippines.¹⁹⁴ It is not unreasonable to consider the PRC’s efforts to prevent the Philippines from resupplying the BRP *Sierra Madre* as an interference with the ship’s public function and blocking the

188. International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels art. 3, Apr. 10, 1926, 176 U.N.T.S. 201.

189. UNCLOS, *supra* note 26, art. 32.

190. G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property art. 16(2) (Dec. 2, 2004).

191. See NIICHIRO MATSUNAMI, IMMUNITY OF STATE SHIPS: AS A CONTRIBUTION TOWARDS UNIFICATION OF THE LAWS ON THE SUBJECT 130–51 (1924).

192. Jean Pierre Isselé, *The Arab Deterrent Force in Lebanon, 1976–1983*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 179, 371 (Antonio Cassese ed., 1986).

193. Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award*, 13 JOURNAL OF CONFLICT AND SECURITY LAW 49, 83–85 (2008); Alfred H. A. Soons, *Law Enforcement in the Ocean*, 3 WMU JOURNAL OF MARITIME AFFAIRS 3, 6 (2004).

194. Press Release, Dep’t of Foreign Affairs of the Republic of the Philippines, Statement of the DFA Spokesperson on the 10 November 2023 Ayungin Shoal Incident (Nov. 16, 2023), <https://www.philippine-embassy.org.sg/statement-of-the-dfa-spokesperson-on-the-22-october-2023-ayungin-shoal-incident/>.

rotation of its personnel as an interference with the immunity of the crew while in the performance of their official duties.¹⁹⁵

Fifth, Chinese operations at the Second Thomas Shoal are part of its ongoing dispute over territorial and maritime rights in the South China Sea with the Philippines. The fact that a State takes coercive action based on contested jurisdictional claims in disputed waters does not necessarily prevent those actions from qualifying as law enforcement measures.¹⁹⁶ Moreover, in the present case, the relatively low intensity of the forcible measures taken by Chinese vessels does not manifestly contravene, at least in the majority of incidents discussed, the principles governing the use of force by law enforcement agencies at sea.¹⁹⁷ However, against this, it must be noted that Chinese actions are not concerned with traditional maritime law enforcement tasks, such as boarding, inspecting, or arresting other vessels,¹⁹⁸ but appear to be aimed at interdiction and deterrence. This reflects the broad authorization conferred on the China Coast Guard by Chinese domestic legislation to take forcible measures in response to perceived sovereign rights infringements.¹⁹⁹ Specifically, the PRC has justified the measures taken by its ships in December 2023, March 2024, and June 2024 as a response to the Philippines sending vessels into the waters of the Second Thomas Shoal to,

195. *Cf.* *Triandafilou v. Ministère Public, Mixed Courts in Egypt Court of Cassation*, June 29, 1942, in 39 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 345 (1945) (distinguishing the immunity of warships from the immunity of their crew members and holding that the latter enjoy immunity from foreign jurisdiction when disembarked in the performance of their official duties).

196. Kwast, *supra* note 193, at 89.

197. *See* Matteo Tondini, *The Use of Force in the Course of Maritime Law Enforcement Operations*, 4 *JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW* 253 (2017). That said, the actions of Chinese personnel in the June 17 incident, in particular their attempts to puncture the hull of Philippine inflatables, is difficult to reconcile with these principles.

198. *Cf.* *Fisheries Jurisdiction Case*, *supra* note 110, ¶ 84 (the Court noted that action to enforce measures for the conservation and management of fisheries stock may include “boarding, inspection, arrest and minimum use of force”).

199. In particular, *see* *Coast Guard Law of the People’s Republic of China*, *supra* note 180, arts. 20–22. Several commentators consider these authorizations to exceed or be otherwise incompatible with the exercise of law enforcement powers under UNCLOS. *See, e.g.*, Suk Kyoong Kim, *An International Law Perspective on the China Coast Guard Law and Its Implications for Maritime Security in East Asia*, 37 *INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW* 241, 245–47 (2022); Shigeki Sakamoto, *China’s New Coast Guard Law and Implications for Maritime Security in the East and South China Seas*, *LAWFARE* (Feb. 16, 2021), <https://www.lawfaremedia.org/article/chinas-new-coast-guard-law-and-implications-maritime-security-east-and-south-china-seas>.

allegedly, “supply construction materials for the large-scale repair and reinforcement” of the BRP *Sierra Madre*.²⁰⁰ According to PRC Foreign Ministry spokespersons, China has acted to “resolutely stop” the Philippines from sending construction materials and to prevent Manila from creating what they described as a “fait accompli.”²⁰¹ The objective and character of Chinese coercive actions, therefore, places them firmly within the context of the dispute between the PRC and the Philippines and therefore beyond the reach of mere law enforcement measures.²⁰² Instead, they are caught by the duty set out in the Friendly Relations Declaration to refrain from the threat or use of force to solve international disputes.²⁰³

Finally, the preceding point is reinforced by China’s warning that it will continue “to adopt resolute measures to safeguard its territorial sovereignty and maritime rights and interests” and that the Philippines “should be prepared to bear all potential consequences” were it to continue on the path of “infringement and provocation.”²⁰⁴ The tribunal in the *Guyana v. Suriname* arbitration found similar words to constitute a threat to use force within the meaning of the Charter.²⁰⁵

Considering all of the relevant factors, they consistently point in the same direction: the actions undertaken by Chinese vessels in December 2023, March 2024, and June 2024 amounted to the use of force within the meaning of Article 2(4) of the United Nations Charter. These actions employed means and tactics equivalent to the use of conventional weapons,

200. Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Lin Jian’s Regular Press Conference on June 21, 2024* (June 21, 2024, 7:48 PM), https://www.mfa.gov.cn/mfa_eng/xw/fyrbt/lxjzh/202407/t20240730_11463244.html; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Mao Ning’s Regular Press Conference on April 11, 2024* (Apr. 11, 2024, 8:56 PM), https://www.fmprc.gov.cn/eng/zy/jj/diaodao_665718/mn/202404/t20240411_11280341.html; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Wang Wenbin’s Regular Press Conference on December 18, 2023* (Dec 18, 2023, 8:19 PM), https://www.mfa.gov.cn/eng/xw/fyrbt/lxjzh/202405/t20240530_11347659.html.

201. *Id.*

202. *But see* Detention of Three Ukrainian Naval Vessels, *supra* note 170, ¶ 72.

203. Friendly Relations Declaration, *supra* note 57.

204. Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Lin Jian’s Regular Press Conference on June 20, 2024* (June 20, 2024, 7:48 PM), https://www.fmprc.gov.cn/eng/xw/fyrbt/lxjzh/202407/t20240730_11463243.html; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson’s Remarks on the Philippines’ Resupply to Ren’ai Jiao* (Mar. 23, 2024, 5:21 PM), https://www.fmprc.gov.cn/eng/xw/fyrbt/fyrbt/202405/t20240530_11349835.html.

205. *Guy. v. Surin.*, *supra* note 113, ¶¶ 439, 445.

caused more than trivial injury and material harm, were carried out by Chinese paramilitary and military vessels acting in concert, deliberately targeted Philippine ships enjoying sovereign immunity, were designed to prevent them from discharging their mission, lacked a legal basis to qualify as law enforcement measures, were expressly undertaken in furtherance of the PRC's territorial and maritime claims against the Philippines, and were backed by the threat of further coercive action. These features clearly distinguish the present case from recognized instances of maritime law enforcement, such as the *Enrica Lexie* incident.²⁰⁶ Indeed, given the means, effects, authors, tactics, targets, legal basis, objectives, and context of Chinese actions, it is difficult to escape the conclusion that they could not constitute measures of law enforcement but were “quintessentially military” in character,²⁰⁷ as the tribunal in the *South China Sea Arbitration* described earlier Chinese operations at the Second Thomas Shoal, and involved the use of force falling within the scope of the United Nations Charter.

V. IMPLICATIONS: BALANCING REWARDS AND RISKS

The preceding section has confirmed that Chinese vessels used force within the meaning of Article 2(4) of the United Nations Charter during the incidents that took place at the Second Thomas Shoal in December 2023, March 2024, and June 2024. This finding has several implications.

A. *Fighting Legal Fictions*

As a preliminary point, it should be underlined that not every use of force in contravention of Article 2(4) of the Charter gives rise to the right to respond in a forcible manner. The right to employ counterforce in the form of individual and collective self-defense is available only in response to the most grave uses of force, namely those that rise to the level of an armed attack.²⁰⁸ In principle, even the use of armed force against a single warship or other governmental vessel may qualify as an armed attack and bring into play the

206. “Enrica Lexie” Incident, *supra* note 102, ¶¶ 1073–77.

207. South China Sea Arbitration, Award on Jurisdiction and Admissibility, *supra* note 155, ¶ 1161.

208. Paramilitary Activities, *supra* note 64, ¶ 191.

right of self-defense under Article 51 of the United Nations Charter,²⁰⁹ provided it results, or is at least capable of resulting, in material destruction or injury of some gravity.²¹⁰ In the present case, however, it is doubtful that the clashes in December 2023 and March 2024 crossed that threshold. Even when viewed cumulatively, the amount of damage and the degree of injury caused by Chinese actions, though far from trivial, is relatively modest and lacking in severity. This means that they did not engage the Philippines' right of self-defense. Nor did they engage the mutual defense commitments under the Mutual Defense Treaty between the Philippines and the United States.²¹¹ The incident in June 2024 is more difficult to dismiss. The fact that it marks a clear escalation by the PRC and involved Chinese personnel boarding Philippine Navy vessels takes it much closer to the threshold of an armed attack. However, in response to a question whether the incident involved an armed attack, Philippine President Ferdinand R. Marcos Jr. denied that this was the case.²¹² In the absence of Manila invoking Article 51 of the United Nations Charter, the main implications lie elsewhere, for now.

Recognizing that China has used force within the meaning of Article 2(4) of the Charter brings greater clarity to the confrontation in the South China Sea. States engaged in grey zone operations are often accused of exploiting legal gaps and ambiguities for military and operational advantage.²¹³ There is no doubt that China leverages legal uncertainty for its own benefit, as do other actors. However, the main thrust of China's legal strategy in the South China Sea is not to exploit uncertainty, but to construct an alternative legal

209. Oil Platforms, *supra* note 65, ¶ 72. *See, e.g.*, Prime Minister's Office, Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 12 January 2024 (Jan. 12, 2024), <https://www.gov.uk/government/publications/summary-of-the-uk-government-legal-position-the-legality-of-uk-military-action-to-target-houthi-facilities-in-yemen-on-22-january-2024>. *See also* Letter dated 12 January 2024 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2024/55 (Jan. 15, 2024).

210. DINSTEIN, *supra* note 51, at 206; TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 155 (2010).

211. Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, *supra* note 11, art. IV.

212. Press Release, Office of the President of the Philippines, PBBM on China's Aggression in Ayungin: 'It's Not Armed, But It Was Deliberate Action To Stop Our People' (June 27, 2024), https://mirror.pco.gov.ph/news_releases/pbbm-on-chinas-aggression-in-ayungin-its-not-armed-but-it-was-deliberate-action-to-stop-our-people/.

213. Rob McLaughlin, *The Law of the Sea and PRC Gray-Zone Operations in the South China Sea*, 116 AMERICAN JOURNAL OF INTERNATIONAL LAW 821, 826 (2022).

reality, a parallel legal universe based on alternative facts and the misapplication of the law to them. In this world of legal fantasy, the PRC enjoys indisputable territorial sovereignty over the Second Thomas Shoal and carries out law enforcement measures to resolutely protect its sovereign rights against repeated provocations by the Philippines. Reality looks different though. We know that the Second Thomas Shoal is a low-tide elevation, a maritime feature incapable of territorial acquisition and generating maritime zones.²¹⁴ It is also established that China is not entitled to any sovereign rights in these waters, but instead must have due regard to the rights and duties of the Philippines in its EEZ.²¹⁵ The present analysis has further shown that at least some of the coercive actions undertaken by Chinese vessels at the Second Thomas Shoal cannot qualify as measures of law enforcement, but fall within the scope of Article 2(4) of the United Nations Charter.

B. Potential Rewards

So far, the Philippines and third States with an interest in the Indo-Pacific region have not called out aggressive Chinese maneuvers as uses of force in contravention of Article 2(4) of the Charter. However, there are several potential benefits in doing so in situations where the facts support such a legal characterization. First, by constructing an alternative legal reality, the PRC seeks to clothe its coercive actions in the mantle of legality, portraying its assertiveness as purely defensive and its infringement of the Philippines' rights as action designed to protect its own. Describing the activities of the China Coast Guard as measures of law enforcement undertaken in compliance with international law is a key element of this legal narrative. Calling it out as false challenges China's misrepresentation of events and reveals its actions for what they are.²¹⁶

214. *Cf.* Territorial and Maritime Dispute (Nicar. v. Colom.) Merits, 2012 I.C.J. 624, ¶ 26 (Nov. 19) (declaring that in contrast to islands, which are capable of appropriation, “low-tide elevations cannot be appropriated”).

215. *See* South China Sea Arbitration, Award, *supra* note 44, ¶¶ 383, 632–33, 647. *See also* Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INTERNATIONAL LAW STUDIES 257 (2020).

216. *See also* Charmaine Misalucha-Willoughby, *Let's Call China's Actions in the South China Sea What They Really Are*, UNITED STATES INSTITUTE FOR PEACE (Nov. 1, 2023), <https://www.usip.org/publications/2023/11/lets-call-chinas-actions-south-china-sea-what-they-really-are>.

Second, the Philippines has variously described Chinese operations at the Second Thomas Shoal as aggressive, dangerous, harassing, and coercive.²¹⁷ These labels may be accurate, but they appeal mostly to political and strategic sensitivities. By contrast, if China is employing armed force without justification, it is acting in contravention of one of the core principles of the United Nations Charter. This has specific legal consequences. In so far as the use of force by China amounts to an internationally wrongful act, it must cease and not be repeated.²¹⁸ The Philippines is entitled, amongst other things, to demand reparation and to take commensurate countermeasures against China.²¹⁹ The Philippines could also consider bringing the matter to the attention of the Security Council or General Assembly pursuant to Article 35 of the United Nations Charter as a dispute or situation “the continuance of which is likely to endanger the maintenance of international peace and security.”²²⁰ Moreover, the prohibition to use force is not only a rule of *jus cogens* in the eyes of many States, but also widely seen as an obligation *erga omnes*, which is a rule of concern to all States.²²¹ Accordingly, third States may invoke China’s non-compliance with Article 2(4), though it remains a matter of debate whether States not directly affected are entitled to take countermeasures.²²²

Third, the gap between low-intensity uses of force that do not reach the level of an armed attack and more serious ones that do is not exceedingly wide.²²³ Even though the incidents in December 2023 and March 2024 were insufficiently grave to amount to an armed attack, the standoff in June 2024

217. The United States has employed similarly restrained language in describing the incident of June 17, 2024. *See* Press Release, U.S. Dep’t of Defense, Readout of Secretary of Defense Lloyd J. Austin III’s Call with Philippine Secretary of National Defense Gilberto Teodoro Jr. (June 26, 2024), <https://www.defense.gov/News/Releases/Release/Article/3818005/readout-of-secretary-of-defense-loyd-j-austin-iiis-call-with-philippine-secret/>. *But see* statements, *supra* note 167.

218. Draft Articles on the Responsibility of States, *supra* note 182, art. 30.

219. *Id.* arts. 31, 49. *See* Armed Activities, *supra* note 53, ¶ 259.

220. All the more so, since the PRC considers “peace and stability in the South China Sea” at stake. *See* Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson’s Remarks on the Philippines’ Resupply to Ren’ai Jiao*, *supra* note 204.

221. *See, e.g.*, Paolo Palchetti, *Consequences for Third States as a Result of an Unlawful Use of Force*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 1224 (Marc Weller ed., 2015).

222. For a discussion in the context of cyberspace, *see* Michael N. Schmitt & Sean Watts, *Collective Cyber Countermeasures?*, 12 HARVARD NATIONAL SECURITY JOURNAL 373 (2021).

223. As indicated by Oil Platforms, *supra* note 65, ¶ 72.

and future incidents may cross this threshold, either on their own or cumulatively.²²⁴ This is all the more the case since maritime confrontations between the PRC and the Philippines are not limited to the Second Thomas Shoal but take place in other parts of the South China Sea too.²²⁵ It bears remembering that “the United States has for a long time taken the position that the inherent right of self-defense potentially applies against any illegal use of force.”²²⁶ In other words, the United States denies that there is any gravity threshold to be crossed before a use of force qualifies as an armed attack and engages the right of individual and collective self-defense. Although this is an isolated position, it colors the United States’ understanding of its mutual defense agreement with the Philippines, potentially bringing its mutual defense guarantee into play far earlier than would otherwise be the case. In any event, even if this guarantee was not engaged, the fact that China is acting in contravention of Article 2(4) of the Charter, at the very least, places renewed emphasis on the mutual commitment of the Philippines and the United States to “maintain and develop their individual and collective capacity to resist armed attack” through individual and joint action under the agreement.²²⁷ In this context, it should be noted that the Bilateral Defense Guidelines adopted by the two countries in May 2023 express their intention “to build interoperability and cooperation in both conventional and non-conventional domains while taking into account asymmetric, hybrid, and irregular warfare and gray-zone tactics.”²²⁸ Finally, it is also worth recalling Security Council Resolution 2722 of January 10, 2024, adopted in response to Houthi attacks on merchant and commercial vessels in the Red Sea, which takes note of “the right of Member States, in accordance with international law, to defend their vessels from attacks, including those that undermine

224. *Cf.* Armed Activities, *supra* note 53, ¶ 146 (accepting, in principle, that individual attacks may be “cumulative in character”).

225. *See, e.g.*, Aaron-Matthew Lariosa, *China Coast Guard Attacks Philippine Ships Near Scarborough Shoal, Say Officials*, USNI NEWS (Apr. 30, 2024), <https://news.usni.org/2024/04/30/china-coast-guard-attacks-philippine-ships-near-scarborough-shoal-say-officials>.

226. Harold Hongju Koh, U.S. Dep’t of State Legal Advisor, International Law in Cyberspace, Remarks at the USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), *reprinted in* HARVARD INTERNATIONAL LAW JOURNAL ONLINE (Dec. 2012), <https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/2012/12/Koh-Speech-to-Publish-1.pdf>.

227. Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, *supra* note 11, art. II.

228. Press Release, U.S. Dep’t of Def., Fact Sheet: U.S.-Philippines Bilateral Defense Guidelines (May 3, 2023), <https://www.defense.gov/News/Releases/Release/Article/3383607/fact-sheet-us-philippines-bilateral-defense-guidelines/>.

navigational rights and freedoms.”²²⁹ This either confirms that the threshold of armed attack is not particularly high or that States have certain defensive options to respond to attacks that do not qualify as armed attacks as understood for the purposes of Article 51 of the Charter.²³⁰

C. Risks

Aside from benefits, invoking the language of Article 2(4) of the Charter also harbors risks. First, accusing China of acting in contravention of the prohibition to use force may prevent the Philippines from successfully litigating these incidents under the dispute settlement mechanisms of UNCLOS, as it makes it more likely that China’s jurisdictional reservation for military activities under Article 298(1)(b) of UNCLOS will be found to be engaged. The *South China Sea Arbitration* already declared that the reservation applies to the confrontations at the Second Thomas Shoal, so there is little for the Philippines to lose here. However, it may impact the Philippines’ chances of successfully bringing future proceedings against China in relation to clashes in other parts of the South China Sea.²³¹

Second, it is safe to assume that China would not give up its legal fiction but would double down on the language of law enforcement. While the *South China Sea Arbitration* has confirmed that the PRC enjoys no entitlements to maritime zones at the Second Thomas Shoal,²³² Beijing refuses to comply with the award and continues to claim territorial sovereignty over the reef. Based on the Chinese legal position, ships attempting to resupply the BRP *Sierra Madre* would cross into China’s territorial sea and thus be bound by the rules governing innocent passage through territorial waters.²³³ Similarly, the BRP *Sierra Madre* and any other vessels making it into the atoll would be considered present in Chinese internal waters in which foreign-flagged ships do not enjoy freedom of navigation at all.²³⁴ There is no doubt that, if these

229. S.C. Res. 2722, ¶ 3 (Jan. 10, 2024).

230. See also Chris O’Meara, *The Relationship Between National, Unit and Personal Self-defence in International Law: Bridging the Disconnect*, 4 JOURNAL ON THE USE OF FORCE 273 (2017) (arguing that a gravity threshold for national-level self-defense sits uneasily with the right of personal or unit level self-defense).

231. See also Alex P. Dela Cruz, *Marching Towards Exception: The Chinese Coast Guard Law and the Military Activities Exception Clause of the Law of the Sea Convention*, 8 JOURNAL OF TERRITORIAL AND MARITIME STUDIES 5 (2021).

232. See *South China Sea Arbitration*, Award, *supra* note 44, ¶¶ 263–78.

233. UNCLOS, *supra* note 26, arts. 17–19.

234. *Id.* art. 8.

rules applied, the BRP *Sierra Madre's* presence since 1999 would be in breach of China's territorial sovereignty, and the activities of resupply vessels could not qualify as innocent passage within the meaning of UNCLOS.²³⁵ This would mean that China, as the coastal State, would be entitled under Article 25 of UNCLOS to take "necessary steps" against Philippine ships to prevent any breach of the conditions of their admission into its internal waters and to prevent their non-innocent passage through its territorial sea.

While warships and other government ships operated for non-commercial purposes benefit from sovereign immunity in the internal and territorial waters of another State,²³⁶ Article 32 of UNCLOS subordinates this immunity to the coastal State's right to take "necessary steps" to prevent their unauthorized presence and activities in those waters pursuant to Article 25 of UNCLOS.²³⁷ Where this leaves vessels enjoying sovereign immunity is not entirely clear. Any necessary steps taken by coastal States against immune vessels pursuant to Article 25 of UNCLOS must comply with Article 301 of UNCLOS, meaning that they may not involve the use of armed force in contravention of Article 2(4) of the Charter.²³⁸ What is not settled is to what extent, if any, such measures may deviate from the sovereign immunity of foreign vessels.²³⁹ In the absence of a definite answer, it is difficult to establish with certainty where the dividing line between permissible measures of constraint under Article 25 of UNCLOS and impermissible uses of force within the meaning of Article 2(4) of the Charter lies in such circumstances.

235. "Passage" requires continuous and expeditious navigation through territorial waters, which the BRP *Sierra Madre* clearly is not doing. Ships seeking to resupply the BRP *Sierra Madre* would be undertaking activities not having a direct bearing on their passage and thus be engaged in passage that is not "innocent."

236. "ARA Libertad," *supra* note 117, ¶ 95.

237. See 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 263 (Satya N. Nandan & Shabtai Rosenne eds., 1993). Given the context, the phrase "necessary steps" clearly envisages some kind of enforcement measures, meaning that Article 32 of UNCLOS cannot be understood as merely subjecting warships and other government ships to the coastal State's prescriptive jurisdiction, while fully preserving their complete immunity from enforcement jurisdiction, as has sometimes been suggested. See, e.g., Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 818 (1984).

238. See F. David Froman, *Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO LAW REVIEW 621, 664–66, 673–78 (1984).

239. Detention of Three Ukrainian Naval Vessels, *supra* note 170, ¶¶ 95–99, 110–11 (suggesting that any restrictions on sovereign immunity are at best limited). See ALFREDO C. ROBLES JR., VESSEL COLLISIONS IN THE LAW OF THE SEA: THE SOUTH CHINA SEA ARBITRATION 162–79 (2022).

In any case, the fact that coercive action is taken by a State inside its own territory, as China is claiming in the present context, does not prevent that action from qualifying as a use of force, as we have seen earlier.²⁴⁰

Chinese authors do not seem troubled by these uncertainties but instead suggest that coastal States enjoy a broad right to take forcible measures to prevent non-innocent passage through their territorial waters and to ensure compliance with their laws and regulations governing innocent passage pursuant to Article 25 of UNCLOS.²⁴¹ In their view, such enforcement measures would only amount to the use of force under Article 2(4) of the Charter if the measures were unnecessary or excessive in responding to the illegal activities of foreign warships or government vessels operated for non-commercial purposes.²⁴² This position is not compelling for several reasons.²⁴³ However, the weakness of this view most likely will not prevent Chinese authors and officials from advancing identical or broadly similar arguments in future incidents, maintaining that the PRC is entitled to take enforcement measures against Philippine vessels in line with Article 25 of UNCLOS, based on its sovereign entitlements over the Second Thomas Shoal, and that doing so falls within the exceptions to sovereign immunity imposed by Article 32 of UNCLOS. In other words, it is likely that the PRC is going to counter accusations that it acts in breach of Article 2(4) of the Charter by advancing an expansive reading of the rights of coastal States. This strategy might succeed in portraying its actions as at least plausibly lawful and detract

240. See *supra* note 69 and accompanying text.

241. Haoran Cui, *A Study on the Interpretation and Application of the 'International Concern Provisions' of Chinese Coast Guard Law*, 2 MARINE DEVELOPMENT 1, 4–6 (2024); Ruiqiang Liu & Zhanfeng Hu, *Controversies and Amendment Proposals on the China Coast Guard Law*, 163 MARINE POLICY 1, 4–6 (2024); Yubing Shi, *China: China's Coast Guard Law: Interpretations and Implications*, 6 ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY 300, 306 (2021).

242. Cui, *supra* note 241, at 6.

243. Among other things, it ignores the fact that Article 30 of UNCLOS provides coastal States with a specific and seemingly exclusive remedy against warships that do not comply with their laws and regulations concerning passage through the territorial sea and disregard requests for compliance, which is requiring them to leave the territorial sea immediately. The Chinese position also points to the fact that sovereign immunity does not serve as a shield against the coastal State's prescriptive jurisdiction pursuant to Article 21 of UNCLOS, but then jumps to the unwarranted conclusion that it is not a shield against enforcement jurisdiction either, thereby conflating prescriptive and enforcement jurisdiction. Finally, it suggests that coastal States may adopt coercive measures both pursuant to Article 25 of UNCLOS and in the form of countermeasures, yet by definition the former would preclude the latter.

from the fact that its underlying claim of territorial sovereignty over the Second Thomas Shoal is wholly untenable.

Third, this brings us to the crux of the matter. Should the Philippines and third States invoke the language of Article 2(4) of the Charter, China will almost certainly consider this to be a direct challenge to its strategic interests in the South China Sea and treat it as an intensification of the dispute. The fact that China has so far adopted a strategy of salami slicing and grey zone competition suggests that it prefers to achieve its goals through “nonmilitarized coercion,”²⁴⁴ marked by “modulated aggressiveness,”²⁴⁵ rather than by direct military confrontation and escalation. This, in turn, suggests that the PRC is a “cautious bully,” or at least not a reckless one, prone to act in a more aggressive manner only when it perceives a need to demonstrate its resolve and when doing so outweighs the economic and geopolitical costs of its action.²⁴⁶ Therefore, the question is: if the PRC is likely to consider any accusation that it is acting in contravention of Article 2(4) of the Charter as a test of its resolve, how will it react?

China has repeatedly underlined the strategic significance it attaches to the South China Sea and signaled its willingness to assert its interests in this region, proclaiming that “forcing China to back down on issues concerning China’s core interests will lead nowhere.”²⁴⁷ Language such as this does not sound as if Beijing will be easily deterred or back down when challenged: it has invested too much into its narrative and capabilities to not respond to an intensification of the dispute in the South China Sea in an aggressive manner by raising the stakes even higher. To put it bluntly, uttering the magic words of Article 2(4) of the Charter will not compel China, without more, to change course, but most likely prompt it to fight back.

All of this suggests that the Philippines and third States should invoke Article 2(4) of the Charter only if they are prepared to back up their words with other measures capable of deterring China from escalating. Absent the capacity and political will to take such measures, relying on the language of

244. Dutton, *supra* note 50, at 10.

245. Denny Roy, *How China is Slow Conquering the South China Sea*, NATIONAL INTEREST (May 7, 2020), <https://nationalinterest.org/feature/how-china-slow-conquering-south-china-sea-151811>.

246. Ketian Zhang, *Cautious Bully: Reputation, Resolve, and Beijing’s Use of Coercion in the South China Sea*, INTERNATIONAL SECURITY, Summer 2019, at 117.

247. Foreign Ministry Spokesperson Wang Wenbin’s Regular Press Conference on December 18, 2023, *supra* note 200.

the Charter will not secure desired outcomes and potentially may be counterproductive.

VI. CONCLUSION

The present article has shown that the actions of Chinese vessels at the Second Thomas Shoal in December 2023, March 2024, and June 2024 were not measures of law enforcement but amounted to the use of force within the meaning of Article 2(4) of the United Nations Charter. This is significant, as it directly contradicts the PRC's long-standing narrative that its operations in and around the Second Thomas Shoal are restrained, lawful, and reactive, aimed solely at protecting its sovereign rights against repeated infringements by the Philippines.

Nothing indicates that China is prepared to give up its exorbitant maritime and territorial claims in the South China Sea any time soon. Invoking Article 2(4) of the Charter is not going to make much of a difference in this respect. Beijing's defiance of the *South China Sea* award shows that legal arguments will not, on their own, roll back China's gains in the South China Sea.²⁴⁸ However, Article 2(4) may usefully contribute to a more limited strategy aimed at containing China by imposing costs upon it and preserving the status quo in disputed waters.

First, confirming that China has resorted to the use of force and may do so again in future incidents presents the Philippines and third States with an opportunity to condemn China's assertiveness in stronger terms than they have done so far. Rather than rebuke China merely for carrying out aggressive actions in the South China Sea, they may accuse it of acting in contravention of the prohibition to use force. Adopting this language not only undercuts China's false legal narrative but serves to stigmatize its conduct as a violation of one of the core principles of the post-war international legal order in the hope of imposing reputational costs.²⁴⁹ However, precisely for these reasons, invoking Article 2(4) will almost certainly provoke a backlash

248. In fact, rolling back China's gains is the most costly and risky strategic option. See Hal Brands & Zack Cooper, *Getting Serious About Strategy in the South China Sea*, NAVAL WAR COLLEGE REVIEW, Winter 2018, at 13.

249. Cf. Eliav Lieblich, *The Salisbury Incident and the Threshold for "Unlawful Use of Force" Under International Law: Between Stigmatization and Escalation*, STOCKHOLM CENTRE FOR THE ETHICS OF WAR AND PEACE (Apr. 20, 2018), <https://stockholmcentre.org/the-salisbury-incident-and-the-threshold-for-unlawful-use-of-force-under-international-law-between-stigmatization-and-escalation/>.

from Beijing. Any decision to accuse China of breaching its obligations under the Charter must anticipate that backlash and be prepared for escalation.

Second, recognizing that force has been used and that Article 2(4) of the Charter is engaged may have a deterrent effect on China. This is so because it potentially brings into play the mutual security guarantees between the Philippines and the United States. For example, the Philippines could raise the stakes by deploying government owned and operated vessels on resupply runs rather than ships chartered from private parties, as armed attacks against public vessels are listed in express terms among the attacks falling within the scope of the Philippine-United States Mutual Defense Treaty.²⁵⁰ Beijing may be prepared to accept some setbacks at the Second Thomas Shoal, such as the Philippines reinforcing the BRP *Sierra Madre* to secure its future as an outpost for a little longer, in the interest of not triggering the commitments under the Mutual Defense Treaty and avoiding the risk of military confrontation. However, it would not be prudent to simply take this for granted and to dismiss the possibility that China may test the parties' commitment to the Treaty.

What is abundantly clear is that Beijing's designs cannot be countered without strategic resolve.

250. Mutual Defense Treaty Between the Republic of the Philippines and the United States of America, *supra* note 11, art. V.