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The Status Of Maritime Militia In The South China Sea Under International Law Perspective

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Received: 30 Maret 2020; *Accepted:* 16 Mei 2020; *Published:* 29 Juni 2020
DOI: 10.20885/iustum.vol27.iss1.art2

Abstract

In order to assert its geopolitical claims in the South China Sea region, China has used an unusual method, namely the use of its fishing industry as a reserve power called maritime militias. This research aims to analyze the status of civilian fishing vessels that play a dual role as Chinese troops, as China often sends maritime militias to carry out diplomacy with low-scale violence against other countries in the South China Sea. This research also analyzes the urgency of the legal framework that inevitably regulates the use of maritime militias. This study uses a normative juridical approach by analyzing relevant international instruments, in general the 1982 Law of the Sea Convention, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, and ongoing negotiations between ASEAN and China in the formation of the South China Sea Code of Ethics . The analysis in this study concludes that: *first*, Chinese maritime militias only have the status and rights of private vessels; *Second*, the actions of the Chinese maritime militias can be imposed as actions of the state (China); and *Third*, there is an urgent need for specific regulations regarding maritime militias.

Keywords: Maritime militia; sovereign immunity; state responsibility

Abstrak

Dalam rangka menegaskan klaim geopolitiknya di kawasan Laut Cina Selatan, Cina telah menggunakan metode yang tidak biasa, yaitu pemanfaatan industri perikananannya sebagai kekuatan cadangan bernama milisi maritim. Riset ini bertujuan untuk menganalisis status dari kapal penangkap ikan sipil yang memainkan peran ganda sebagai pasukan Cina, seiring dengan seringnya Cina mengirimkan milisi maritim untuk melaksanakan diplomasi dengan kekerasan skala rendah terhadap negara lain di Laut Cina Selatan. Penelitian ini juga menganalisis urgensi atas kerangka hukum yang pasti mengatur penggunaan milisi maritim. Penelitian ini menggunakan metode pendekatan yuridis normatif dengan menganalisis instrumen internasional yang relevan, secara garis besar Konvensi Hukum Laut 1982, ILC Articles on the Responsibility of States for Internationally Wrongful Acts, dan negosiasi yang sedang berjalan antara ASEAN dengan Cina dalam pembentukan Kode Etik Laut Cina Selatan. Analisis dalam penelitian ini menyimpulkan bahwa: pertama, milisi maritim Cina hanya memiliki status dan hak-hak kapal privat; Kedua, tindakan-tindakan dari milisi maritim Cina dapat dikenakan sebagai tindakan negara (Cina); dan Ketiga, terdapat kebutuhan mendesak atas peraturan khusus mengenai milisi maritim.

Kata kata Kunci: Milisi maritim; kekebalan berdaulat; tanggung jawab negara

Introduction

As one of the claimant State in the South China Sea (SCS), the People's Democratic Republic of China (China) had shown numerous efforts from diplomatic, administrative, economic, to military means¹ to hinder other claimant States² in the disputed areas.³ The claim asserted by China in the SCS is commonly known as the "nine-dash line", an imaginary line adopted to claim 90%⁴ area of the SCS.⁵ Such controversial claim, as anticipated, was highly opposed by the other neighboring States around the SCS until the Philippines in 2013 finally brought the matter to the Permanent Court of Arbitration (PCA).⁶ However, even after the PCA awarded that it approved 14 out of 15 claims from the Philippines and decided all kinds of China's claims as illegitimate as well as inconsistent with the UNCLOS 1982,⁷ still, China strongly declared its refusal to conform to the decision.⁸

Among all the means resorted by China to assert its claims, what has been considered as unusual is the utilization of more than 200,000 civilian fishing vessels serving as maritime militias.⁹ This unconventional force is organized under the People's Armed Forced Maritime Militia (PAFMM) and operated, although unofficially, under the direction of the People's Liberation Army Navy

¹United States Defense Department, Annual Report to Congress, Military and Security Developments Involving the People's Republic of China, 2018, pp. 13-14 [US Reports on China 2018].

²China, Vietnam, Malaysia, Brunei, Indonesia, Philippines. See, Aaron L. Connely, "Indonesia in the South China Sea: Going it alone", *Lowy Institute for International Policy*, December 2016, p. 3; Lowell Bautista, "Philippine Arbitration against China over the South China Sea", *Asia-Pacific Journal of Ocean Law and Policy*, 2016, p. 122; Ramses Amer, "China, Vietnam, and the South China Sea: Disputes and Dispute Management", *Ocean Development & International Law*, Vol. 45, No. 1, p. 19; Robert Beckman, "The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea", *The American Journal of International Law*, Vol. 107, 2013, p. 144.

³M. Taylor Fravel, "China's Strategy in the South China Sea", *Contemporary Southeast Asia*, Vol. 33, No. 3, 2011, p. 293

⁴Liu Zhen, "What's China's 'nine-dash line' and why has it created so much tension in the South China Sea?", *South China Morning Post*, <https://www.scmp.com/news/china/diplomacy-defence/article/1988596/whats-chinas-nine-dash-line-and-why-has-it-created-so> accessed on 4 November 2019 23:43 WIB.

⁵Permanent Mission of China to the United Nations, Letter dated 7 Mei 2009, Letter from Permanent Mission of China to the United Nations to the Secretary General, U.N.Doc.CML/17/2009.

⁶*Republic of the Philippines v. People's Democratic Republic of China*, PCA Case No. 2013-19, Memorial of the Philippines, Vol. III, Annex 1, 22 January 2013.

⁷*Republic of the Philippines v. People's Democratic Republic of China*, PCA Case No. 2013-19, Award on, 12 Juli 2016, Dispositif, para. 1203(B)(2) [SCS PCA Award]; Feng Zhang, "Assessing China's Response to the South China Sea Arbitration Ruling", *Australian Journal of International Affairs*, Vol. 71, No. 4, p. 441.

⁸US Reports on China 2018, *Op. Cit.*, p. 16.

⁹James Kraska dan Michael Monti, "The Law of Naval Warfare and China's Maritime Militia", *International Law Studies*, Vol. 91, 2015, p. 451 [Kraska& Monti].

(PLA Navy).¹⁰ As militias, the members of PAFMM provided their service to various activities of China's interest.¹¹ Essentially, the maritime militias perform the role during peacetime to endorse China's coercive maritime diplomacy against its geopolitical opponents in disputed areas not only on SCS but also in the East China Sea.¹² The main purpose is to harass other States at a certain level of coercion severe enough to manifest its claims but low enough to avoid international armed conflict. The kinds of operations frequently conducted by China's maritime militias are namely presence, harassment and sabotage, escort, and also intelligence, surveillance, and reconnaissance.¹³

Principally, China exploits the grey area of international law, where a unit of civilian status is made to serve military purposes while shifting from one role to another from time to time. This strategy certainly provided the PLA Navy an auxiliary force, a force-multiplier with lower cost, and eventually presented China's opponents with an operational, legal, and political challenge in SCS's disputed areas. Such a lacuna in international law as well as the size and scope of the maritime militia have complicated the battlespace, decreasing China's opponents' effectivity in decision-making, and confer a political dilemma which leads to the opponents' hesitation in taking actions against China during this maritime crisis.¹⁴ Such implications had put the opponents in a much weaker and unfair bargaining position at sea where the Navies of other States ultimately find themselves bound to political sensitivity in confronting civilian actors.¹⁵ Regardless of whether or not the maritime militia plays a significant combat role, a number of law scholars now question the actual status of its presence in the disputed area, especially of SCS,¹⁶ and finds it important to determine the status

¹⁰Connor M. Kennedy dan Andrew S. Erickson, "China Maritime Report No. 1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA", *China Maritime Studies Institute – Center for Naval Warfare Studies – US Naval War College*, p. 2 [China Maritime Report No. 1].

¹¹*Ibid.*, Kraska & Monti, *Loc. Cit.*

¹²Kraska & Monti, *Loc. Cit.*

¹³China Maritime Report No. 1, *Op. Cit.*, p. 10.

¹⁴Kraska & Monti, *Loc. cit.*

¹⁵Andrew Erickson and Conor M. Kennedy, "Meet the Chinese Maritime Militia Waging a 'People's War at Sea'", *The Wall Street Journal*, <https://blogs.wsj.com/chinarealtime/2015/03/31/meet-the-chinese-maritime-militia-waging-a-peoples-war-at-sea/> accessed on 27 February 2020 18:18 WIB.

¹⁶Connor Kennedy, "The Struggle for Blue Territory: Chinese Maritime Militia Grey Zone Operations", *RUSI Journal*, Vol. 163, No. 5, 2018, p. 19; Kraska & Monti, *Op. cit.*, p. 456; Andrew Erickson, "Countering China's Third Sea Force: Unmask Maritime Militia Before They're Used Again", *The National Interest*, 2016,

of maritime militia in order to give it the treatment accorded in international law and knowing where to seek responsibilities upon the damage caused by the conduct of maritime militias.

Research Question

China's maritime militias operate under the absence of law. Hence, to solve the dilemma faced by other States, it becomes necessary to provide answers and analyze the main questions presented: what is the status of China's maritime militias?; how shall they be treated and who shall be held responsible for the damages they caused?. Besides, this paper will also analyze the urgency for a legal framework regulating the maritime militias in the SCS.

Research Objectives

This paper aims to analyze the legal status of maritime militias in the SCS, by assessing its chain of command, characteristics, as well as functions to establish a definite answer on how the other States shall treat them under international law. This paper also analyzes the best legal framework to put an end to the ambiguity exploited by China's maritime militias.

Research Method

This research applies the juridical normative approach, which mainly analyzes relevant legal instruments and literature with regard to the research problem.¹⁷ The paper assesses primarily international law, the national law of relevant States, as well as maritime law literature. The analysis was elaborated through the qualitative method on how the currently available legal norms should be applied to maritime militias in the SCS.

Results and Discussion

First and foremost, it is necessary to discuss what should be considered as 'militia' in international law. While there has not been a treaty-based definition of 'militia' agreed internationally, 'militia' has been commonly defined as a military unit/group of paramilitary comprised of regular citizens rather than professional

<https://nationalinterest.org/feature/countering-chinas-third-sea-force-unmask-maritime-militia-16860> accessed on 28 January 2020.

¹⁷Rianto Adi, *Metodologi Penelitian Sosial dan Hukum*, Granit, Jakarta, 2004, p. 129.

soldiers, who are trained to serve as reserve forces to the regular armed forces, also to conduct military tasks in case of emergency, while often not being considered as the armed forces but instead as a supplementary actor.¹⁸

Maritime militia itself is not a new concept in international law. The utilization of civilian merchant boats such as fishing vessels and trawlers for States' military purposes has been practiced even since world wars. A good example was the United Kingdom during the Great War as it decided to take extra advantage of its fishing industry, which was the largest and most advanced in 1913, by requisitioning more than two thousands of merchant fishing vessels such as steam trawlers and herring drifters assembled from all ports in the British Isles as its front-line military actors.¹⁹ However, the more common use of militias is during wars, even the role of militias is mainly discussed in treaties dealing with the law of war. For instance, in Regulations Respecting the Laws and Customs of War on Land, Annex to the 1899 Hague Convention with Respect to the Laws and Customs of War on Land, it is stipulated that the law of war applies not only on armies but also to militias and volunteer forces.²⁰ Meanwhile, the case at hand regarding China's maritime militia stands at the other end of the spectrum, as China chose to employ its maritime militias during peacetime or *jus ad bellum*.

Understanding China's Maritime Militia

It has been widely known that there are technically two kinds of maritime militia sailing in China's claimed area. The first is the aforementioned PAFMM and the other one is the employment of commercial fishing fleets on a more *ad hoc* basis in cooperation with commercial entities or local governments.²¹ In 2018, the US Department of Defense published the *Annual Report to Congress on China's military development*. The document stipulated that the PAFMM works as a

¹⁸ Julia Gebhard, 'Militias', 2010, MPEPIL 338, para. 1.

¹⁹ Robb Robinson, "A Forgotten Navy: Fish, Fishermen, Fishing Vessels and the Great War at Sea", *Journal for Maritime Research*, Vol. 19, No. 1, p. 47—8.

²⁰ International Peace Conference 1907, *Regulations Respecting the Laws and Customs of War on Land, Annex to the 1899 Hague Convention with Respect to the Laws and Customs of War on Land*, 18 October 1907, Art. 1.

²¹ Rob McLaughlin, "The Law of the Sea, Status and Message Ambiguity", in *Law of the Sea in South East Asia: Environmental, Navigational and Security Challenges*, edited by David Letts and Donald Rothwell, Routledge, United Kingdom, 2019, p. 139 [Message Ambiguity].

subset of China's national militia which is an armed reserve force of civilians, and further asserted that the PAFMM 'has organizational ties to, and is sometimes directed by, China's armed forces'.²² Meanwhile, with the second type of maritime militia, the same Report provided that China's government subsidizes various local and provincial commercial organizations to operate militia vessels to perform "official" missions outside of their regular civilian commercial activities.²³

As provided above, the missions conducted by China's maritime militia are mainly of the purpose to assert China's maritime claims. However, too often such mission was executed at the other States' expense as shown by the numerous incidents at sea, involving and/or even occurring due to the abrasive behaviour of China's maritime militias. One of the most remarkable incidents was the harassment against the USNS *Impeccable* in March 2009. This incident originally involved five Chinese vessels in a mission to repel United States Naval Ship (USNS) *Impeccable*²⁴ reportedly conducting routine military surveillance operations²⁵ in approximately seventy-five miles from China's coastline, which by law constitutes as China's exclusive economic zone.²⁶ The group of Chinese vessels comprised of a PLA Navy ship, a state oceanographic patrol vessel, a law enforcement vessel belonging to the Bureau of Maritime Fisheries patrol vessel, and the other two appeared to be what seems like civilian fishing trawlers flying Chinese flags.²⁷ On the day of the incident, the five Chinese vessels shadowed and surrounded the USNS *Impeccable* which at the time was unarmed, and afterward threaten the US vessel to leave the vicinity or otherwise to "suffer the consequences".²⁸ It was reported that following the verbal threat, the two fishing trawlers played the most aggressive role where they maneuvered in dangerously

²²US Reports on China 2018, *Op., Cit.*, p. 72.

²³*Ibid.*

²⁴See Arts. 3, 33(2), 57, United Nations General Assembly, *Convention on the Law of the Sea*, 10 December 1982 [UNCLOS 1982].

²⁵Raul Pedrozo, "Close Encounters at Sea", *Naval War College Review*, Vol. 62, No. 3, 2009, p. 102.

²⁶*Ibid.*

²⁷See "RAW DATA: Pentagon Statement on Chinese Incident with U.S. Navy", *Fox News*, 9 March 2019, <https://www.foxnews.com/politics/raw-data-pentagon-statement-on-chinese-incident-with-u-s-navy> accessed on 28 February 2020 20:49 WIB [Pentagon Statement].

²⁸Michael Green, *et al.*, "Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence – Case Study of Harassment of the USNS *Impeccable*", *Asia Maritime Transparency Initiative*, 9 May 2017, <https://amti.csis.org/countering-coercion-hub/> accessed on 25 December 2019 10:56 WIB.

close proximity to the USNS *Impeccable*,²⁹ then continued to impede the path of the *Impeccable* by stopping directly ahead of the ship, blocking its way³⁰ and forcing it to a halt.³¹ Moreover, they also made attempts to cause damages upon the cables the USNS *Impeccable* was towing by crossing it in very close distance.³²

Another incident was the Scarborough Shoal standoff in 2012. The standoff lasted for approximately two months and involved mostly maritime militias on behalf of China. Scarborough Shoal itself is one of the disputed features in the SCS, which at the time was under the Philippines' *de facto* control.³³ The standoff was firstly provoked by the presence of a group of Chinese fishermen anchored in the vicinity, where afterward Philippines' largest naval frigate, BRP *Gregorio del Pilar*, reached the shoal and boarded the Chinese fishing vessels.³⁴ The standoff involved 12 Chinese fishing vessels from Tanmen Maritime Militia Company, whereby 6 of them stood outside the lagoon, attempting to block the upcoming Philippines' vessels from approaching the shoal, and the other 6 were inside the lagoon, trapped and boarded by Philippines' troops.³⁵

China's maritime militias were also very active in harassing other States' civilian fishing vessels. In June 2019, Vietnamese fishermen become the victims of China's fishing vessels' aggressiveness. It was reported that the Vietnamese fishing vessel was blocked, harassed, and robbed of its catch by Chinese fishing vessel in the vicinity of The Parcel Islands, which is a disputed area between China and Vietnam.³⁶ Not only Vietnam, in the same month a Chinese fishing vessel was reported to crash itself to a Filipino fishing vessel then left the Filipino

²⁹Pentagon Statement, *Loc. cit.*

³⁰Pedrozo, *Op. Cit.*, p. 101.

³¹Connor Kennedy, "The Struggle for Blue Territory...", *Op. Cit.*, p. 15.

³²Andrew S. Erickson and Connor M. Kennedy, "China's Daring Vanguard: Introducing Sanya City's Maritime Militia", *Center for International Maritime Security*, <http://cimsec.org/chinas-daring-vanguard-introducing-sanya-citys-maritime-militia/19753> accessed on 28 February 2020 21:52 WIB.

³³Michael Green, *et al*, *Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence (CSIS Reports)*, Center for Strategic and International Studies, Japan, 2017, p. 96.

³⁴Michael Green, *Loc. Cit.*

³⁵Andrew Erickson, "Model Maritime Militia: Tanmen's Leading Role in the April 2012 Scarborough Shoal Incident", *Center for International Maritime Security*, 2016, <http://cimsec.org/model-maritime-militia-tanmens-leading-role-april-2012-scarborough-shoal-incident/24573> accessed on March 16 2020 12:06 WIB.

³⁶Duncan DeaAeth, "Vietnam protests Chinese vessels abuse, robbery of Vietnamese fishermen", *Taiwan News*, <https://www.taiwannews.com.tw/en/news/3729061> accessed on March 2 2020 18:22 WIB.

fishermen in distress, before eventually rescued by Vietnam.³⁷ The incident happened around the waters of Reed Bank, which has been decided by the PCA as the Philippines' continental shelf.³⁸ The fact that both incidents occurred in disputed areas sends a message more than mere fishermen collision at sea.

Status of Maritime Militia under International Law

Maritime militias operate on its ambiguity in the perspective of its opponents. While conducting its operations in the SCS, maritime militias impose a problem of identification upon the other neighboring states as they disguised themselves as common civilian fishing boats, as if their presence in disputed areas were merely accidental while engaging in commercial fishing activities.³⁹

The important question regarding maritime militias' existence under international law is its status under the law of the sea, which has clear regulations on vessel status crystallized in the UNCLOS 1982. Indeed, the rules set out under UNCLOS 1982 mainly revolved around navigation and shipping in the context of military and strategic purposes, however, there are a number of articles provided in the Convention that clearly draw a distinction between vessels and navigations of military purposes from the ones of a commercial character.⁴⁰

To distinguish military vessels from the commercial ones, generally, there are two main characterizations of vessels under the scheme encapsulated under UNCLOS 1982, namely the ones entitled to sovereign immunity, and the others which are not. This classification roots in the differentiation between the act of state and the act of private entities.⁴¹ Henceforth, by assessing China's maritime militias on these terms, it will eventually determine if their conducts were the act of its sovereign as well or not.

³⁷Duncan DeaAeth, "Philippines says Chinese vessel attacked Filipino fishermen in South China Sea", *Taiwan News*, <https://www.taiwannews.com.tw/en/news/3724210> accessed on March 2 2020 18:34 WIB.

³⁸SCS PCA Award, *Op. Cit.*, p. 474.

³⁹Connor M. Kennedy dan Andrew S. Erickson, "China Maritime Report No. 1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA", *China Maritime Studies Institute – Center for Naval Warfare Studies – US Naval War College*, p. 15.

⁴⁰Ted L. McDorman, "Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions", in *Jurisdiction over Ships: Post-UNCLOS Development in the Law of the Sea*, edited and compiled by Henrik Ringbom, Publications on Ocean Development, Vol. 80, p. 82.

⁴¹Ian Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford, 2008, pp. 327—336.

In general, foreign public vessels are considered to attract the character of sovereign immunity,⁴² hence pursuant to UNCLOS 1982, sovereign immune vessels are *inter alia* warships,⁴³ government vessels operated only for non-commercial purposes,⁴⁴ and duly authorized ships clearly marked and identifiable as being on government services.⁴⁵ Meanwhile, in the opposite, vessels not entitled to sovereign immunity are those with more private or commercial character, for instance, merchant ships and government ships operated for commercial purposes,⁴⁶ and fishing vessels.⁴⁷

In addition to UNCLOS 1982, The Jurisdictional Immunities Convention regulated that “a certificate signed by” a flag state representative “shall serve as evidence of the character,” to prove if the said vessel is governmental and/or engaged in non-commercial activities.⁴⁸ Consequently, it can be learned that the question regarding one particular vessel’s sovereign immunity is rather a question of fact much informed by the function of said vessel, its physical characteristics, and its relationship with the related flag state.⁴⁹

In the case of China’s maritime militias, the function of China’s maritime militia is to endorse China’s coercive maritime diplomacy against its geopolitical opponents in disputed areas.⁵⁰ However, their physical characteristics are entirely those which appear as common fishing trawlers and/or cutters without any distinctive external mark.⁵¹ This is in line with the objective of utilizing local fishermen and their fishing vessels in the first place, and that is primarily to further China’s strategic claims in disputed waters with significantly less risk of conflict escalation compared to the use of navies or other government vessels.⁵² Meanwhile, the relationship between the maritime militias and China itself is not

⁴²Ian Brownlie, *Op. Cit.*, pp. 371—2.

⁴³UNCLOS 1982, Arts. 29, 32, 95.

⁴⁴UNCLOS 1982, Arts. 32, 96.

⁴⁵UNCLOS 1982, Arts. 110(5), 111(5), 224.

⁴⁶UNCLOS 1982, Chapter II(3)(B).

⁴⁷UNCLOS 1982, Arts. 42(1)(c), 62(4).

⁴⁸ Art. 16(6), United Nations, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004.

⁴⁹McDorman, *Op. Cit.*, p. 90.

⁵⁰Kraska & Monti, *Loc. Cit.*

⁵¹*Ibid.*

⁵²Justin Chock, “China’s non-Military Maritime Assets as a Force Multiplier for Security”, *East-West Centre Asia Pacific Bulletin*, No. 322, 2015.

transparent. A number of scholars have assessed that China's maritime militias links mainly to the PLA Navy, and also to the CCG, People's Armed Forces Department, and other law enforcement bodies.⁵³ Hence, China's maritime militias have taken its part in the chain of command and further studies show that China's militia laws and regulations accommodate its maritime militias as well.⁵⁴

The Scarborough Shoal standoff may shed some light to better understand the characteristics of China's maritime militias. During the incident, one of China's fishing vessel, Qionghai 09099, was present in the standoff and got detained by the Philippines. Qionghai 09099 was reported to have only fishermen on board with one man as the leader, who were poaching giant clams in the area prior to the standoff and later confirmed as part of the Tanmen's maritime militia, getting direction from the Tanmen Fisheries Law Enforcement Department to participate in the standoff.⁵⁵ These facts had shown that regular fishing vessels still engaged in normal fishing activities, while afterward, they are available to be summoned by China's navy of law enforcement department to serve the State's political agenda. This echoes the concept that China's maritime militias operate on a more opportunistic basis, shifting from one function to another in no time.⁵⁶

An assessment of China's maritime militias' physical characteristics, functions, and relationship with China would indicate that it may have the potential to attract a sovereign immune status. As it serves the purpose of governmental nature, it's easy to jump into the conclusion that the act of China's maritime militias is *ipso facto* the act of its sovereign hence confer upon it the state immunity. However, in accordance with China's national law, fishing vessels flying the flag of China shall be duly registered to the authorities to conduct any

⁵³Andrew Erickson, "China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA", *China Maritime Studies Institute*, p. 2; Liza Tobin, "Underway—Beijing's Strategy to Build China into a Maritime Great Power", *Naval War College Review*, Vol. 71, No. 2, p. 1; Liza Tobin, "Wind in the Sails: China Accelerates Its Maritime Strategy", 2018, <https://warontherocks.com/2018/05/wind-in-the-sails-china-accelerates-its-maritime-strategy/> accessed on March 14 2020 18:49 WIB.

⁵⁴Masaaki Yatsuzuka, "China's Advance into the Sea and the Maritime Militia, *NIDS Commentary*, No. 53, 2016, <http://www.nids.mod.go.jp/english/publication/commentary/pdf/commentary053e.pdf> accessed on March 14 2020 19:03 WIB.

⁵⁵Andrew Erickson, "Model Maritime Militia: Tanmen's Leading Role in The April 2012 Scarborough Shoal Incident", *Center for International Maritime Security*, 2016, <http://cimsec.org/model-maritime-militia-tanmens-leading-role-april-2012-scarborough-shoal-incident/24573> accessed on March 14 2020 16:48 WIB.

⁵⁶Message Ambiguity", *Op. Cit.*, p. 139.

fishing activity and navigate at sea,⁵⁷ indicating that the maritime militias, prior to being involved with China's governmental activities, have been registered initially as fishing vessels engaging in commercial activities. Therefore, the transitions conducted by maritime militias, from vessels engaging in commercial fishing activities to vessels serving its flag state's geopolitical interest might imply otherwise.

The Chief of Indonesian Navy's Legal Department noted that in Indonesia, the transition of status and function of one vessel cannot be done arbitrarily, thus the maritime militias—regardless of the governmental functions they were serving while conducting their operations—does not instantly earn the sovereign immunity when the vessels were originally registered as commercial fishing vessels.⁵⁸ A similar practice can also be found in the United States, where chartered private vessels operated by the Military Sealift Command are entitled to sovereign immunity, but only after certain procedures and notification requirements are fulfilled.⁵⁹ The transition from merchant to state vessels can also be found in the Law of Naval Warfare, but even such transition requires an official procedure in the form of an announcement of conversion.⁶⁰ All these regulations echo with one another that conversion of vessel status is indeed lawful and possible, however, the system with which China's maritime militias are operating is on the contrary, where its status becomes somehow fluid.

Referring to an assessment upon every terminology used for public vessels in UNCLOS 1982, from warship to government vessels, also shows that China's maritime militias positively do not fall in any of the terminologies provided. A 'warship' is defined by UNCLOS 1982 as, "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and

⁵⁷People's Democratic Republic of China, *Measures of the People's Democratic Republic of China for registration of fishing vessels*, 2012.

⁵⁸Indonesia, Ministry of Maritime and Fisheries Affairs, Minister Regulation No. 23 of 2013 on the Registration and Marking of Fisheries Vessels, 2013; First Admiral of Indonesian Navy KresnoBuntoro, (2020), Personal interview, Jakarta.

⁵⁹United States, *The Commander's Handbook on The Law of Naval Operations*, 2017, para. 2.3.2.

⁶⁰International Peace Conference 1907, *The Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships*, 18 October 1907, Art. 6.

manned by a crew which is under regular armed forces discipline”.⁶¹ It has to be noted that indeed there exists China’s national law regulating militias as a part of their armed forces,⁶² however as was elaborated before, the maritime militia does not bear any external mark—hence harder to be distinguished from regular fishing vessels—and are still engaged in fishing activities in between. They also were registered as private fishing vessels, not as vessels belonging to China’s government. Conclusively, they may serve the armed forces, but the vessels cannot be considered as warships under the definition in UNCLOS 1982.

In the next articles, warships are often coupled with other kinds of terminology, which are government vessels operated only for non-commercial purposes,⁶³ and duly authorized ships marked and identifiable as being on government services.⁶⁴ These terminologies are presumably provided to accommodate the various ships besides warships usually used by States to support governmental functions or missions. Interpretation upon the names used for vessels used in non-commercial activities indicates that the relevant rules apply as well to ships complimentary to warships, such as troops carrier, supply ships, and hospital ships, along with ships with public functions, like coast guard, icebreakers, and customs ships.⁶⁵ However, on the plain wording of Article 96, the words ‘government non-commercial’ attract a strict cumulative test, which translates into the loss of immunity if such ships were used for any commercial purposes.⁶⁶ This interpretation eliminates China’s maritime militia and its fluid function at sea. Furthermore, the terminology of ‘duly authorized ships marked and identifiable as being on government services’ also cannot cover China’s maritime militia, having established their lack of the absence of any identification mark to distinguish them as being on government services.

Considering the analysis above, the Author concluded that under the law of the sea, China’s maritime militias bear no more than a fishing vessel status. Its

⁶¹UNCLOS 1982. Art. 29.

⁶²People’s Democratic Republic of China, *Law of the People’s Republic of China on National Defense*, 1997, Art. 22.

⁶³UNCLOS 1982, Arts. 32, 96.

⁶⁴UNCLOS 1982, Arts. 110(5), 111(5), 224.

⁶⁵Alexander Proelß (Ed.), *The United Nations Convention on the Law of the Sea: A Commentary*, Verlag C.H. Beck Literatur, Munchen, 2017, p. 253.

⁶⁶Alexander Proelß, *Op. Cit.*, p. 719.

fluid characters and functions, shifting from daily fishing to operating under the command of China's armed forces without any formal notice do not mean it can be entitled to the sovereign immunity conferred upon public vessels, but rather denying it of one. Conclusively, China's maritime militia still attracts a more commercial status rather than a public one.

Maritime Militia and State Responsibility

The analysis in the previous chapter probably was not very satisfactory for the ones seeking to hold China accountable for the damages caused by the operations of its maritime militias. On the other hand, there is still another alternative to analyze the conduct of China's maritime militias which may transform what seems to be the conduct of random fishing vessels into a conduct legally characterized as one State's conduct. That is by assessing the theory of attribution under the 2001 International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

Before addressing the matter of attribution, it would be necessary to address the internationally wrongful act (IWA) itself. ARSIWA establishes that every IWA of a State entails the international responsibility of that State.⁶⁷ In other words, for a State responsibility to arise, there must be an IWA conducted by the State. This has been a long-recognized basic principle in international law, which has been affirmed by the Permanent Court of Justice since 1938 in one of its cases, the *Phosphates in Morocco*.⁶⁸ In order to establish the existence of an IWA of a State, there are two elements to fulfill, which are: (a) a conduct attributable to the State under international law and (b) a conduct that is a breach of an international obligation to the State.⁶⁹

We have observed that China resorts to a low-level of coercion to uphold its claim for sovereignty over disputed waters, whether it is through harassing the navigation of foreign ships⁷⁰ or even crashing itself to one.⁷¹ With such behaviour,

⁶⁷Art. 1, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83 [ARSIWA].

⁶⁸*Phosphates in Morocco (Italy v. France)*, PCIJ, Preliminary Objection [Judgment], 1938, p. 28.

⁶⁹ARSIWA, Art. 2.

⁷⁰Pentagon Statement, *Loc. Cit.*

there is always a potential for an incident to escalate from a mere confrontation to a collision and at the end to the use of force. One of the most relevant rules in this regard is China's international obligation under the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) to which China is a party.⁷² The incident against USNS *Impeccable* in 2009 where China's maritime militia deliberately maneuvered in dangerously proximity and blocked the ship's path⁷³ and the sinking of Vietnamese fishing vessel in 2015 are enough evidences that China's maritime militia had conducted in violation of the rules under COLREGs, particularly Rule 8 regarding actions to be taken in order to avoid a collision, which includes passing in the safe distance and making alterations needed.⁷⁴

Having established China's international obligation being breached by the conduct of its maritime militias, the much-needed discussion is on the matter of attribution. In the ARSIWA, the provisions in Chapter II of Part One provided us with the scope of attribution both from a subjective and a functional point of view,⁷⁵ with a total of eight notions.⁷⁶ There are two possibilities that are most relevant to the case of China's maritime militia: first is by referring to Article 5, which regulates the conduct of persons or entities exercising elements of governmental authority;⁷⁷ and second is Article 8, regarding conducts directed or controlled by a State.⁷⁸

Article 5 specifically stated that,

*"the conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."*⁷⁹

⁷¹Duncan DeaAeth, "Philippines says Chinese vessel attacked Filipino fishermen in South China Sea", *Taiwan News*, <https://www.taiwannews.com.tw/en/news/3724210> accessed on March 2 2020 18:34 WIB.

⁷²International Maritime Organization (IMO), *Convention on the International Regulations for Preventing Collisions at Sea*, 20 October 1972 [COLREGs]; IMO, "Status of Convention: Ratification by State", <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/status-x.xlsx> accessed on March 15 2020 15:26 WIB.

⁷³Pentagon Statement, *Loc. Cit.*

⁷⁴COLREGs, Rule 8.

⁷⁵James R. Crawford, "Articles on Responsibility of States for Internationally Wrongful Acts", *United Nations Audiovisual Library of International Law*, 2012, p. 4.

⁷⁶ARSIWA, Arts. 4—11.

⁷⁷ARSIWA, Art. 5.

⁷⁸ARSIWA, Art. 8.

⁷⁹ARSIWA, Art. 5.

ILC in its commentary further elaborated that the background of Article 5 was to answer the increasingly common phenomenon of parastatal entities serving governmental authorities.⁸⁰ The most important element of the Article is that the internal law of the State conferring on the relevant entity the right to exercise certain elements of governmental authority.⁸¹ In China's national law, Article 22 of its National Defense Law stipulates as follows:

*"The armed forces of the People's Republic of China are composed of the active and reserve forces of the Chinese People's Liberation Army, the Chinese People's Armed Police Force and the Militia (emphasis added)."*⁸²

This rule indicates that China's militia, which also includes the maritime militia, is a part of China's armed forces and that its existence is empowered by China's national law. While not being specific regarding the mandate, the conduct of China's maritime militia, as long as were in its capacity as a 'reserve force' hence can be attributed to China as the State.

The second option, Article 8, would be an alternative in case China's national law establishing the militia is not found as satisfactory to establish the State's mandate upon the maritime militias. By contrast to Article 5, Article 8 does not necessitate for written legislation in the national law, but rather it focuses on the relationship established between the State and the said entity engaging in the conduct.⁸³ Article 8 stipulates

*"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the discretion or control of, that State in carrying out the conduct."*⁸⁴

Article 8 has been widely accepted in international law jurisprudence and cases mostly arise where State organs supplement their action by recruiting or instigating private persons or groups acting as "auxiliaries".⁸⁵ One of the

⁸⁰International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc. A/56/10, p. 42 [ARSIWA Commentary].

⁸¹James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 100.

⁸²People's Democratic Republic of China, *Law of the People's Republic of China on National Defense*, 1997, Art. 22.

⁸³ARSIWA Commentary, p. 47.

⁸⁴ARSIWA, Art. 8.

⁸⁵ARSIWA Commentary, p. 47.

landmark jurisprudence in this matter is the case of *Nicaragua* in the ICJ, where the judges found that the key analysis in Article 8 is the “degree of control” the State has upon the entity engaged in conduct.⁸⁶ It has been firmly established that China’s maritime militias operated in conjunction with the armed forces, they are organized and commanded directly by the PLA’s local military commands,⁸⁷ received funds constructed in the China’s Communist Party’s economic plans,⁸⁸ and were trained by the armed forces from ship identification to military organization⁸⁹ solely for the purpose of making them a reserve force on the sea and solve China’s South Sea problems.⁹⁰ However, it shall be noted that in the *Nicaragua* case, United States’ participation in the financing, organizing, training, supplying and equipping of the paramilitary group in Nicaragua, Contras, and the planning of the operation of Contras were still insufficient in itself to attribute the humanitarian perpetration conducted by Contras to the United States.⁹¹ Therefore, similar to the conducts of China’s maritime militia, it would be necessary for the State seeking to give rise to China’s responsibility, to establish not only the relationship between China and its maritime militias in general but to establish China’s direction and command in particular for the said conduct.

The Urgency for a Formal Legal Framework Regulating Maritime Militia

The analysis above demonstrates the complexities of how to hold China responsible for the conduct of its maritime militias at sea. We cannot set aside the fact that indeed, the ambiguity being exploited by China is rooted in the absence of the law regulating maritime militias in the first place. With the vast increase of China’s use of maritime militias, and the signs of other States such as Vietnam quietly fostering similar reserve forces,⁹² it becomes more important now than

⁸⁶*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgments, ICJ Reports 1986, para. 111 [Nicaragua].

⁸⁷Connor M. Kennedy dan Andrew S. Erickson, “China Maritime Report No. 1: China’s Third Sea Force, The People’s Armed Forces Maritime Militia: Tethered to the PLA”, *China Maritime Studies Institute – Center for Naval Warfare Studies – US Naval War College*, p. 3.

⁸⁸*Ibid.*

⁸⁹Kraska & Monti, *Op. Cit.*, p. 453.

⁹⁰Miles Yu, “Inside China: Armed Fishermen”, *Washington Times*, <https://www.washingtontimes.com/news/2012/jul/18/inside-china-armed-fishermen/> accessed on March 16 2020 10:24 WIB

⁹¹*Nicaragua*, para. 114—5.

⁹²Ralph Jennings, “Vietnam’s Fishing ‘Militia’ to Defend Maritime Claims Against China”, *VOA News*, 2018, <https://www.voanews.com/east-asia-pacific/vietnams-fishing-militia-defend-maritime-claims-against-china> accessed on March 16 2020 10:56 WIB.

ever to establish an adequate legal framework regarding maritime militias as to eliminate the gray-area currently heavily benefitted by China. The need for a clear legal framework is not merely to restrict the use of maritime militias, but rather to give certainty to the other States in facing one because when the ambiguity that attends both the status of maritime militia vessels, the potential for misunderstanding and escalation is worryingly high.⁹³

Considering how the claimant States of the SCS are all ASEAN member States in exception to China, it would be the most convenient to incorporate the rules regulating maritime militias in the already on negotiation legal framework, the SCS Code of Conduct (COC). Earlier in May 2002, ASEAN and China had signed a non-binding political statement known as the Declaration on Conduct of Parties in the SCS (DOC), however, the non-binding nature of the DOC had proven to make it less-effective, especially by seeing how it took another decade for the parties to finally adopt the Guidelines to Implement the COC.⁹⁴ Fortunately, China had shown a more cooperative manner now that in 2017 China has endorsed the framework for the COC along with ASEAN,⁹⁵ although its binding status is still a question.

The ASEAN-China Framework for the COC appeared to be short in details and mostly comprises of the similar principles and provisions contained in the 2002 DOC.⁹⁶ However what has been interesting is an addition to the adopted principle from the DOC, where the Framework for COC includes a new reference regarding the prevention and management of incidents, as well as an indication of a stronger commitment to maritime security.⁹⁷ With this new reference at hand, it would be suitable for the matter of maritime militias to be included in the COC in the future, considering how the ambiguity of this unorthodox force had otherwise provoked more incidents and hamper maritime security in the SCS. It would be

⁹³Rob McLaughlin, "The Legal Status and Characterization of Maritime Militia Vessels", *EJIL: Talk!*, 2019, <https://www.ejiltalk.org/the-legal-status-and-characterisation-of-maritime-militia-vessels/> accessed on March 12 13:12 WIB.

⁹⁴Carlyle Thayer, "ASEAN, China and the Code of Conduct in the South China Sea", *SAIS Review of International Affairs*, Vol. 33, No. 2, p. 77.

⁹⁵Rahul Mishra, "Code of Conduct in the South China Sea: More Discord than Accord", *Maritime Affairs: Journal of the national Maritime Foundation of India*, 2018, p. 11.

⁹⁶Ian Storey, "Assessing the ASEAN-China Framework for the Code of Conduct for the South China Sea", *ISEAS Yusof Ishak Institute: PERSPECTIVE*, No. 62, 2017, p. 2

⁹⁷*Ibid.*, p. 1.

important for the negotiating States not to overlook the gray-area of China's maritime actors if a good order at sea is to be achieved through the adoption of a COC.

Conclusion

China resorted to the utilization of its massive fishing industry as reserve force since it was a cheaper source than sending its navies and warships for power projection in disputed areas, particularly the SCS. It benefitted from the grey-area of the law of the sea, where it serves the geopolitical interest of China while still engaging in commercial fishing activities, disguising themselves as common fishermen in the eyes of the opponents. China took advantage of the dilemma now faced by the opposing States in the SCS on how the maritime militias are supposed to be treated.

This paper concludes that regardless of the governmental functions served by China's maritime militias, its physical characteristics and relationship with China still render it a commercial status. The constant shift of maritime militias' functions had denied it of a sovereign immunity conferred by UNCLOS 1982 upon public vessels operating for non-commercial purposes. The dual identity of a maritime militia does not necessarily mean that it is a public vessel since its registry and physical characterization had determined its status as a commercial fishing vessel.

However, the conduct of maritime militias still can be traced to its command, China. While not entitled to sovereign immunity nor the status of the public vessel, an alternative to transform what seems like a "fishing vessel" conduct into State conduct is by attributing the maritime militias' conduct to China, pursuant to the theory of attribution in ARSIWA. Two possibilities are the Article 5 and Article 8 of ARSIWA. Article 5 requires national legislation conferring upon China's maritime militias its right to exercise governmental authority, while Article 8 focuses more on the factual relationship in form of "degree of control" between China and its maritime militias. In conclusion, both possibilities demand a clearer analysis of the domestic regulatory arrangement regarding China's maritime militias. It has to be known whether or not there

exists a direct command for each specific conduct of the maritime militias, to give raise to China's legal responsibility on the damage imposed by its maritime militias'. Unfortunately, there is only very limited information regarding this command. A clearer understanding of the mandate upon China's maritime militias will fancy the opponents with a more definitive conclusion of the analysis.

It is highly suggested that the other claimant states in the SCS, not to overlook this matter of maritime militias. Hence, as the other claimant states in the SCS are ASEAN member States with the negotiation on COC currently on the process, it will work so much in every State's favor if the regulation of maritime militias can be incorporated into the COC of SCS. The clearer legal framework on maritime militias' regulations will give every State a better judgment on how to engage with maritime militias according to international law.

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