

RESEARCH ARTICLE

Is China Responsible for Its Maritime Militia's Internationally Wrongful Acts? The Attribution of the Conduct of a Parastatal Entity to the State

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Abstract

China's maritime militia groups have attracted much scholarly attention in recent years. Systematically funded and trained by the Chinese authorities, the militia groups help advance China's maritime claims but risk both intended and unintended physical clashes at sea. Based on the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, this study explores the possibility of establishing and recognizing China's state responsibility in relation to the internationally wrongful conduct of its maritime militia. China's maritime militia groups blur the line between fishing boats and naval forces. In essence, they are empowered to perform the critical function of the Chinese government as provided by Chinese internal laws. As shown by emerging evidence, China's maritime militia groups are also instructed, directed, and/or controlled by the Chinese state organs including military authority and party leadership, both central and local. This study finds that the conduct of Chinese maritime militia constitutes the breach of China's international obligations in terms of (1) due regard for other states, (2) maritime safety, (3) marine environment protection and preservation, and/or (4) the overfishing ban.

Keywords: breach of international obligation; Chinese maritime militia; parastatal entity; South China Sea; state responsibility

Introduction

One of the major challenges to East Asian security involves maritime issues. There has been a series of conflicts between coastal states over a variety of issues ranging from food and energy resources to the safety of the sea lines of communication (SLOC) to jurisdiction over maritime spaces. As this enclosed and semienclosed ocean has become the main stage of strategic competition between the United States and China, military activities have also been on the rise. The main source of instability is the People's Republic of China (PRC), which has revealed its ambition to become a great sea power by its centennial year in 2049. To many, it is no surprise that China is challenging the US maritime hegemony in earnest. The controversy over China's revised Maritime Traffic Safety Law, which came into force on 1 September 2021, is one of the latest examples that highlights the potential conflict between the international law of the sea and China's assertive approach to maritime security.¹

The rise of maritime China poses a daunting challenge for its neighbors. Aside from building a world-class navy, China is actively using maritime militia to serve its grand strategy of "peaceful maritime rise." The existence of maritime militia is not unique in China's modern history.²

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¹Buszynski (2012); Koo (2009, 2017); McDevitt (2016); Denmark (2020); Pedrozo (2021); Poling et al. (2021).

²What began as a defending force of China's coast as of 1949 evolved into a government-led maritime militia by the 1970s. At the onset of the Paracel dispute with South Vietnam in 1974, for instance, the maritime militia played a pivotal role in interfering with South Vietnamese activities and seizing their assets in disputed waters (Grossman and Ma, 2020).

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Over the past decade, however, the scale and scope of its engagement in maritime issues have become more extensive and sophisticated than ever. China's maritime militia policy has indeed evolved into an aggressive hybrid strategy that risks destabilizing the status quo in favor of China without crossing the threshold into a full-scale militarized conflict. The fact that maritime militiamen are civilians provides China with the advantages of legal ambiguity and diplomatic arbitrariness.³

Many experts have begun to consider China's maritime militia a parastatal entity, if not a formal state organ, and attribute responsibility to the Chinese state for the conduct of its maritime militia.⁴ However, establishing the responsibility of the Chinese state for the acts of its maritime militia raises thorny legal and diplomatic questions due to the lack of clear identification of maritime militia. China does not publicly release a list of militia vessels, let alone their crews, to keep its key advantages shadowy, deniable, and secretive.⁵ It is not easy to reject China's claim that the conduct of maritime militia during peacetime cannot be attributed to the Chinese government as the militia is organized as a wartime reserve force. The Chinese government also contends that the conduct of maritime militia cannot be linked to the instructions, direction, or control of the Chinese government. It is equally complex to establish whether and to what extent its conduct is a wrongful act that breaches China's international obligations. It is no wonder that China makes the best use of its gray-zone strategy by expanding its maritime militia while denying state responsibility in the shadow of legal ambiguities and diplomatic arbitrariness.

With the observation in mind that the Chinese maritime militia causes geopolitical, economic, environmental, and legal uncertainties, this study critically reviews the evolution of China's gray-zone strategy. Then, based on the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) of the UN International Law Commission (ILC), it explores the possibility of establishing and recognizing China's state responsibility for the acts of its maritime militia in four prominent cases including maritime safety, marine environment protection and preservation, and the overfishing ban.

The remainder of this study proceeds as follows. Section 2 reviews existing literature on geopolitical and legal issues relating to China's maritime militia. Then, it offers the conceptual framework of state responsibility, which is a critical starting point for any empirical research seeking to understand China's maritime militia and its hybrid strategy. Section 3 analyzes whether and to what extent the Chinese government can be held responsible for the maritime militia exercising some elements of "governmental authority" and/or carrying out certain operations "on the instructions of, or under the direction or control of" the Chinese authorities. Section 4 examines four cases in which China's maritime militia has breached China's international obligations of (1) due regard, (2) maritime safety, (3) marine environment protection and preservation, and (4) the overfishing ban. Section 5 summarizes key findings and draws policy implications.

Chinese maritime militia and the question of state responsibility

The rise of China's maritime militia has attracted much scholarly attention in recent years. Specific areas of interest include its history, identity, organizational structure, command and control system, various activities at sea, and government subsidies for fuel and pensions as well as danger pay allowance. The majority of the work notes that these militia groups are systematically funded and trained by the Chinese authorities to strengthen China's maritime sovereignty claim while echoing the worry that they might cause both intended and unintended physical clashes at sea.⁶

In fact, China's militia performs various roles in supporting the Chinese government at sea. Under the auspices of top political leadership and the PLA Navy, the maritime militia conducts three broadly categorized operations in disputed waters: fishing, intelligence gathering, and bullying.

³Kraska and Monti (2015); Patalano (2018); Hu (2020); O'Rourke (2020); Wiegand and Ryou-Ellison (2020).

⁴For instance, Admiral John Richardson, former head of the US Navy, argued that the maritime militia working with the People's Liberation Army (PLA) Navy and the China Coast Guard (CCG) are in fact the third naval force, thus requiring a similar reaction to regular forces (Sevastopulo and Hille, 2019).

⁵Martinson (2021).

⁶Erickson and Kennedy (2015a, 2015b, 2015c, 2016a, 2016b, 2016c); Kennedy and Erickson (2016a, 2017a, 2017b, 2017c); McDevitt (2016); Poling (2019); Grossman and Ma. (2020); Poling et al. (2021).

First, fishing is an important part of its mission. In response to the dwindling fishing resources in the East Asian seas, the Chinese government has encouraged its fishermen to protect, contest, and occupy the contested maritime space as much as possible.⁷ Western scholars warn that the fishing and fuel subsidies are a formula for overfishing,⁸ whereas Chinese scholars consider maritime militia to be one of the essential policy tools for the protection of Chinese fishing rights.⁹ Both camps agree that along with the PLA Navy and CCG, China's maritime militia is part of its efforts to safeguard civilian economic activities.

Second, maritime militia groups are often stationed in and around China's offshore outposts in the South China Sea such as the Subi Reef and Mischief Reef. It has been documented that most militia groups, when captured by high-resolution optical satellite images, spend far more time at anchor or transiting than fishing. The number of Chinese militia vessels engaging in paramilitary intelligence work is much larger than elsewhere in the world.¹⁰

Third, Chinese maritime militia groups have been involved in bullying activities in and around disputed waters.¹¹ Chinese scholars disagree with this claim and point out the geopolitical situation unfavorable to Beijing's maritime claim as well as the allegedly widespread looting activities by others. They insist that it is necessary to expand the role and mission of the maritime militia and to have them cooperate with the PLA Navy and CCG to secure China's maritime interests. For them, the effective paramilitary force is deemed a rightful way to deter outside forces from undermining the sovereignty and sovereign rights of China.¹²

The ambiguous and secretive nature of Chinese maritime militia poses a threat to the international legal system. Kraska and Monti (2015) find that China's paramilitary groups obscure the core principles of distinction between civilian and military objects as developed in international humanitarian law and that China is further integrating its maritime militia into the naval structure by taking advantage of such ambiguities. They also argue that the use of fishing vessels during any armed conflicts is against the legal principle of the protected status of coastal fishing vessels found in customary international law.

Sato (2020) examines China's maritime militia in the context of *jus ad bellum* and *jus in bello*. He argues that infringement, for example, landing on and occupying an island using ships and fishermen with ambiguous appearances during peacetime, could be regarded as aggression or an armed attack. China's maritime militia vessels masked as fishing vessels during wartime have the status of auxiliary ships for military purposes. As a result, attacks on enemy warships by paramilitary groups shall be regarded as a violation of the law of war.

Other studies analyze legal issues regarding state responsibility for the wrongful acts of Chinese militia groups. Odom (2018) examines China's state responsibility based on the ARSIWA and three bodies of international law: the Law of Naval Warfare, the Use of Force by States, and the UN Convention on the Law of the Sea (UNCLOS). He concludes that the conduct of Chinese maritime militia is legally attributable to the Chinese authorities and that legal problems for any breaches of international obligations by them may not only damage relations between countries but also can be extended to armed conflicts.

In a similar vein, Manullang et al. (2020) analyze the General Act of the Maritime Convention of 1982, the ARSIWA, and the Code of Conduct in the South China Sea (under negotiation). Through a

⁷In 2013 during his visit to the Tanmen Maritime Militia Company—one of the best-known homes to maritime militias—in Hainan province, President Xi Jinping urged the militiamen to “build bigger ships and venture even further into the oceans and catch bigger fish” and to “support island construction and reef development” (Kennedy and Erickson, 2016b; Zhang and Bateman, 2017, 294). Of course, Chinese fishing vessels are not allowed to keep an unreasonably close distance to the islets, reefs, atolls, and/or oil rigs effectively controlled by other countries in the South China Sea without permission by the government (Zhang and Bateman, 2017, 300). Nevertheless, it is clear that the government's encouragement has led to a wave of fishing- and non-fishing-related activities by the militias.

⁸Dupont and Baker (2014); Martinson (2016); Mackinnon (2019).

⁹Zheng and Wang (2014); Lu (2017); Wan et al. (2017); Hu (2020).

¹⁰Kennedy and Erickson (2017a); Poling (2019).

¹¹Mackinnon (2019); Martinson (2021).

¹²Lu (2017); Wan et al. (2017); Hu (2020).

normative juridical analysis, they conclude that a Chinese maritime militia vessel has the status of a civilian boat; nonetheless, their conduct is attributable to China, necessitating a specific legal framework to regulate the use of maritime militia.

The question of state responsibility has been long debated. In light of traditional international law principles, the state is the only legitimate entity responsible for the impact of breaches of international obligations.¹³ However, the emergence of a variety of actors in exercising state sovereignty has made the legal discourse on state responsibility more diverse and complex. With the advent of the 1949 International Court of Justice (ICJ) advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, legal entities other than the state have begun to be recognized as subjects of international law.¹⁴ The ICJ concluded that the United Nations can possess international rights and duties as a subject of international law and that it can be held accountable for any internationally wrongful acts.¹⁵

In 1947 the UN General Assembly established the ILC to codify the law of state responsibility as well as others. At its first session in 1949, it adopted a provisional list of topics including state responsibility. After lengthy deliberation and a rigorous discussion, the ILC presented the draft articles to the General Assembly in December 2001.¹⁶ As Caron (2002) notes, the endorsement of the ARSIWA was an achievement that presents a paradox. The ARSIWA is yet to be a final treaty. There is no consensus on whether to upgrade it to a treaty as a formal source of law.¹⁷ Nevertheless, many international tribunals and organizations, directly or indirectly, have cited and made references to these articles when addressing specific issues relating to state responsibility.¹⁸

The ARSIWA defines state responsibility for internationally wrongful acts (Article 1) and presents two components accordingly: (1) an attribution of conduct to the state under international law and (2) a breach of an international obligation of the state (Article 2). The following two sections are organized in line with these two components and attempt to apply the law to China's maritime militia and its conduct.

Is maritime militia's conduct attributable to the Chinese government?

The attribution of conduct to a state is codified in eight articles of Chapter 2. In relation to China's maritime militia, Articles 5 and 8 are of particular importance. These two articles provide two separate but related starting points for establishing the responsibility of a state for the conduct of maritime militia: (1) a parastatal entity is empowered by a state's internal law to "exercise elements of governmental authority" or (2) the conduct of the parastatal actor is taken "on the instructions of, or under the direction or control of" state authorities. In addition to Article 4 that defines an act of a state as the conduct of "any state organ" that exercises "legislative, executive, judicial, or any other functions," Article 5 extends the scope of a responsible state organ to include a person or entity that is not an organ of a state under Article 4, provided that the person or entity "is empowered by the law of that state to exercise elements of governmental authority" and "is acting in that capacity." Even when the conditions of Article 5 are not met, the conduct of a person or entity can be regarded as the conduct of a state under Article 8 if the state (1) supplements its own function by instructing private persons or groups to "act as auxiliaries while remaining outside the official structure of the state" or (2) if there is "a real link between the person or group performing the act and the state machinery."¹⁹

Conduct of persons or entities exercising elements of government authority

Article 55 of the Constitution of the People's Republic of China states the following: "It is the honorable duty of citizens of the People's Republic of China to perform military service and join the militia

¹³Pellet (2010), 6.

¹⁴Crawford and Olleson (2003), 446.

¹⁵International Court of Justice (1949), 174–79.

¹⁶Crawford (2012), 2.

¹⁷Rim (2020), 185.

¹⁸Many legal experts would agree that the ARSIWA has had significant effects on legal thinking and practices as one of the most certified statements of the norms of state responsibility in international law (Caron, 2002, 857–58; Oh, 2007, 209–10; Wood, 2008, 383).

¹⁹ARSIWA Article 8, Commentary paragraphs 1 and 2.

in accordance with the law.” Article 4 of the Military Service Law (MSL) and Article 22 of the National Defense Law (NDL) respectively state the following: “[t]he 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,” and “[t]he Militia, under the command of military organs, shoulders the tasks of preparations against war.” Serving as an assisting and reserve force of the PLA, China’s militia is “an armed organization of the masses not divorced from production”²⁰ and “militia organizations shall be set up in townships, nationality townships, towns, enterprises, and institutions.”²¹

From one perspective, the conduct of militia carrying out its mission at sea based on China’s internal laws is attributable to the Chinese government because the militia is a state organ under Article 4 of the ARSIWA. However, the point is obscured by the fact that Chinese maritime militia and their vessels in effect belong to state-owned fishery companies. Some analysts—mostly Chinese—insist that fishery companies and their affiliated militia groups are neither state organs under Article 4 nor parastatal entities under Article 5.²² It would be a long shot to determine whether Chinese maritime militia groups are state organs. Instead, many argue that those militia groups are parastatal organs empowered by China’s internal laws.²³

Under the Commentary to Article 4 of the ARSIWA, a state shall assume responsibility for the conduct of any organs even if the state denies their formal status as state organs. It does not matter whether those organs are classified as private or public based on the internal legal system, equity participation, or ownership of the state and whether they are subject to government executive control. According to Article 5 of the ARSIWA, even if the state creates, funds, and directs militia groups or parastatal entities to expunge their official ties to the state, their conduct can be attributed to the state, provided their act exercises elements of government authority conferred on the entities in question by internal law.

In short, many articles and provisions in the Chinese legislation acknowledge that the duties and missions of maritime militia groups include the defense of Chinese borders and preservation of orders in and around the Chinese mainland. Although these provisions do not specifically mention “governmental authority,” the very phrase “defend the frontier and maintain public order” proves that Chinese maritime militias are empowered to exercise governmental authority.²⁴

The 2016 *Flemingo v. Poland* case offers a good reference for determining “elements of governmental authority” conferred on nonstate actors in question. In 2012, the Polish Airports State Enterprise (PPL) terminated the lease and operation agreement of duty-free business in the airport signed with Baltona, which had been acquired by the Flemingo Group established under the laws of India. The PPL then requested that Baltona leave the Polish airport immediately without any due compensation. The claimant, Flemingo, filed arbitration against the respondent, the Republic of Poland, in the Permanent Court of Arbitration under the United Nations Commission on International Trade Law Rules. Under Polish internal law, the PPL was an independent and self-governed enterprise. At the same time, it was a state-owned enterprise (SOE) whose stock was 100 percent owned by the Polish Ministry of Finance and whose management was supervised by the Polish Ministry of Transport. From one perspective, the PPL could easily and quickly be deemed as exercising certain governmental authority under the internal law of the Polish state. Yet the arbitral tribunal ruled that the question of whether the state’s equity participation in a state-owned enterprise is, or is close to, 100 percent alone cannot determine whether it is an organ exercising governmental authority.²⁵ Only after further examining the various functions

²⁰MSL Article 36.

²¹MSL Article 37.

²²Zheng and Wang (2014); Lu (2017); Wan et al. (2017); Hu (2020).

²³Erickson and Kennedy (2016b); Sato (2020), 3.

²⁴MSL Article 36; NDL Articles 22 and 64.

²⁵United Nations Commission on International Trade Law (2016). As seen in other cases such as the 2008 *Jan de Nul N.V. and Dredging International N.V. v. the Arab Republic of Egypt* case and the 2009 *EDF (Services) Limited v. Romania* case, the tribunal’s consistent case law holds that an SOE cannot be regarded as a state organ exclusively on the basis of the structural test or the state’s internal law as specified in Article 4 of the ARSIWA.

and roles of the PPL beyond the scope of ARSIWA Article 4 did the tribunal unanimously agree that the PPL was a de facto state organ.²⁶

It is also worth noting that the test of “typical or essential state function” as established in the 1985 *Hyatt v. Iran* case clarifies the otherwise ambiguous interpretation of governmental authority.²⁷ The Hyatt International Corporations signed management agreements of three Hyatt hotel services in Iran from 1971 to 1979. However, the Alavi Foundation and the Foundation for the Oppressed, both of which were established by the “direction of Imam Khomeini and approval of Revolutionary Council,” confiscated the property of the Hyatt International Corporations during the 1979 revolution. In this case, it was questioned whether the act of confiscation of property by government-established charity foundations under government control would be attributed to the state. Iranian internal law stated that the charity foundations were mandated to find the properties subject to detention under the close supervision of the government. The tribunal determined that it was necessary to consider whether the function performed by the entity is “typically or essentially” a state function. It concluded that the foundations were not private but public entities empowered by Iranian internal law and that their functions to find and confiscate foreign properties could be regarded as aid for public purposes on behalf of the government.²⁸

To summarize this section, China’s maritime militia groups blur the line between fishing boats and naval forces. In essence, they are empowered to perform the essential function of the Chinese government as provided by Chinese internal laws to “defend frontier and maintain public order” in disputed waters.²⁹ The prominent operations exercised by China’s maritime militia include displaying the Chinese flag on barren reefs and atolls, supporting the construction of artificial islands, bullying other countries’ vessels, and protecting oil rigs in cooperation with other kinds of official forces.³⁰ Such activities would constitute a “typical or essential state function” regardless of the identity and character of maritime militia as a parastatal or private entity.

Conduct instructed, directed, or controlled by a state

China’s state responsibility for its maritime militia can also be established if the militia is instructed, directed, or controlled by China’s state machinery when conducting intelligence and surveillance operations at sea or transporting logistic supplies to artificial islands in coordination with the PLA Navy, CCG, and other maritime law enforcement agents.³¹

Many observers and analysts believe that China’s maritime militia is not only instructed but also directed or controlled by the Chinese authorities. More specifically, China’s maritime militia receives commands and orders from the military, the party, or the government bureaucracy. Local party committees and government at all levels take part in the overall planning and arrangement process of militia groups. A party unit explicitly charged with relaying the directives of the Chinese Communist Party (CCP) has been established within every maritime militia group.³² At the central government level, the State Council also “exercises leadership jointly with the Central Military Commission over the building of ... the militia.”³³ At the local level ranging from the provincial military districts to the county and township PLA departments, direction and oversight are carried out over militia work in accordance with the Militia Work Regulation. The multilayered command-and-control system works effectively for Chinese maritime militia to take a role as a strategic instrument in disputed waters.³⁴

²⁶Jati (2017), 1–6. After years of negotiation, the Flemingo Group signed an investment agreement again with the PPL to sell Flemingo’s 80.68 percent share in Baltona Duty Free in October 2019 (Moodie, 2019).

²⁷Jones (2008), 265–67.

²⁸Iran–United States Claims Tribunal (1985), 14–16.

²⁹Kennedy and Erickson (2016a); Yatsuzuka (2016); Kraska (2020).

³⁰Wan et al. (2017), 43.

³¹ARSIWA Article 8.

³²Yatsuzuka (2016).

³³NDL Article 12(8).

³⁴Erickson and Kennedy (2016a, 2016b).

China's maritime militiamen are required by the Chinese government to participate in basic training and exercises to conduct assigned missions. Article 64 of the NDL states that "the militiamen, reservists, and other people shall perform their functions and duties when taking part in military training and undertaking the tasks of preparations against war and defense operations." Article 20 of the Militia Work Regulation states that the "PLA services and arms organs, troops, and military academies shall assist the provincial military districts in conducting military training, including both routine and specialized training on target identification and reporting, for militias."

In addition, the militia groups are asked by the Chinese government to take part in joint training and operations with the PLA Navy and CCG. Many believe that participating in these exercises while wearing militia uniforms and performing mission-specific operations would be impossible without the instructions of high-level military authorities or the central and local governments.³⁵ The Chinese authorities are also known for directing or controlling the reinforcement of militia fishing boats equipped with strengthened hulls, ammunition storage, surveillance capability, information support systems, and the like.³⁶

The 1986 *Nicaragua v. United States of America* case can be a useful reference in this regard. The Nicaraguan government challenged the United States in the ICJ, asserting US responsibility for the conduct of two Nicaraguan rebel groups: Unilaterally Controlled Latino Assets (UCLAs) and Contras.³⁷ The ICJ denied the attribution of these acts against humanity by the Contras to the United States.³⁸ However, the ICJ admitted that the conduct of the UCLAs in attacking certain facilities was attributed to the United States for the following reasons: (1) in addition to financial support from the US military, the US Central Intelligence Agency (CIA) was engaged in the process of the UCLAs' attack on ports and airports in Nicaragua; (2) the attack was under the supervision of US agents and received logistical support such as speedboats, guns, and ammunition from the US government; and (3) the conduct of the UCLAs was planned by the US and was on the direct instructions of the US agency in its operation.³⁹ The ICJ ruling indicates that if there are "real links" or if there is an "effective control relationship" between militia groups and any government, whether national or foreign, their conduct is attributable to the government.

Have China's maritime militia groups breached China's international obligations?

Article 12 of the ARSIWA states that a breach of obligation occurs when an act of a state is not in conformity with specific terms and conditions in an internationally binding agreement, regardless of its origin or character. International obligations may include any treaties, international customary rules, or general principles.⁴⁰ As with the nexus between the government and maritime militia discussed in the previous section, China rejects the claim that its maritime militias have breached

³⁵Erickson and Kennedy (2015d); Kennedy and Erickson (2016b, 2017a).

³⁶US Department of Defense (2020), 72. The government's control of maritime militia is also linked to compensation and discipline. During joint exercises with the PLA Navy and CCG, maritime militia receives compensation, praise funds, subsidies, social benefits, and pensions from localities (Kraska, 2020). The government commends and rewards maritime militiamen for the successful implementation of their mission to protect China's sovereignty and sovereign rights in troubled waters (Erickson and Kennedy, 2016a). In the case of violation of maritime militia obligations, fishermen are fined, fishing licenses are canceled, and/or subsidies are disqualified (Zhang, 2016, 66).

³⁷In 1979, the United States obtained information that the new government of Nicaragua, which had been established by a civil war, provided military support for rebels in El Salvador and other neighboring Latin American countries. In the process of oppressing the new government of Nicaragua, the United States intervened in the bombing attack of ports, airports, oil facilities, and naval bases in Nicaragua from 1983 to 1984 while providing financial support for Nicaraguan rebel groups (International Court of Justice, 1986, 21, paras. 19–20; 48, para. 81; 86, para. 86).

³⁸In determining the US responsibility for the breach of international humanitarian law committed by the Contras, the confirmation of "complete dependence" and "control" was a key element. The ICJ acknowledged US involvement in planning military operations for the Contras. Nevertheless, it concluded that it was not a complete dependence because the military operation of the Contras continued after the suspension of US support and the United States did not take "effective control" of the Contras' conduct (International Court of Justice, 1986, 62–65, paras. 109–10, 115).

³⁹International Court of Justice (1986), 48–51.

⁴⁰ARSIWA Article 12, Commentary paragraph 3. The breach rule is not applied retroactively as stated in Article 13.

China's international obligations, citing that with their civilian identity militia groups mainly serve commercial interests, albeit occasionally conducting activities for the protection of China's sovereignty and sovereign rights.⁴¹ This section focuses on four international obligations that China has committed, or will have to commit, itself to and examines whether there have been any breaches of obligation by its maritime militia.

The obligation of due regard

On 8 March 2009, a PLA Navy intelligence collection ship, two law enforcement patrol ships, and two Chinese-flagged maritime militia vessels that belonged to Fugang Fisheries Company surrounded the USNS Impeccable, which was conducting routine intelligence collection and surveillance operations in China's EEZ near the Hainan Island. The two militia vessels approached as close as 25 feet (about 7.6 meters) to the USNS Impeccable. Then, one person from a militia vessel tried to sever the towed array sonar of the US ship, while the other vessel dropped debris in front of its path, forcing it to alter course continuously and to withdraw from the area. The USNS Impeccable had to stop right in front of the militia vessels to avoid collision and eventually left the area. The other Chinese ships kept farther back and just watched the process.⁴²

Such conduct constitutes a violation of the UNCLOS, which China ratified in 1996. In addition to the freedoms of the high sea as defined in Article 87, the UNCLOS urges that the rights in the EEZ of coastal states "shall be exercised with due regard for the interests of other states."⁴³ The conduct of Chinese maritime militia—that is, forcing the US ship to leave the area—can thus be considered a breach of due regard by a coastal state to ensure the freedom of navigation for all states as stated in UNCLOS Articles 56 and 58. But China rejects the accusation that the close-quarters situation intentionally created by approaching the USNS Impeccable violates China's due regard obligations. Instead, it asserts that the US ship did not have freedom of navigation in China's EEZ as it was on a surveillance mission without prior permission from the Chinese authorities.⁴⁴

Although the text of the UNCLOS does not clearly define what due regard means, the history of UNCLOS negotiations indicates that all states are required to abstain from actions that impede the exercise of other states' freedom of navigation.⁴⁵ The act of repeatedly harassing and bullying another state's vessel at a close distance and impeding its navigation is not in conformity with the said obligations as stipulated in Article 56.2. Recent case law confirms that the general features of due regard obligations involve a duty to cooperate with foreign vessels and to keep the right balance between their own rights and obligations.⁴⁶

In addition, Article 56.1 of the UNCLOS states that a coastal state enjoys limited jurisdictional rights for the purpose of "exploring and exploiting, conserving, and managing the natural resources" as well as establishing and using "artificial islands, installations, and structures" to "conduct marine scientific research or to protect the marine environment" in its EEZ. It is generally interpreted that the rights and jurisdiction set out in this provision do not justify a coastal state's conduct in restricting activities or interfering with the free navigation of other states.⁴⁷

Nevertheless, large vessels of China's maritime militia do not seem to care about other countries' sovereignty and sovereign rights within and around disputed waters. They gather around the disputed islands effectively controlled by other neighbors such as the Philippines, Taiwan, Vietnam, and Japan. With or without the presence of CCG ships, many of these vessels have been seen anchoring or

⁴¹Luo and Panter (2021).

⁴²Erickson and Kennedy (2015d); Green et al. (2017), 57–59.

⁴³UNCLOS Articles 56 and 58.

⁴⁴People's Daily Online (2009); Green et al. (2017), 61. China's argument is contradictory to its own practice. Most notably, the number of Chinese warships operating across the South Korean EEZ increased from 110 in 2016 to 290 in 2019, while the number of Chinese warships engaging in military activities in other countries' EEZs is also increasing (Park, 2020).

⁴⁵Odom (2018), 52.

⁴⁶Forteau (2019), 25.

⁴⁷Odom (2010), 441–42.

transiting around the islands without engaging in fishing activities.⁴⁸ For many in East Asia, it is a real possibility that China's armed maritime militia could land on disputed islands and reefs to claim China's sovereignty. It is equally likely that China's militia vessels may engage in armed conflicts with vessels of other countries in disputed waters, thus violating China's due regard obligation.⁴⁹

The obligation of maritime safety

In May 2014, the China National Offshore Oil Corporation moved an oil rig (HYSY-981) to disputed waters that had been contested with Vietnam. The arrival point of the rig was 70 nautical miles (nm) within Vietnam's EEZ and 20 nm from China-owned Triton Island in the Paracel archipelago. When China deployed HYSY-981, only three service ships initially accompanied the escort mission. When the Vietnamese coast guard and its law enforcement ships were dispatched, however, China reinforced escort ships, including the CCG cutters, PLA Navy ships, and maritime militia vessels that belonged to Fugang Fisheries Company.⁵⁰ Over the next two months, Vietnamese ships suffered under a significant show of force by China, including ramming and collisions.⁵¹

Such actions are not in conformity with China's obligations for maritime safety as stipulated in the International Regulations for Preventing Collisions at Sea (COLREGs).⁵² The rules of the COLREGs are applied to all vessels in all waters as long as they are "navigable by seagoing vessels."⁵³ Judging from news reports and video evidence, ramming and causing Vietnamese fishing boats to capsize and sink can be considered a breach of obligations of responsibility (Rule 2), safe speed (Rule 6), risk of collision (Rule 7), action to avoid collision (Rule 8), crossing situation (Rule 15), and action by a give-way vessel (Rule 16) of the COLREGs. The COLREGs state that all vessels shall take proper and effective actions or measures with ample time and good seamanship to prevent collisions. In a similar vein, the UNCLOS stipulates that applicable regulations relating to the safety of life at sea and the prevention of collisions shall be observed and that states shall take necessary measures for those purposes.⁵⁴

International rules notwithstanding, China's maritime militia vessels intentionally hit three Vietnamese fishing boats, thus sinking them and putting their fishermen at risk. If the South China Sea arbitration (*Philippines v. China*) serves as a reference, Chinese maritime militia vessels breached China's international obligations under the law of the sea. In 2016, the International Arbitral Tribunal established under Annex VII to the UNCLOS unanimously ruled that the acts of Chinese boats in the vicinity of Scarborough Shoal caused serious risk of collision and danger to Philippine vessels and their crews and found that China has thus breached Article 94 of the UNCLOS and Rules 2, 6, 7, 8, 15, and 16 of the COLREGs.⁵⁵

The obligation of marine environment protection and preservation

China launched massive land reclamation and facility construction projects in 2013, which include runways, small ports, seawalls, floating work platforms, fuel and water storage facilities, and paved roads, on the seven reefs in the Spratly archipelago.⁵⁶ Aside from official government ships, a number of militia vessels participated in the reclamation and construction projects.⁵⁷ Perhaps not by intention

⁴⁸Poling (2019); Kraska (2020); VOA News (2020).

⁴⁹Wan et al. (2017), 43–44.

⁵⁰In response to Chinese maritime militias, Vietnam has been building up a large maritime militia force in the South China Sea (Duo, 2022). Some of them were reportedly assigned and dispatched to the conflict site during the 2014 confrontation (Thao and Thanh, 2019; Phuong, 2020). It is beyond the scope of this study to examine whether and to what extent Vietnamese maritime militias are similar to their Chinese counterparts in terms of scale and complexity.

⁵¹Reuters (2014); Erickson and Kennedy (2015d); Green et al. (2017), 207–21.

⁵²Poling et al. (2021), 13–14.

⁵³COLREGs Rule 1.

⁵⁴UNCLOS Article 94.2(b) and Article 94.5.

⁵⁵For the motivation of the Philippine government to pursue arbitration against China, see Wiegand and Beuck (2020).

⁵⁶Green et al. (2017); Koo (2017).

⁵⁷For instance, a group of militia vessels belonging to Fugang Fisheries Company conducted a "fishing expedition" to the Spratly Islands right before the reclamation and construction project of the artificial islands began. The fleet included 1

but clearly by effect, significant environmental damage has been done to the marine ecosystem. Most notoriously, dredgers removed not only reefs but also lagoons and upper reef slopes. Many satellite images show that sediments on the reefs and corals left by reclamation have further aggravated the damage already done in their vicinity.⁵⁸

The 2016 International Arbitral Tribunal ruled that some of China's construction work breached Article 192 of the UNCLOS, which states that “[s]tates have the obligation to protect and preserve the marine environment.”⁵⁹ The participation of maritime militia in reclamation and construction of artificial islands can also be regarded as breaching Article 194.1 of the UNCLOS, which requires states to take all measures necessary to “prevent, reduce, and control pollution of the marine environment from any source.” In addition, China has yet to evaluate the environmental effects of its reclamation and construction projects in the South China Sea and is therefore reasonably suspected of breaching Article 204.1, which requires states to make a diligent effort to scientifically “observe, measure, evaluate, and analyze ... the risks or effects of pollution of the marine environment.”

The controversy over fishery subsidies

China's maritime militia vessels are known for long-distance fishing expeditions, which would not have been possible had it not been for government subsidies, including fuel subsidies, Spratly Islands special fishing subsidies, and vessel construction subsidies designed for larger steel-hulled vessels to explore more frequently into further seas.⁶⁰

From 2011 to 2015, the Chinese government's financial support for fisheries amounted to RMB 146 billion (USD 22 billion), about 80 percent of which came as fuel subsidies, while about 7 percent of the fund was provided for the construction and/or renovation of vessels.⁶¹ In 2018, China became the largest fishery subsidy provider in the world by giving out a total of USD 7.2 billion—about 20 percent of the world's total subsidies.⁶² Generous subsidies to the maritime militia must have caused illegal, unreported, and/or unregulated (IUU) fishing.⁶³ Aside from fishing, satellite images show that the Chinese expedition fleet spent far more time at anchor without fishing activities in disputed waters than is typical of vessels elsewhere, indicating that their priority is not always commercially driven.⁶⁴

The provision of fisheries subsidies is controversial, causing both economic and environmental concerns, especially within the World Trade Organization (WTO). As part of the Subsidies and Countervailing Measures (SCM) agreement, WTO members have negotiated rules to prohibit governments from providing subsidies to the fisheries industry as a way to restore and ensure a sustainable marine ecosystem. With the aim of reaching an agreement on eliminating subsidies for IUU fishing and curbing particular forms of fisheries subsidies, the current discussion revolves around the Draft Consolidated Chair Text of the Proposed Fisheries Subsidies Disciplines, which was circulated as proposed Annex VIII of the SCM Agreement in November 2007. According to Article 1 of the draft text, subsidies regarding the construction or renovation of fishing vessels, replenishment of fishermen's income, illegal fishing, and all support that affects overfishing resources are prohibited. The negotiating group of rules on fisheries subsidies circulated a revised draft text on 30 June 2021. An earlier expectation to conclude the 20-year negotiations by the end of 2021 was not met because the 12th

command and supply ship, 29 trawlers, and 316 militiamen, and it sailed about 1,800 nm (Erickson and Kennedy, 2015d). During the reclamation and construction work, another fleet consisting of a 4,000-ton command and supply ship, a 1,500-ton cargo ship, and 30 trawler ships from Danzhou conducted a “rights protection expedition” to the Spratly Islands (Erickson and Kennedy, 2016b).

⁵⁸Erfteimeijer et al. (2012); Langenheim (2015); Kominek (2016); Southerland (2016).

⁵⁹Permanent Court of Arbitration (2016).

⁶⁰US Department of Defense (2020), 71–72. For instance, the Tanmen maritime militia received a fuel subsidy of RMB 35,000 (USD 5,400) and one-time subsidies of RMB 82 (USD 12) per kW of engine power each time they traveled to the Scarborough Shoal or the Spratly Islands (Kennedy and Erickson, 2016b).

⁶¹Zhang and Bateman (2017).

⁶²Sumaila et al. (2019), 7.

⁶³He (2015), 111; Cisneros-Montemayor and Sumaila (2019), 1–2.

⁶⁴Poling (2019).

Ministerial Conference (MC12) was postponed after an outbreak of the Omicron variant of the COVID-19 virus forced many governments to impose travel restrictions. By the time of writing, the WTO continues to work on the draft agreement, with informal consultations being held on various technical issues.⁶⁵

It is certain that China alone should not be held responsible for IUU fishing and certain forms of subsidies that contribute to global overcapacity and overfishing problems. Also, the Chinese government's efforts to curb the so-called black ships—Chinese fishing vessels without valid legal permits—and to prevent overfishing in its coastal areas and beyond should not be discounted. Reportedly, Chinese authorities confiscated or regulated more than 30,000 black ships in 2017 for violation of identification obligations and/or permit requirements.⁶⁶

By taking advantage of fisheries subsidies, however, China's fishing industry became the world's largest producer of marine capture in 2018 as well as a top exporter of marine products.⁶⁷ Fuel subsidies as well as vessel construction and renovation subsidies are classified in the discussions on the Fishery Subsidies Agreement as a "bad subsidy" or "capacity-enhancing subsidy" similar to "prohibited subsidies" in the SCM agreement. Even worse, the Chinese government has provided militia groups with fishery subsidies in various forms to conveniently disguise them as civilians and camouflage their true identities. The prospective WTO illegality of fisheries subsidies might have little to do with the attempt to attribute the wrongful acts of Chinese maritime militia to the Chinese state. Nevertheless, it is worth noting because it helps to demonstrate the extent to which China's maritime militia is breaching the emerging trade norms to ban IUU fishing and establish sustainable fishing processes and production methods (PPMs). Such an appropriate institutional setting within the WTO is also likely to strengthen the responsibility of China's maritime militia by heightening China's perception of the reputation costs incurred among the international community.⁶⁸

Conclusion and implications

China has actively used maritime militia groups in recent years to implement the Chinese dream of the great rejuvenation of the nation at sea. Its maritime militia policy has quickly evolved into an aggressive hybrid strategy that is causing growing concerns regarding stability in the South China Sea and beyond. After critically reviewing the evolution of China's gray-zone operations, this study explored the possibility of attributing state responsibility to the Chinese government for the internationally wrongful conduct of its maritime militia.

Establishing China's state responsibility for the conduct of the maritime militia requires a cross-examination of three separate but related elements: (1) whether China's maritime militia is empowered by China's internal laws and exercises "elements of governmental authority"; (2) whether the conduct of China's maritime militia is taken "on the instructions of, or under the direction or control of" the Chinese authorities; and (3) whether China's maritime militia is breaching China's international obligations. It is no surprise that China has denied state responsibility for the gray-zone operations conducted by maritime militia in the shadow of legal ambiguities and diplomatic arbitrariness. China claims that the conduct of the maritime militia during peacetime cannot be attributed to the state because the militia groups are organized as wartime reserve forces. China also contends that the conduct of the maritime militia cannot be linked to the Chinese government because it not only has a civilian status but also belongs to fisheries companies that serve commercial interests, albeit occasionally conducting activities for the protection of China's sovereignty and rights.

⁶⁵World Trade Organization (2021).

⁶⁶Zhang (2019). The Chinese government's efforts notwithstanding, the (mis)conduct of black ships can be attributed to the Chinese government's responsibility according to the International Tribunal for the Law of the Sea (ITLOS). On 2 April 2015, the ITLOS rendered an advisory opinion on the rights and obligations of flag states and coastal states regarding IUU fishing within the EEZ of coastal states. This applies not only to legally licensed fishing vessels but also to black ships. As a party to the UNCLOS, China is obliged to exercise "due diligence" as a flag state to ensure that no IUU fishing occurs in other countries' EEZs (International Tribunal for the Law of the Sea, 2015).

⁶⁷Food and Agriculture Organization (2020), 10, 75.

⁶⁸Kim (2019), 639–42.

This study argues that China's maritime militia groups are parastatal entities that are empowered by many articles and provisions in Chinese legislation to defend Chinese borders and to preserve orders in and around the Chinese mainland. Their activities unrelated to fisheries would constitute a "typical or essential state function" regardless of their identity or character as a public or civilian entity. Their acts can also be considered acts of the Chinese state to the extent that they are de facto instructed, directed, or controlled by the state machinery including military and party leadership as well as government bureaucracy, both central and local, in carrying out their duties and missions.

This study examined four prominent cases to determine whether and to what extent China's maritime militia groups have breached China's international obligations. First, the 2009 USNS Impeccable incident indicates that Chinese maritime militia breached a due regard duty to cooperate and to strike a proper balance between the rights and obligations concerned. Second, the 2014 oil rig dispute between Vietnam and China shows that the conduct of Chinese maritime militia violated its obligations for maritime safety under the COLREGs and UNCLOS by operating in a dangerous manner, thus causing serious risk of collision for Vietnamese vessels in their vicinity. Third, China's obligation toward marine environmental protection and preservation under the UNCLOS has also been breached by a series of construction works in the South China Sea, where the maritime militia actively participated in the reclamation and construction of artificial islands. Fourth and finally, China's maritime militia vessels have received a large amount of government subsidies that have caused both commercial and environmental concerns, especially within the context of the WTO negotiations on banning illegal fisheries subsidies.

As a result, China's state responsibility can be established and recognized for the conduct of its maritime militia. Given that many activities of China's maritime militia are linked directly or indirectly to the Chinese authorities and some of them have breached China's international obligations in various issue areas, China must be held responsible for the internationally wrongful conduct of its maritime militia groups. Yet this conclusion must be taken with a caveat as more empirical evidence needs to be established to justify a general claim about the nature of China's state responsibility. Given the multidimensional nature of state responsibility, future research will also be required to tease out which components of state responsibility are necessary for reparation to an injured state to be justified.

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