Grey Zone Conflict in the South China Sea and Challenges Facing the Legal Framework for the Use of Force at Sea

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ABSTRACT

The pursuit of maritime resources, especially in disputed maritime zones, has encouraged various States to engage in grey zone conflict to assert control over such areas on the one hand, and to obtain marine resources for economic benefit on the other hand. These operations have posed threats to the neighbouring States as well as challenges to international law on the use of force since the force used is often below the threshold of conventional military operations to which the current international law on the use of force applies. This article introduces the concept of grey zone conflict and analyses tactics common to such conflicts in the context of the South China Sea. Based on these, the author revisits the legal framework for the use of force at sea, including the prohibition thereof under the United Nations Charter (UN Charter) and the United Nations Convention on the Law of the Sea (UNCLOS), explores its treatment under International Humanitarian Law (IHL) and International Human Rights Law (focusing on maritime law enforcement) to identify key challenges to international law in addressing this phenomena in the South China Sea, and gives relevant recommendations on the subject.

Keywords: Use of Force at Sea, Grey Zone Conflict, South China Sea.

Introduction

In March 2009, while conducting routine operations in international waters in the South China Sea, the surveillance ship USNS *Impeccable* was harassed by five Chinese vessels which allegedly attempted to impede the

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US vessel's activities in the area, although the location was beyond the territorial sea of any coastal State.[1] In April 2012, two Chinese maritime surveillance ships approached and prevented a Philippine warship from arresting Chinese fishermen who were illegally fishing near the disputed Scarborough Shoal in the South China Sea.[2] From May to August 2014, State-owned China National Offshore Oil Corporation moved its HD-981 oil platform to the disputed waters near the Paracel Islands in the South China Sea, resulting in tension between China and Vietnam. Chinese vessels not only rammed and sank Vietnamese fishing boats, but also fired water cannons at a Vietnamese ocean inspection ship while it was operating in the territorial waters of Vietnam.[3] These incidents have become increasingly common in the South China Sea, escalating tensions among States and affecting regional peace and stability. Nevertheless, these activities fall within the concept of "gray zone" conflicts, thus, challenging the application of international law on the use of force.

The abovementioned incidents are examples of gray zone conflicts, in which operations of forces may not merely be actions by regular armed forces and do not clearly reach the threshold of war. Gray zone conflict has been a subject of numerous research projects, which often focus on aspects of international relations and security.[4] The legal framework for the use of force remains a traditional topic in international law; however, the discussion around use of force within grey zone conflict is an area that can be further explored.

Patricia Jimenez Kwast successfully addresses key aspects of the distinction between maritime law enforcement and the use of force at sea

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[1] Yuli Yang, "Pentagon says Chinese vessels harassed U.S Ship", *CNN*, 9 March 2009, available at: http://edition.cnn.com/2009/POLITICS/03/09/us.navy.china/index.html (all internet references were accessed on June 2020).

[2] Associated Press in Manila, "Philippine warship in standoff with Chinese vessels", *The Guardian,* 10 April 2012, available at: https://www.theguardian.com/world/2012/apr/11/philippines-china-stand-off-south-china-sea.

[3] Ankit Panda, "Chinese Ship rams and sinks Vietnamese fishing boat in South China Sea", *The Diplomat,* 28 May 2014, available at: https://thediplomat.com/2014/05/chinese-ship-rams-and-sinks-vietnamese-fishing-boat-in-south-china-sea/.

[4] Michael Mazarr, *Mastering Gray zone: Understanding a changing era of conflict*, U.S Army War College Press, Carlisle, 2015; Nathan Freier et al., *Outplayed: Regaining Strategic Initiative in the Gray Zone*, U.S Army War College Press, Carlisle 2016; Nadia Schadlow, "Peace and War: The Space between", *War on the Rocks*, 18 August 2014, available at: https://warontherocks.com/2014/08/peace-and-war-the-space-between/.

in her paper on the Guyana/Suriname Award,[5] without, however, delving into other forms of use of force or other branches of international law governing the use of force. Johnathan G. Odom has also comprehensively analysed legal aspects of the operation of grey zone strategy under different international law frameworks,[6] though his research is limited to the operation of maritime militia, a common form of grey zone strategies. Most recently, Aurel Sari distinguished lawfare, hybrid warfare and grey zone conflicts with the recommendation to treat international law as a special instrument to pursue strategic and operational objectives,[7] but without scrutinizing any specific international law framework regulating these three situations.

In this context, it is essential to revisit the international law on use of force at sea to identify the most feasible framework for the grey zone. Within its scope, the paper would briefly recap understanding of grey zone conflicts among international scholars before describing specific patterns of grey zone conflicts being used in the South China Sea. Afterwards, the legality of this phenomenon would be considered by answering two questions: (i) whether the use of force is prohibited under the United Nations (UN) Charter and United Nations Convention on the Law of the Sea (UNCLOS) framework; and (ii) how force is used under the international humanitarian law and maritime law enforcement framework. It should be noted that whether each body of international law scrutinized in this paper is applicable or not depends on pieces of factual evidence of an incident and the context in which the said incident arises. Thus, the analysis in this paper is based on the assumption that all information found and referred to is accurate. If any information is found inaccurate, a different legal analysis may be more applicable.

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[5] Patricia Jimenez Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award", *Journal of Conflict & Security Law*, Vol. 13, No. 1, (2008), pp. 49-92.

[6] Johnathan G. Odom, "Guerrillas in the sea mist – China's maritime militia and international law", *Asia-Pacific Journal of Ocean Law and Policy,* No. 3, 2018, pp. 31-94.

[7] Aurel Sari, "Legal resilience in an era of grey zone conflicts and hybrid threats", *Cambridge Review of International Affairs*, 20 May 2020, available at: https://www.tandfonline.com/doi/full/10.1080/09557571.2020.1752147.

The Use of Force in Grey Zone Conflict

Understanding the Grey Zone Conflict

Grey zone is neither a legal term nor a brand-new strategy, but simply a new terminology to replace a long-standing concept in international relations.[8] Grey zone conflict is a metaphorical state of being between war and peace, where one country may aim to win either political or territorial advantages associated with overt aggression, using military or paramilitary forces, without crossing the threshold of open warfare with its rivals. Grey zone conflict moves gradually towards its objective rather than seeking conclusive results in a specific period of time.[9]

In recent years, the concept of the grey zone has attracted the attention of policymakers and has been the subject of debates among international scholars. Nadia Shadlow defines grey zone as "the space between war and peace [...] a landscape churning with political, economic, and security competitions that requires constant attention".[10] Denny Roy describes it as a situation "where a State attempts to make gains at the expense of a strategic competitor by using tactics that, while aggressive, remain below the level that usually triggers conventional military retaliation".[11] Meanwhile, Nathan Freier et al. propose that "gray zone challenges lie between 'classic' war and peace, legitimate and illegitimate motives and methods, universal and conditional norms, order and anarchy, and traditional and irregular (or unconventional) means."[12] Despite differing descriptions, most scholars are similar in setting conventional warfare as a ceiling for grey zone operation and recognize grey zone strategy as having three major characteristics: (i) an objective to

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[8] Adam Elkus, "50 shades of gray: Why the gray wars concept lacks strategic sense, Commentary", *War on the Rocks,* 15 December 2015, available at: https://warontherocks.com/2015/12/50-shades-of-gray-why-the-gray-wars-concept-lacks-strategic-sense/.

[9] M. Mazarr, above note 4.

[10] N. Schadlow, above note 4.

[11] Deny Roy, "China Wins the Gray Zone by Default", *ETH Zurich Center for Security Studies*, 1 October 2015, available at https://css.ethz.ch/en/services/digital-library/articles/article.html/193819/pdf.

[12] N. Freier et al., above note 4.

change the *status quo*; (ii) the gradual or incremental operation; and (iii) the involvement of "unconventional" elements of State Powers.[13]

There is a range of tools and techniques that can be used to assemble grey zone campaigns. Grey zone strategy can be exercised in the areas of economics, military, information, politics and other fields, with different purposes. With specific regard to the military field, grey zone tools and techniques could include nuclear posturing, movement of troops, threats, creation of *fait accompli* situations, large-scale covert actions to weaken regime, discrete acts of violence at key moments, use of unconventional warfare forces (special operation forces, covert operators) in direct action with deniability and sponsoring large scale proxy violence, among others.[14]

Grey Zone Conflict in South China Sea

Assessments of the situation in the South China Sea have shown that the grey zone strategy is being used in the South China Sea, making the regional situation unstable and unpredictable.[15] This hypothesis comes from the assumption that there is a "grey zone" in waters, particularly in the South China Sea, a disputed area with numerous overlapping country claims. For instance, some States have conducted unilateral activities to gradually alter the *status quo* and control the sea by involving "unconventional" elements such as law enforcement or civilian forces.[16] This strategy aims to control the waters without the use of military force or creating reason for military intervention.

There have been a number of grey zone tools and techniques used as part of the grey zone strategy in the South China Sea. However, within the scope of this article, the author will focus on the analysis of two major patterns: (i) military activities; and (ii) paramilitary activities.

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[13] Dmitry Filipoff, "Andrew S. Erickson and Ryan D. Martinson Discuss China's Maritime Gray Zone Operations", *Center for International Maritime Security (CIMSEC)*, 11 March 2019, available at: http://cimsec.org/andrew-s-erickson-and-ryan-d-martinson-discuss-chinas-maritime-gray-zone-operations/39839.

[14] M. Mazarr, above note 4.

[15] To Anh Tuan et al., "China's gray zone strategy in the East Sea (South China Sea)", East Sea Institute, November 2018, p. 15.

[16] *See* Introduction.

Military Activities

Military activities in the grey zone implies the use of military power to spread a message of readiness to use said military power or otherwise escalate militarily.[17] Though these may appear to be closest in form to use of force,[18] these activities are still within the grey zone since they only manifest force in the form of deterrence, and information about these events, if any, comes from unofficial sources only.

In the South China Sea, military activities in the grey zone often take different forms. It could be a threat to invade, for instance, as when China moved the HD-981 oil rig to Vietnam's EEZ, which some media sources revealed the Chinese military had gathered along the border between the two countries.[19] However, no official source has confirmed the news. Nevertheless, the threat to invade creates a psychological advantage for the country that uses grey zone tools, and threatens and discourages neighbouring countries. Military activities in the grey zone could also be applied in large-scale military exercises—for example, in 2018, China for the first time sent a bomber (H-6K) to land on an island in the South China Sea (Paracel Islands), the purpose of which was to deter and show its (possibly illegal) control over the islands and normalize its military presence there.[20]

The situation should be more complicated when "low level" coercion and nonmilitary capabilities such as the employment of paramilitary forces are applied in the maritime context. Commonly, a State would use military vessels to support sea action in the grey zone, a strategy referred to as salami/cabbage slicing.[21] In this strategy, there is a combination of use of coast guard forces with fishermen, militia, and naval forces to assert a maritime claim. Particularly, capabilities would be used in concert, with fishermen and maritime militia acting as the first line

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[17] T. Tuan, above note 15, p. 16.

[18] *Ibid.*

[19] Joshua Philipp, "Chinese Military said to be massing near the Vietnam border", *The Epoch Times,* 18 May 2014, available at: https://www.theepochtimes.com/chinese-military-said-to-be-massing-near-the-vietnam-border_682973.html.

[20] Bethlehem Feleke, "China tests bombers on South China Sea island", *CNN*, 21 May 2018, available at: https://edition.cnn.com/2018/05/20/asia/south-china-sea-bombers-islands-intl/index.html.

[21] T. Tuan, above note 15, p. 18.

of defence, the coast guard as the second line, and the military as a force of last resort, which is always ready to use force when necessary.[22] This strategy is well-illustrated in various incidents in the South China Sea such as those involving the Impeccable (2009), the 2013 incident at Second Thomas Shoal in the Spratly Islands (2013), and HD-981 (2014), among others.

Paramilitary Activities

Paramilitary activities include using measures, whose characteristics, subjects and strategy blur the line between military and paramilitary activities.[23] Within the scope of this paper, the author will focus on paramilitary activities implemented by three main subjects: (i) maritime law enforcement forces; (ii) maritime militia; and (iii) State-owned or semi-State-owned enterprises. These subjects can operate separately or in harmony with each other depending on the nature and scale of the activities.

Maritime law enforcement forces, such as coast guard, maritime surveillance forces, etc., aim to enforce administrative controls over disputed waters.[24] Accordingly, these forces not only perform traditional

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[22] Michael Green et al., "Countering Coercion in Maritime Asia: The Theory and Practice of Gray Zone Deterrence", *Center for Strategic & International Studies*, Washington, D.C., 2017, p. 12.

[23] Lyle Morris, *Gray Zone Challenges of East and Southeast Asia* (presented at 9th South China Sea International Conference, Ho Chi Minh City, Vietnam), November 2017.

[24] Depending on countries, the organization of maritime law enforcement force may vary. However, the obvious link between government and these forces is a thing in common. For example, under the State Council Institutional Reform and Functional Transformation Plan (2013), China Coast Guard (CCG) was restructured on the basis of merging departments as China Maritime Surveillance Forces (CMS), Fisheries Law Enforcement (FLEC), Maritime Safety (MSA), etc. From 2018, CCG was put under the command of the military-administered People Armed Police (PAP) of China. Vietnam coast guard is a people's armed and specialized force of the State playing the key role in law enforcement and protection of national security and order and safety at sea (Article 3, Vietnam Law on Coast Guard 2018). Similarly, Indonesia Sea and Coast Guard (KPLP) is tasked to safeguard and carry out law enforcement functions at sea and coast in terms of safety inspection, maritime traffic and safety of shipping lane (Law of the Republic of Indonesia Number 17 of 2008 on Shipping Law, Chapter XVII, Article 277). The Indonesian Maritime Security Board/The Indonesia Coast Guard (BAKAMLA) is tasked to carry out and organize joint safety patrols, safety early warning system

maritime missions such as ensuring security, order, safety, as well as observance of domestic law of the sea, but could also take actions such as collisions or using water cannons to attack foreign military or civil vessels in disputed waters. In May 2013, after accusing the Philippines of building a new structure on the vessel BRP Sierra Madre, Chinese Coast Guard vessels appeared near the Second Thomas Shoal and attempted to block food supplies for this vessel.[25]

Maritime militia, on the other hand, employ civilian vessels controlled by fishermen that are in fact trained in the military, and can be armed to perform duties in disputed waters, including patrolling, monitoring and attacking foreign fishing vessels.[26] The main objective of these activities is to maintain superiority over the disputed waters while keeping the dispute below the level of conflict and ensuring effective maritime claims. A maritime militia is neither a State agency nor officially established by governments. Instead, they are fishing enterprises and are often comprised of individuals that do not wear military uniform but engage in economic production activities (i.e., fishing). Though the use of maritime militia has never been affirmed as a formal activity,[27] its formal nature is clearly suggested by four characteristics, i.e., that they are: (i) conducted by State organizations;[28] (ii) conducted by authorized personnel;[29] (iii) conducted at government instruction, direction or control;[30] and (iv) acknowledged or adopted by a State.[31] Maritime militias are believed to have been involved in major incidents in the South China

(Presidential Regulation of the Republic of Indonesia Number 178 of 2014 on Maritime Security Agency, Chapter I, Article 3).

[25] M. Green et al., above note 23.

[26] T. Tuan, above note 15, p. 22.

[27] Zhang Hongzhou, "Beijing has a maritime militia in the South China Sea. Sound fishy?", *South China Morning Post*, 3 March 2019, available at: https://www.scmp.com/week-asia/geopolitics/article/2188193/beijing-has-maritime-militia-south-china-sea-sound-fishy.

[28] UNGA Res. 56/83, 12 December 2001, Art. 4 (hereinafter "ROSFIWA").

[29] ROSFIWA, above note 28, Art. 5.

[30] ROSFIWA, above note 28, Art. 8.

[31] ROSFIWA, above note 28, Art. 11.

Sea, such as the Impeccable (2009),[32] Scarborough (2012),[33] and HD-981 (2014).[34]

Paramilitary activities in the grey zone can also be implemented by State-owned or semi-State-owned enterprises. These are strategic tools to gain benefits in disputed waters and to erase the boundary between military and civilian activities. It is challenging to identify the exact status of this kind of subject. Specifically, in practice, the national oil and gas enterprises are often owned by States and led by high-ranking officials.[35] Some may even be of a higher rank than the authorities of local governments where they operate, making it difficult for local government authorities to control or order them.[36] This often creates vague boundaries between commercial and national interests. For instance, in the HD-981 incident (2014), the role of energy companies of China was confirmed.[37] However, it is not easy to identify whether these companies are operating for commercial or national interests.

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[32] During the incident, the South China Sea Bureau of the Chinese Fisheries Bureau ordered Chinese maritime militia to obstruct the operation of the Impeccable. *See* Andrew S. Erickson and Connor M. Kennedy, "China's Daring Vanguard: Introducing Sanya City's Maritime Militia"*, Andrew S. Erickson*, 5 November 2015, available at: https://www.andrewerickson.com/2015/11/chinas-daring-vanguard-introducing-sanya-citys-maritime-militia/.

[33] During the incident, Chinese maritime militia attacked twenty-five fishing boats in four groups to the shoal in response to the need for higher-level State authorities. *See* Connor M. Kennedy and Andrew S. Erickson, "Model Maritime Militia: Tanmen's leading role in the April 2012 Scarborough Shoal Incident", *Andrew S. Erickson*, 21 April 2016, available at: http://www.andrewerickson.com/2016/04/model-maritime-militia-tanmens-leading-role-in-the-april-2012-scarborough-shoal-incident/.

[34] In the incident of HD-981 oil rig, Dam Mon maritime militia of China was ordered to participate in a barrier around the oil platform. *See* Connor M. Kennedy and Andrew S. Erickson, "From Frontier to Frontline: Tanmen's Leading Role Pt. 2", *Andrew S. Erickson*, 17 May 2016, available at: http://cimsec.org/frontier-frontline-tanmen-maritime-militias-leading-role-pt-2/25260.

[35] For instance, Wang Yilin, former chairman of the board of the China National Petroleum Corporation (CNPC) from 2015 to 2020, was a member of the 18th Central Commission for Discipline Inspection, a high-ranking position in the Communist Party of China.

[36] Kenneth Lieberthal, *Managing the China Challenge: How to Achieve Corporate Success in the People's Republic*, Brookings Institution Press, Washington, D.C., 2011, p. 51.

[37] A. Panda, above note 3. HD-981 oil rig operates under the China National Offshore Oil Company (CNOCC).

Challenges Facing the International Law on Use of Force at Sea

The emergence of grey zone threats has posed challenges to the traditional understanding of international law on use of force, making it necessary to reconsider the legality of the prohibition on the use of force as well as the manner in which use of force is exercised under various legal frameworks.

Legalities Regarding the Prohibition on the Use of Force

UN Charter

The principle of non-use of force, stipulated under Article 2(4) of the UN Charter, is one of the most important principles in international law to prevent States from resorting to the use of force or threat to use force as a method of resolving international disputes. This is a *jus cogens* principle or a peremptory norm of international law from which no derogation is allowed.[38] In the *Nicaragua* case, the International Court of Justice (ICJ) also confirmed the status of the prohibition of the use of force in Article 2(4) of the Charter as a customary norm with binding character towards all subjects of international law.[39]

However, the interpretation of this article remains ambiguous. Generally, the concept of use of force refers to an armed attack by organized military, naval or air forces of States. However, unofficial agents, volunteers, armed bands and groups of insurgents could also be involved in practice[40] which makes it challenging to identify whether agencies concerned could be categorized as military or other forces under government control.

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[38] Oliver Dörr and Albrecht Randelzhofer, "Chapter I: Purposes and Principles, Article 2(4)" in Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 1995, para. 61.

[39] International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgement (Jurisdiction and Admissibility of the Application), *ICJ Reports 1984*, para. 73 (hereinafter "*Military and Paramilitary Activities (Jurisdiction)*").

[40] Ian Brownlie, *International Law and the Use of Force by States*, Clarendon Press, Oxford, 1981, p. 361.

In grey zone operations, determination of whether a threat to use force or use of force has been exercised by a State is rather problematic for a number of reasons.

First, it is challenging to determine whether force has been used. Article 2(4) of the UN Charter does not limit said force to the armed forces, but could also include political, economic or any other form of coercion aimed against States.[41] Nevertheless, the Preamble of the UN Charter does refer to the need to ensure that "armed force" should not be used except in the common interest while Article 51 of the UN Charter deals with the right to self-defence.[42] In grey zone operations, armed forces might be deployed in the form of military or paramilitary activities. However, grey zone operations are frequently kept under the threshold of an open warfare so as not to infringe on non-use of force *jus cogens*. Rather, grey zone operators only manifest armed forces in the form of deterrence and information to discourage neighbouring countries.[43] Thus, even though the armed forces are employed, it is may not be immediately evident that a State has illegally used force as part of its grey zone strategies.

Second, the prohibition of the threat to use force hardly prevents a State from pursuing a grey zone strategy. A threat to use force can be a "signaled intention to use of force if certain events occur"[44] or consist "in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government".[45] The use of grey zone tools in the form of large scale military exercises near a shared border without any express or implied message from the operators may hardly be categorized as a threat to use force. In the case of a message such as a threat to invade, since it often comes from an unofficial source, a solid link with a government's intention cannot be easily drawn. Additionally, mere possession of weapons cannot by itself

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[41] UNGA Res. 2625(XXV), 24 October 1970.

[42] Malcolm Shaw, *International Law*, Cambridge University Press, Cambridge, 2008, p. 1124.

[43] T. Tuan, above note 15, p. 16.

[44] ICJ, *Legality of the threat or use of nuclear weapons,* Advisory Opinion, *ICJ Reports 1996*, para. 47 (hereinafter "Nuclear Weapons Advisory Opinion").

[45] I. Brownlie, above note 40, p. 364.

constitute a threat to use force,[46] thus, military parades for instance cannot be prohibited under the non-use of force principle.

Third, even in case of the confirmation of the use of force, whether the force has been used in an illegal manner by States and thus entail State responsibility under international law still requires more concrete evidence. Though there is no single treaty or convention that specifically covers State responsibility, customary rules on State responsibility have been reflected in judicial decisions and in the Articles on Responsibility of States for Internationally Wrongful Acts (ROSFIWA).[47] Accordingly, actions or omissions can be attributed to a State only if they are: (i) conducted by State organizations;[48] (ii) conducted by authorized personnel;[49] (iii) conducted at government instruction, direction or control;[50] and (iv) acknowledged or adopted by a State.[51]

While the link between maritime law enforcement forces and the government may be obvious,[52] the conduct of maritime militia in grey zone conflicts is not easily attributable to the concerned State. Maritime militia are not State organs—instead, they are created by fishing companies and use civilian vessels.[53] Furthermore, little evidence supports that maritime militia are empowered by law to patrol, monitor or even attack foreign fishing vessels since they are mainly fishermen whose functions are fishing. It is argued that China's maritime militia is empowered by the China Emergency Response Law of 2007, which

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[46] Nuclear Weapons Advisory Opinion, above note 44, paras. 48-50.

[47] ROSFIWA, above note 28.

[48] ROSFIWA, above note 28, Art. 4.

[49] ROSFIWA, above note 28, Art. 5.

[50] ROSFIWA, above note 28, Art. 8.

[51] ROSFIWA, above note 28, Art. 11.

[52] Above note 24.

[53] It is believed that the People's Liberation Army (PLA) Navy employed the South China Fisheries Company's maritime militia during the 1974 contest between China and Vietnam over the Paracels (Andrew S. Erickson and Connor M. Kennedy, "Trailblazers in Warfighting: The Maritime Militia of Danzhou", *CIMSEC*, 1 February 2016, available at: http://cimsec.org/trailblazers-warfighting-maritime-militia-danzhou/21475). Similarly, the Sansha City Fisheries Development Company is explicitly meant so serve as a maritime militia organization to develop maritime rights protection capabilities for Sansha City of China (Connor M. Kennedy and Andrew S. Erickson, "Riding a New Wave of Professionalization and militarization: Sansha City's maritime militia", *CIMSEC*, 1 September 2016, available at: http://cimsec.org/riding-new-wave-profession alization-militarization-sansha-citys-maritime-militia/27689).

requires members of said militia to participate in rescue and relief efforts.[54] However, such empowerment by law remains uncertain unless there is a law that specifies that certain missions involving the protection of maritime interests fall within the scope of its emergency response activities. Arguably, maritime militia can be armed to perform duties, including attacking foreign vessels in disputed waters,[55] thus, there are reasons to believe that they are trained in military combat and can be instructed or controlled by the government. Nevertheless, this attribution to State is, once again, not easy to be legally formulated under the international law of State responsibility. There must be a "real link"[56] between the maritime militia and State machinery to demonstrate the instruction, direction or control, such as a regulation under domestic law on the establishment of maritime militia or a decision to organize maritime militia by an authorized State's body, etc. However, maritime militia often do not wear uniform and mainly conduct economic production activities (i.e., fishing).[57] The threat or use of force by maritime militia, if any, thus, cannot establish the "real link" with the State as governments would never affirm that maritime militia are demonstrating their positions. Similarly, it is groundless to affirm that there is an acknowledgement or adoption of State under ROSFIWA for the threat or use of force by maritime militia.

Nevertheless, force can be lawfully exercised if States use force at sea as a means of self-defence against armed attacks on their territory, ships or aircrafts.[58] Under Article 51 of the UN Charter, States enjoy the

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[54] China Emergency Response Law, Art. 14.

[55] Examples of Impeccable (2009), Scarborough (2012) and HD-981 (2014).

[56] International Law Commission, "IV.E.2. Responsibility of States for Internationally Wrongful Acts: General Commentary", in Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10, 10 August 2001, Art. 8, para. 1.

[57] Uniform-wearing individuals cannot be considered as State agent in the strict sense. However, their infringement of international obligations can be still attributable to State for the purpose of State responsibility because foreign States cannot be expected to know, or to figure out, which acts do or do not fall within the actual competence of a domestic official. *See Caire Claim (France v. Mexico)*, Arbitral Award, *5 R.I.A.A. 516*, 13 June 1929, p. 530.

[58] Jinxing Ma and Shiyan Sun, "Restriction on the use of force at sea: an environmental protection perspective", *International Review of the Red Cross*, Vol. 98, No. 902, 2016. It is further noted that States may also lawfully use force with the authorization of the UNSC

right of use of force in case of self-defence in response to an armed attack. The ICJ in the *Nicaragua case* opined the nature of the acts, which can be treated as an armed attack, including those which are:

> [N]ot merely actions by regular armed forces across an international border, but also the sending by or on behalf of a state of armed bands, groups irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to among to an actual armed attack concluded by regular forces or its substantial involvement therein.[59]

Additionally, to distinguish between use of force and an armed attack, the Court further emphasized that the resort to force constitutes an "armed attack" depending on the scale and effect of an operation rather than the nature of personnel conducting the operation.[60] In the latter case of *Oil Platforms*, the ICJ likewise addressed the distinction between the use of force and an armed attack. The United States, in this case, argued that its use of force against several of Iran's offshore oil platforms was an act of self-defence in response to a number of Iran's actions. However, taking consideration the facts of the case and compared to its decision in the *Nicaragua case*, the Court decided that Iran's actions did not qualify as the most grave form[61] of use of force to constitute an armed attack and repeated the gravity distinction from the *Nicaragua case*.[62]

Based on these legal grounds, whether a grey zone operation constitutes an "armed attack" and triggers the individual right of self-

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in form of resolutions under Chapter VII to address certain threats to international peace and security recognized by the UNSC. However, there are not many cases in which force was used at sea within the framework of UN's actions. Thus, the author does not discuss this exception in this paper.

[59] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgement (Merits), *ICJ Reports 1986*, para. 195.

[60] *Ibid*. "The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."

[61] *Military and Paramilitary Activities (Jurisdiction)*, above note 39, para. 19.

[62] ICJ, *Oil Platforms (Iran v. United States)*, Judgement (Merits), *ICJ Reports 2003*, para. 64.

defence for another State requires an examination not only of the nature of personnel involved but also the scale, gravity and effect of the operation. On the one hand, for military activities in grey zone operations, though they involve military personnel in large scale exercises, the gravity and effect are limited to spreading the threat and discouraging neighbouring countries from maintaining maritime claims in the disputed waters. In the unlikely case of a significant effect, it is not easy to establish the causal link between military activities and the alleged effect. On the other hand, as earlier mentioned, the use of State personnel to conduct paramilitary activities in grey zone operations needs more evidence. The scale of paramilitary activities is confined in disputed waters or low level coercion among two or more fishing vessels. Thus, the effect of these activities is relatively small compared to that of an armed attack. For these reasons, the possible use of force in grey zone conflicts could hardly be categorized as an armed attack that could trigger other countries to act in self-defence.

United Nations Convention on the Law of the Sea (UNCLOS)

In the context of the oceans, the principle of non-use of force is further emphasized in the constitution of the law of the sea, the 1982 UNCLOS.[63] In its preamble, the UNCLOS refers to the UN Charter in that the codification and development of the law of the sea would be in accordance with the purposes and principles of the Charter.[64] Article 301 of the UNCLOS states that:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Except for small differences in the wordings, Article 301 refers to a similar prohibition against the threat to, or use of, force as well as the same

[63] United Nations Convention on the Law of the Sea, 1833 UNTS 397 (entered into force 16 November 1994) (hereinafter "UNCLOS").

[64] UNCLOS, above note 63, Preamble, para. 8.

indication of the protection territorial integrity and political independence under Article 2(4). Nevertheless, the nature of the use of force in the oceans must be determined by the background, basis, and forms of the use of force.[65] Usually, the users of force at sea are either State forces, law enforcement forces, armed agencies, organized armed groups, pirates or other private entities.

The use of force at sea has commonly been exercised to either protect the sovereignty rights of a coastal State or in the course of law enforcement. The legitimation of the use of force for protection of sovereignty rights of coastal States depends on the locations of exercises where coastal States have different rights and obligations.

(a) Internal Waters and Territorial Seas

Internal waters are treated similarly to the land territory of a State under the UNCLOS.[66] Thus, there is no rule allowing foreign military forces to enter internal waters without the permission of the coastal State. Military activities within this zone are *a fortiori* impermissible. Besides UN Security Council enforcement under Chapter VII and situations of self-defence as set out under Article 51 of the UN Charter, the occasions under which an act of force arises in the territorial sea fall into two typical circumstances.

The first circumstance is when a coastal State resorts to the use of force as a countermeasure against a foreign State's illegal acts, usually during its exercise of innocent passage. Under Article 25 of the UNCLOS, a coastal State can "take the necessary steps in its territorial sea to prevent passage which is not innocent".[67] Usually, use of force under this article arises during a conflict between States, thus raising the question of

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[65] Permanent Court of Arbitration (PCA), *Maritime Boundary Delimitation (Guyana v. Suriname)*, Award, *PCA Report 2007*, para. 442-443.

[66] UNCLOS, above note 63, Art. 2.

[67] In the Pueblo incident of 1968, the North Korean naval military resorted to armed force to capture the US intelligence ship Pueblo. After the seizure, North Korea imprisoned the personnel of Pueblo, until an agreement for the release of the crew members in exchange for the US acknowledgement of its espionage activities. (Francesco Francioni, "The Gulf of Sirte Incident and International Law", *Italian Yearbook of International Law 1985*, Vol. 5, pp. 1980-1981) Similarly, the Gulf of Sirte incident of August 1981 illustrates the parties' use of force to protect coastal rights and to defend the freedom of navigation of their fleet.

whether a resulting force is admissible and if so, what degree of force is acceptable. Obviously, Article 25 recognizes the right of a coastal State to use force in the course of negating the aggressive acts of foreign navies. Regarding the acceptable degree of the use of force, one must rely on the general rule of necessity and proportionality.[68]

The second circumstance is when a foreign State resorts to the use of force to assert navigational claims. In the *Corfu Channel case,* the British navy used force to assert freedom of transit through the Channel and the ICJ agreed that the assertion of navigational rights, even when involving use of force, does not constitute an illegal threat or use of force.[69] On the contrary, other military activities such as carrying out maneuvers along the coast, assembling combat formation or issuing an ultimatum would still constitute a violation of international law.

Apparently, admissible use of force in internal waters and territorial seas must be in the form of self-defence which takes place under strict conditions—i.e., either aggressive acts of foreign navies during innocent passage or assertion of navigational claims in territorial seas by forces. These two circumstances, however, have not been witnessed in practice for two reasons. First, the sovereignty and sovereign rights of coastal States in these maritime areas are obvious and firmly stipulated by UNCLOS with little "grey area" for any grey zone operations. Thus, States have little reason to put themselves in a legal risk by directing grey zone operations in these maritime areas. Second, in the unlikely case that there is a grey zone operation in these maritime areas, it is likely a paramilitary activity. However, it has been previously demonstrated that the existence of an armed attack in this situation can hardly be legally formulated.

(b) Exclusive Economic Zone (EEZ)

According to Article 56 of the UNCLOS, within the EEZ, a coastal State has sovereign rights and jurisdiction over the economic exploitation and exploration of all resources, artificial islands and installations, marine scientific research and the protection and preservation of the marine

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[68] International Tribunal for the Law of the Sea (ITLOS), *The M/V "Saiga" (No.2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgement, *ITLOS Reports 1999*, para. 155.

[69] ICJ, *Corfu Channel (UK v. Albania)*, Judgement (Merits), *ICJ Reports 1949*.

environment. Article 58, on the other hand, allows other States to enjoy the same freedoms as in the high seas but with "due regard" to the rights and duties of coastal States. These articles did not contemplate the issue of whether military activities, such as military maneuvers, weapons tests, the gathering of strategic information, military practices, etc. are lawful in the EEZ or not. Many scholars hold the belief that regulations concerning the military uses of the seas should be applied in the EEZ as they are applied in the high seas[70] as the UNCLOS did not grant coastal States any power to regulate military activities within the EEZ and coastal States are only able to exercise very limited rights and jurisdiction over certain subjects.[71] Therefore, it is safe to conclude that the UNCLOS does not prohibit lawful military activities within the EEZ. However, these activities must be performed with "due regard"[72] for the rights of coastal States.

Additionally, it is worth noting that there is no specific provision regulating the permissible use of force to counter unlawful activities within the EEZ. Though it is acceptable that a coastal State could invoke the use of force in law enforcement operations as an act of its domestic powers under Articles 73 and 216 of the UNCLOS, the use of force in these circumstances is exercised for the main purpose of safeguarding the resources of the EEZ and its marine environment only. Other than that, when the matters are clearly not within the limited jurisdiction of the coastal State in the EEZ, the strict approach of the use of force under Article 2(4) UN Charter and the Article 301 UNCLOS must be applied.

Unlike the previously discussed maritime areas, an EEZ could commonly be disputed waters with overlapping claims as a result of unfinished delimitation efforts among States. Thus, grey zone operations could take place within the EEZ more frequently. Nevertheless, whether

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[70] H. Labrousse, "Les Problèmes Militaires Du Nouveau Droit de la Mer", *The Management of Humanity's Resources: The Law of the Sea,* The Hague Academy of International Law Workshop, The Hague, 29-31 October 1981, p. 307- 313.

[71] UNCLOS, above note 63, Art. 56.

[72] As there is no definition of the phrase "due regard" in the UNCLOS, there are many interpretations. "Due regard" will depend on the particular circumstances, military practices or weapon tests, for example, need to take measures to ensure the safety of maritime navigation in the zone. See Jing Geng, "The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS", *Merkourios,* Vol. 28, No. 74, pp. 22-30; 27.

the legal framework of the use of force within the EEZ could cover this operation remains unclear. Grey zone operations within the EEZ will only infringe international law if it amounts to an "internationally wrongful" act or omission which is attributable to States and which constitutes a breach of an international obligation of the State.[73] This assumption could be true if it can be legally demonstrated that a State has failed to conduct grey zone operation with "due regard" under Article 58 of the UNCLOS. The obligation to act with "due regard" is characterized as a "balancing exercise"[74] between the rights and duties of coastal and other States.[75] During the HD-981 incident (2014), China moved its oil rig to waters where Vietnam enjoys sovereignty rights (in the EEZ and continental shelf) under the UNCLOS. The oil rig was escorted by coast guard vessels, transport ships and tugboats, fishing vessels and even naval ships. These grey zone operations of China aim to prevent Vietnam's fishing vessels from fishing in their traditional fishing grounds within Vietnam's EEZ by using non-military forces against non-military forces.[76] Apparently, these similar actions of grey zone operations, though kept under the threshold of an armed attack, impaired or interfered with the lawful use of the seas enjoyed by Vietnam, and thus, violates the obligation of due regard under Article 58. Nevertheless, obstacles to attribute a grey zone operation to a State mentioned earlier still make it difficult to challenge the legal basis of grey zone operations in the EEZ under UNCLOS.

(c) High Seas

All States enjoy the freedom of navigation, overflight and of laying submarine cables and pipelines in the high seas.[77] Therefore, it is permissible for all States to perform lawful military activities in the high seas.

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[73] ROSFIWA, above note 28, Art. 2.

[74] PCA, *The Chagos Marine Protected Area Arbitration (Mauritius v. U.K.)*, Award, *PCA 2015*, para. 534.

[75] Myron H. Nordquist et al. (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2, Kluwer Academic Publishers, Dordrecht, 1993, p. 556.

[76] *Military and Paramilitary Activities (Jurisdiction)*, above note 39.

[77] UNCLOS, above note 63, Art. 87.

Although UNCLOS does not mention the use of force in the high seas, one can easily find such regulation governing the use of force in law enforcement operations in the high seas within general public international law. Accordingly, all States are entitled to exercise the right of visit on the high seas in the case of rendering assistance, piracy, slave trade, unauthorized broadcasting, statelessness and hot pursuit. However, before force is resorted to, law enforcement officials must exhaust all other means. The use of force "must be avoided as far as possible and where […] unavoidable, it must not go beyond what is reasonable and necessary in the circumstances".[78] Additionally, in all circumstances, the freedom of the high seas must be exercised with "due regard" for the interests of other States' freedom of the high seas.[79]

As grey zone operations often take place in disputed areas where the rights and obligations of the coastal State and other States are "grey", the use of force in the high seas would not share the characteristics of a grey zone conflict. The use of force in a grey zone conflict in high seas, if any, could be dealt with by general principles of international law of non-use of force as illustrated above. The only obligation that would need further consideration is the obligation to exercise the freedom of the high seas with due regard for the interests of other States in the high seas. However, similar to circumstances in the EEZ, even in the unlikely case that a violation of the due regard obligation is found in the course of a grey zone operation in the high seas, such action could hardly be attributable to States giving rise to State responsibility under international law.

Legality Regarding Manner of the Use of Force

In this part, the kinds and legitimate degrees of force used at sea will be assessed. Depending on the prevailing situation, notably the existence or non-existence of an armed conflict, international humanitarian law or international human rights law is applicable.

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[78] *Saiga*, above note 68, p. 10, para. 155

[79] UNCLOS, above note 63, Art. 87.

International Humanitarian Law

The rules of international humanitarian law (IHL) regulate the manner in which use of force is exercised by principles of distinction, proportionality and precautions. These principles are applicable in the case of armed conflict, whether international or non-international.[80] The operation of grey zone conflicts usually concerns the use of force between States. Thus, it might constitute an international armed conflict.

Without defining it, the notion of an international armed conflict is used in Common Article 2 of the Geneva Conventions of 1949:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

In the jurisprudence, an armed conflict of an international character is generally considered to exist "whenever there is a resort to armed force between States".[81] Accordingly, an international armed conflict would occur if one or more States resort to armed forces against another State,

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[80] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts. 51, 52 and 57 (hereinafter "Additional Protocol I"); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I, Cambridge University Press, Cambridge, 2005, Rules 1, 7, 14.

[81] ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; Philip Spoerri et al. (eds), Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 2nd Edition, International Committee of the Red Cross (ICRC), Geneva, 2017, Art. 2, para. 240 (hereinafter "ICRC Commentary on the Second Geneva Convention").

regardless of the reasons or the intensity or the absence of a formal declaration or recognition of war. The existence of an international armed conflict, however, depends on what actually happens on the ground.[82]

Thus, under what circumstances will an operation during grey zone conflict amount to an international armed conflict under IHL? As mentioned earlier, armed forces in grey zone operations only manifest through either deterrence or large-scale exercises without crossing another State's borders. Thus, the existence of an international armed conflict under IHL cannot be easily proven. Nonetheless, the 2017 ICRC Commentary on the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea[83] reveals some circumstances under which grey zone operations could qualify as an international armed conflict.

According to the Commentary, a lawful use of force of a State against a vessel of another State being suspected to violate fisheries legislation does not constitute an international armed conflict.[84] However, depending on the circumstances, the use of force at sea motivated by other reasons than the enforcement of maritime law may qualify as an international armed conflict.[85] The Commentary does not explain further about the exact circumstance when a use of force at sea could amount to an international armed conflict. Nevertheless, it could generally be interpreted as any use of force at sea by a State disguised as maritime law enforcement which could possibly amount to an international armed conflict. This coincidently is the mechanism of how a grey zone strategy is commonly developed in practice.

In the salami/cabbage slicing strategy of China, coast guard forces who are tasked by the Government to enforce maritime law are actually escorted by naval forces and ready to use force to illegally assert maritime claims in disputed areas. The underlying motivation of this grey zone operation is rather to assert maritime claims and alter the *status quo* of the region. Thus, any actions of these forces, not except for the use of force, could also be attributable to China as a State. Therefore, it could be

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[82] ICRC, *How is the term "armed conflict" defined in International Humanitarian Law*, Geneva, March 2008, p. 1.

[83] ICRC Commentary on the Second Geneva Convention, above note 81.

[84] ICRC Commentary on the Second Geneva Convention, above note 81, para. 249.

[85] *Ibid*.

argued that this strategy of use of force in grey zone conflict has amounted to an international armed conflict under Common Article 2 of Geneva Conventions and triggers the application of IHL. Yet, this argument is admittedly weak since grey zone operators would never affirm any motivation but maintenance of maritime order, while deploying such forces.

Another point worth noting from the Commentary is that regardless of who is involved, a situation may qualify as an international armed conflict as long as a State resorts to means and methods of warfare against another State.[86] In other words, whether the grey zone operation is conducted by maritime militia or military forces is immaterial for the determination of an international armed conflict under IHL. As long as the State's organs or other entities acting on behalf of a State use force, it would matter if such forces use the means and methods of warfare. Nevertheless, in the context of grey zone conflict, there is little information on which means have been used by States. Generally, in sea incidents which are allegedly grey zone strategies, a State often refrains from using military weapons. Alternatively, water cannons are commonly reported to be used by States in many incidents to gain advantages.[87] To what extent then can water cannons be categorized as "means of warfare" under IHL? A means of warfare generally refers to weapons, weapons systems or platforms employed for the purpose of attack in an armed conflict.[88] IHL does not provide an exhaustive list of means of warfare. Nonetheless, weapons of a nature that can cause superfluous injury or unnecessary suffering or widespread, long-term and severe damage to the natural environment are prohibited.[89] Accordingly, it is really complicated

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[86] ICRC Commentary on the Second Geneva Convention, above note 81, para. 250.

[87] Water cannons are reported to be used in HD-981 incidents. *See* Ernest Bower and Gregory Poling, "China-Vietnam Tensions High Over Drilling Rig in disputed waters", *CSIS,* 7 May 2014, available at: https://www.csis.org/analysis/china-vietnam-tensions-high-over-drilling-rig-disputed-waters; *see also* Manny Mogato, "Philippines accuses China of turning water cannon on its fishing boats," *Reuters*, 21 April 2015, available at: https://www.reuters.com/article/us-southchinasea-philippines-usa/philippines-accuses-china-of-turning-water-cannon-on-its-fishing-boats-idUSKBN0NC0MN20150421.

[88] ICRC, "Means of warfare", *ICRC Glossary*, available at: https://casebook.icrc.org/glossary/means-warfare.

[89] Additional Protocol I, above note 80, Article 35(2)(3).

to decide whether the use of water cannons in grey zone operations is a means for warfare. The existence of an international armed conflict is unknown, as it is unclear what exact injuries and consequences are caused by water cannons in a grey zone situation when both sides reveal opposite observations of the incidents.

In the unlikely case that the existence of armed conflict is legally formulated in grey zone operations, the use of force must comply with principles of IHL such as distinction, proportionality and precautions. Generally, the principle of distinction requires a separation between non-combatants and combatants.[90] The use of force must also be controlled to ensure that it targets only military objects.[91] Under the principle of precautions, attacking parties are obligated to take measures to ensure that non-targets are evacuated or are at least aware of the incoming attack.[92] The principle of proportionality is also a criterion for the lawfulness of the use of force under general international law.[93] Under IHL, the principle of proportionality prohibits an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[94]

There is little information on factual details of sea incidents in the context of a grey zone conflict, thus, an investigation on compliance with IHL principles can only be based on the prime features of the recent grey zone operations illustrated above. Accordingly, it is argued that none of those principles have been complied with. As illustrated above, incidents at sea in a grey zone conflict often aim at fishing vessels, which are civilian in nature and do not at any time take part directly in hostilities, thus

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[90] Additional Protocol I, above note 80, Article 48; J. Henckaerts and L. Doswald-Beck, above note 80, Rules 1 and 7; Waldemar A. Solf, "The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice", *American University Law Review*, Vol. 33, 1983, p. 58.

[91] Additional Protocol I, above note 80, Art. 52.

[92] J. Henckaerts and L. Doswald-Beck, above note 80, Rules 15 and 22.

[93] Nuclear Weapons Advisory Opinion, above note 44, para. 42. "A use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."

[94] J. Henckaerts and L. Doswald-Beck, above note 80, Rule 14; Additional Protocol I, above note 80, above note 89, Art. 51(5)(b) and Art. 57.

violating the principle of distinction provided that IHL is applicable. There is no evidence that fishing vessels have been notified of possible collisions at sea, thus, they are not aware of incoming attacks as required under the principle of precautions of IHL. Operations in grey zone conflict are mainly based on the asymmetric condition between opponents[95] to gain psychological advantages. Thus, the principle of proportionality is not always complied with. Even in the case that the use of force is proportionate, grey zone operations could still cause incidental loss of life and injury to fishermen and damage to fishing vessels, thus violating principle of proportionality under IHL.

Maritime Law Enforcement as Required under International Human Rights Law (IHRL)

Enforcement is an act to compel observance of or compliance with the law.[96] Law enforcement operations at sea, thus, can be perceived as activities of law enforcement or military vessels flying the flag of a State with a view to stopping crimes and violations of the applicable law in specific waters. Law enforcement action against foreign-flagged vessels may be operated for fiscal, immigration, sanitary and customs violations in the coastal States' contiguous zone, for all natural resource law violations in the EEZ and for seabed resource violation in the continental shelf. Law enforcement may also be carried out against a foreign-flagged vessel even without the permission of the flag State within the zones of internal waters, archipelagic waters and territorial seas when law enforcement officials determine that there exist reasonable grounds of violation of coastal States' law applicable in those waters, including the illicit traffic of drugs. [97]

It is worth noting that maritime law enforcement will only be applicable if a State can legally establish its sovereign rights and jurisdiction over the subject waters. Nevertheless, grey zone operations

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[95] David Carment and Dani Belo, "Wars Future: the risks and rewards of grey zone conflict and hybrid warfare", *Canadian Global Affairs Institute*, October 2018, available at: https://www.cgai.ca/wars_future_the_risks_and_rewards_of_grey_zone_conflict_and_hybrid_warfare.

[96] Bryan A. Garner, *Black's Law Dictionary*, 8th ed., Thomson West, Toronto, 2004, p. 569.

[97] UNCLOS, above note 63, Art. 108.

are often deployed in the disputed waters where the exact boundary of sovereign rights and jurisdiction have not been delineated by States. Therefore, maritime law enforcement cannot be applied.

In the unlikely case that maritime law enforcement is found applicable in a specific grey zone operation, it is argued that such use of force is not consistent with the manner required under the legal framework of law enforcement.

UNCLOS does not have any specific provision regarding the use of force for law enforcement. The international legal regulation of the exercise of "police" force at sea has principally developed in customary international law.[98] As noted in the arbitration between Guyana and Suriname concerning the delimitation of maritime boundary and the alleged infringements of international law by Suriname in disputed maritime territory, "force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary."[99] Before the use of force can be exercised during the course of law enforcement operations, all other measures must have been exhausted. Such use of force must comply with the principles of unavoidability, proportionality and necessity[100] as required under international human rights law.

International Human Rights Law (IHRL) governs the use of force in maritime law enforcement operations the most and is applicable at all times.[101] Accordingly, the use of force in maritime law enforcement operations cannot infringe on the right to life recognized under the International Covenant on Civil and Political Rights.[102] Regardless of their non-binding character, the UN Code of Conduct for Law Enforcement Officials (CCLEO)[103] and the UN Basic Principles on the

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[98] I.A. Shearer, "Problems of Jurisdiction and Law Enforcement against Delinquent Vessels", *The International Comparative Law Quarterly*, Vol. 35, No. 2, 1986, p. 341.

[99] *Maritime Boundary Delimitation,* above note 65, para. 445.

[100] Gerald Gray Fitzmaurice, "The Case of the I'm Alone", *British Yearbook of International Law*, Vol. 17, 1936, p. 99.

[101] ICRC, "The Use of Force in Law Enforcement Operations", 14 June 2019, available at: https://www.icrc.org/en/document/use-force-law-enforcement-operations-0.

[102] International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976), Art. 6.

[103] UNGA Res. 34/169, 5 February 1980 (hereinafter "CCLEO").

Use of Force and Firearms by Law Enforcement Officials (BPUFF)[104] provide further guidance on the use of force in law enforcement operations.[105]

According to the BPUFF, the use of force is considered unavoidable when "other means remain ineffective or without any promise of achieving the intended result."[106] The other means may include issuing verbal warnings to stop, use of radio communication, etc. Only when law enforcement officials have exhausted those measures without achieving results can they resort to the use of force.

With respect to the principle of necessity, under the CCLEO, law enforcement officials may use force only in "strictly necessary" situations and to the extent required for the performance of their duty.[107] According to BPUFF, it is only acceptable for law enforcement officials to exercise the use of force in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such danger and resisting their authority or to prevent their escape, and only when less extreme means are insufficient to achieve these objectives.[108]

The principle of proportionality "sets a maximum on the force that might be used to achieve a specific legitimate objective".[109] When resorting to the use of force, "law enforcement officials shall act in proportion to the seriousness of the offence and legitimate objective to be achieved."[110] Article 225 of the UNCLOS prohibits any law enforcement action which endangers the safety of navigation or otherwise creates any hazard to a vessel, or brings it to an unsafe port or anchorage, or exposes the marine environment to an unreasonable risk". It indicates that the

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[104] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials", *UN Human Rights Office of the Commissioner*, 27 August-7 September 1990 (hereinafter "BPUFF").

[105] The Use of Force in Law Enforcement Operations, above note 101.

[106] BPUFF, above note 104, Art. 4.

[107] CCLEO, above note 103, Art. 2.

[108] BPUFF, above note 104, Art. 9.

[109] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/26/36, 1 April 2014, §66.

[110] BPUFF, above note 104.

safety of the crew and the protection of the marine environment prevail over the State's right to enforce its laws.[111]

In the context of the South China Sea disputes, regardless of differences in the interpretation of the principles of necessity and proportionality compared to the IHL framework, operations of grey zone conflict are not consistent with principles of maritime law enforcement as required under IHRL.

Conclusion

The scrutiny of all applicable international law on the use of force at sea reveals that grey zone operations hardly fit in any legal framework due to its distinctive features. The operation of grey zone strategy would not amount to use of force or a threat to use force under the UN Charter. Even when it is the case, the attribution of such operation to States faces many legal challenges due to the involvement of diverse types of force and their unclear link with governments under the principle of State responsibility. Activities within grey zone conflicts are designed to assert and establish territorial claims in disputed waters and gradually alter the *status quo,* thus, preventing the use of principle of non-use of force under the UNCLOS which apply in different maritime zones. For similar reasons, maritime law enforcement as required under IHRL cannot cover operations in grey zone strategy. In the unlikely case that force could legally be exercised, principles of IHL and maritime law enforcement can prevent any effort to legitimize the use of force in grey zone conflict under international law.

In the author's viewpoint, while the application of UNCLOS, IHL and maritime law enforcement as required under IHRL face challenges, as when the location of grey zone operation is in disputed waters, the traditional principle of non-use of force within the UN Charter framework is the most feasible framework in considering the legality of grey zone operations. The biggest challenge remains the attribution of grey zone activities to States, and accordingly, attributing State responsibility. In the absence of an effective framework applicable to grey zone operations, there are a number of recommendations that affected States

[111] UNCLOS, above note 63, Art. 225.

should consider undertaking to address concerns arising from grey zone operations.

On the one hand, States should publicize concerns of grey zone activities to other nations, explaining the ramifications of the expansion of grey zone operations in the long run, such as increasing suspicion among neighbouring States, and affecting peace and stability in the region and the rest of the world. Additionally, affected States should stimulate a global attempt to clarify as well as condemn the exercise of grey zone activities. On the other hand, affected States should furnish themselves with a comprehensive understanding of all forms and varieties of grey zone activities to develop appropriate plans to deal with each situation. At the same time, they should also communicate with States operating grey zone activities through various diplomatic and military channels to signal their concerns, call upon goodwill in conducting sea activities and minimize consequences and possible damage caused by these activities. Most importantly, the lack of accurate and sufficient factual information on what happens in a grey zone operation has prevented States from applying international law. Therefore, it is essential to increase transparency through regular information exchange among States regarding the exercises of grey zone operations. It is particularly relevant as transparency is also a legal obligation under domestic, regional and international legal frameworks.[112] Nevertheless, from an international law perspective, to effectively cope with this phenomenon, the adherence of States to international law in general and to its fundamental principles, especially those of non-use of force and the peaceful settlement of international disputes, still plays the most significant role.

[112] General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187 (entered into force 1 January 1995), Art. 10; Treaty on European Union (Consolidated Version), Official Journal of the European Communities C 325/5 (entered into force 1 November 1993), Art. 11; Constitution of the Federative Republic of Brazil of 1988, Art. 5.