

China's maritime militias, human rights, and the law of the sea: contested norms in a shifting international legal order

Book or Report Section

Published Version

Creative Commons: Attribution-Noncommercial-Share Alike 4.0

Open Access

Loefflad, E. and Kapogianni, V. ORCID: <https://orcid.org/0000-0002-6512-9054> (2024) China's maritime militias, human rights, and the law of the sea: contested norms in a shifting international legal order. In: Leucci, P. (ed.) Humanity across the waves - rethinking the law of the sea through a human rights lens. ASCOMARE Yearbook on the Law of the Sea, 4. Luglio Editore, Trieste, pp. 189-221. ISBN 9788868034115 Available at <https://centaur.reading.ac.uk/124375/>

It is advisable to refer to the publisher's version if you intend to cite from the work. See [Guidance on citing](#).

Published version at: <https://ascomare.com/ylos-volume-4/>

Publisher: Luglio Editore

All outputs in CentAUR are protected by Intellectual Property Rights law, including copyright law. Copyright and IPR is retained by the creators or other copyright holders. Terms and conditions for use of this material are defined in the [End User Agreement](#).

www.reading.ac.uk/centaur

CentAUR

Central Archive at the University of Reading

Reading's research outputs online

China's maritime militias, human rights, and the law of the sea: Contested norms in a shifting international legal order

■ *Eric Loefflad** and *Vicky Kapogianni***

Abstract

While many have studied the international legal dimensions of South China Sea disputes, few have explored the intersection of human rights and the law of the sea. Yet, this perspective is crucial – especially given China's claims that its maritime militia fishermen, who controversially advance its maritime strategy, have suffered human rights abuses. Using this issue to theorise the broader relationship between human rights and the law of the sea, we examine Chinese maritime militias through a comparative international law framework. On the one hand, existing legal doctrine – including the United Nations Convention on the Law of the Sea and its implementing agreement on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction – provides strong grounds to critique China's maritime militia strategy.

* Lecturer in Law, University of Kent, Eliot College Extension, Canterbury CT2 7NS, e.d.loefflad@kent.ac.uk.

** Lecturer in EU and International Law, University of Reading, Foxhill House, Shinfield Road, Whiteknights, Reading RG6 6EP, Senior Research Associate at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, a Centre of the Faculty of Law, University of Johannesburg, v.kapogianni@reading.ac.uk.

On the other hand, these militias can be framed as agents of China's 'ecological civilisation' agenda, confronting climate change and advancing human rights under the law of the sea. Ultimately, the Chinese maritime militia question offers deep insights into intersecting legal regimes amid global norm contestations.

Keywords: Law of the sea, human rights, South China Sea, maritime militias, BBNJ agreement, comparative international law.

1. Introduction

On 12 July 2016, an arbitral tribunal convened under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)¹ ruled in favour of the Philippines in its action against the People's Republic of China (PRC) regarding the latter's controversial claims over the South China Sea.² With this action, the long-standing array of territorial disputes between the PRC and several neighbouring States (Brunei, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam) centred on the South China Sea took on a new degree of international legal significance.

Despite China's non-participation in the arbitration, Chinese opinion was made clear through an extensive rebuttal of the award crafted by scholars from the Chinese Society of International Law.³ Amongst the

1. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force, 16 November 1994) 1833 UNTS 397.

2. *South China Sea Arbitration, Philippines v China, Award*, PCA Case No 2013-19, ICGJ 495 (PCA 2016), 12th July 2016, Permanent Court of Arbitration.

3. Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17 *Chinese Journal of International Law* 207 (hereinafter: CSIL, 'Critical Study').

multitude of points raised, the rebuttal contains the curious assertion that:

By firing upon Chinese fishing boats and fishermen, illegally seizing and detaining Chinese fishermen, giving them inhumane treatment and robbing them of their property, the Philippines has gravely infringed upon the personal and property safety and the dignity of Chinese fishermen and blatantly trampled on their basic human rights.⁴

While a seemingly minor point in the grand scheme of this text's 542 pages,⁵ this inclusion, nevertheless, contains within it a grand amalgam of controversies with far-reaching implications that demand serious scholarly scrutiny. This is especially true for any who seek to delineate the relationship between human rights and the law of the sea in a highly contested world.

Given this curious configuration present in China's rebuttal, we argue that an analysis of China's maritime militias and their contested legal status provides ample opportunity to gain insights into intersecting branches of international law at a time when existing norms are being subject to a vast array of challenges. This is particularly true as it concerns the maritime militias operating in contested waters as would-be subjects of human rights. What is the legal status of said militias? What theory of human rights would centre the activities of said militias? These issues become all the more pressing when considering how originally the maritime militias were agents of guerrilla warfare in the context of the Chinese Revolution – a period in time when the PRC viewed international law writ large as an unredeemable tool of capitalist imperialism.⁶ What then

4. *Ibid.*, 705

5. This human rights issues only appears two other times in the rebuttal. *Ibid.*, 596, 707.

6. Hungdah Chiu, 'Communist China's Attitude Toward International Law' (1966) 60 *American Journal of International Law*, 245.

might it mean to consider the ongoing deployment of Cold War-reminiscent maritime militias in a moment when China has not only come to view international law favourably, but is increasingly positioning itself as a norm entrepreneur – including in the domain of international human rights?⁷ How do the particularities of the South China Sea disputes shape the operation of the law in this area? It is these questions that we seek to disentangle in reference to existing international legal doctrine (and its limits) when considering how maritime militias in the South China Sea provide a unique opportunity to explore the relationship between human rights and the law of the sea.

Section 2 provides a high-altitude overview of contestations over human rights and the law of the sea in Western and Chinese discourse, framing maritime militias as situated at the intersection of two already contested areas. From here, we argue that a broad approach to comparative international law enables deeper insights into the relationship between human rights and the law of the sea in light of Sino-Western contestation. Section 3 then provides a detailed doctrinal unpacking of the international legal status of China's maritime militias as they operate to advance Chinese claims in the South China Sea, in light of recent legal developments – most notably the UNCLOS implementing agreement on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ Agreement).⁸

While the law as it exists provides a strong foundation for being critical of Chinese actions, in Section 4 we show how recent developments

7. Malin Oud, 'Powers of Persuasion? China's Struggle for Human Rights Discourse Power at the UN' (2024) 15 *Global Policy* 85; Ryan Martínez Mitchell, 'How China Came to Embrace International Institutions' in Raluca Groseanu and Ned Richardson-Little (eds), *Socialism and International Law: The Cold War and Its Legacies* (OUP 2025) 115.

8. Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (New York, 19 June 2023).

regarding ‘considerations of humanity’ in the law of the sea jurisprudence might enable the PRC’s strategy of linking its conceptions of human rights and the law of the sea. This is especially pertinent if the International Tribunal of the Law of the Sea’s (ITLOS) recent climate change mitigation strategies are read in conjunction with China’s ‘ecological civilisation’ strategy for climate action. Such considerations provide the grounding for a very different interpretation of Chinese maritime militia fishermen and their relevance to international human rights. In concluding, we offer observations on further directions in which the above analysis may go.

2. Human rights and the law of the sea in Western versus Chinese perspective: Towards a comparative international law

To speak of the international legal status and human rights of Chinese maritime militias in the South China Sea is to raise an array of (geo) politically loaded international legal questions. After all, the effect of China’s rise on the international legal order – with the South China Sea as a key battleground – is one of the most important questions in the current discourse on both international law and international politics.⁹ Connecting past, present, and future, to speak of China in the broader scheme of international law is to speak of an ancient civilisation whose

9. Barry Buzan, ‘China in International Society: Is ‘Peaceful Rise’ Possible?’ (2010) 3 *Chinese Journal of International Politics*, 5; Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (CUP 2019); Jessica Chen Weiss and Jeremy Wallace, ‘Domestic Politics, China’s Rise, and the Future of the Liberal International Order’ (2021) 75 *International Organisation*, 635; Tingyang Zhao, *All Under Heaven: The Tianxia System for a Possible World Order* (University of California Press 2021).

status as ‘Middle Kingdom’ between heaven and earth was brutally dispatched by international law-justified imperialism. This same civilisation later developed a globally captivating anti-imperial identity that is now embracing its newfound role as a norm-shaping agent within the very domains of international law and institutionalism it once condemned as the source of its marginalisation.¹⁰ Representing a grand-scale challenge to five centuries of Eurocentric global legal presumptions, to critically imagine China is to reimagine the very structure and purpose of international law.¹¹

In few domains is the controversy spawned by China’s world-historical trajectory more apparent than in the domains of international human rights law and the law of the sea. Here, even the most seemingly technical and doctrinal of legal issues can generate an avalanche of political commentary. Here, the prospect of seemingly irreconcilable interpretation turns attention to the irreconcilably differing worldviews that underlie this failed reconciliation and undermine any effort to construe (international) law as a seamless web of meaning.¹² Never far from this rupturing disjuncture is the ghost of the Third Reich jurist Carl Schmitt who infamously prophesied that the ‘spaceless universalism’ of Anglo-American liberalism would inevitably collapse into a multiplicity of normatively irreconcilable ‘greater spaces’, each dominated by unquestionable regional

10. Li Chen, ‘Universalism and Equal Sovereignty as Contested Myths of International Law in the Sino-Western Encounter’ (2011) 13 *Journal of the History of International Law*, 75; Teemu Ruskola, ‘China in the Age of the World Picture’ in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 138; Anthony Carty and Janne Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (OUP 2018); Maria Adele Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840* (CUP 2019); Ryan Martínez Mitchell, *Recentering the World: China and the Transformation of International Law* (CUP 2022).

11. See Alberto Toscano, ‘Carl Schmitt in Beijing: Partisanship, Geopolitics and the Demolition of the Eurocentric World’ (2008) 11 *Postcolonial Studies*, 417.

12. Kevin Jon Heller, ‘The “Great Powers” and The Formation of International Law’ (2024) 23 *Chinese Journal of International Law*, 637.

hegemony.¹³ The fact that Schmitt's theories of public law, international law, political theology, and geopolitics enjoy no small degree of influence in present-day China (and Russia) certainly complicates the task of anyone seeking to rebuff Schmitt's prophecy.¹⁴ While either human rights or the law of the sea alone can serve as a catalyst for meta-speculation on the global law-politics-normative continuum, the risk of a heightened controversy becomes even more pronounced when these issues are combined. This combination is precisely at issue in China's claims that its maritime militia members are human rights abuse victims in the context of the South China Sea disputes.

Regarding human rights, China has long been viewed as a grave challenge by those who conflate human rights with theories of liberal democracy, proclaiming that individual autonomy forms an axiomatic limit on State power.¹⁵ From this perspective, China acts against the purpose of human rights by subordinating the individual to the collective through an all-powerful State.¹⁶ However, for many Chinese scholars approaching the question of human rights, this line of critique is questionable at the levels of both accuracy and authority.

As a matter of accuracy, those critical of the 'individual subordinated to the state' narrative is a mischaracterisation of the Chinese attempt

13. Carl Schmitt, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum* (Telos Press 2003).

14. Zhang Shuangli, 'Why Should One be Interested in the Theological Dimension within the Project of Modern Politics? On the Chinese Acceptance of Carl Schmitt's Political Theology' (2014) 2 *Critical Research on Religion*, 9; Ryan Martinez Mitchell, 'Chinese Reception of Carl Schmitt since 1929' (2020) 8 *Penn State Journal of Law and International Affairs*, 181; Xie Libin and Haig Patapan, 'Schmitt Fever: The Use and Abuse of Carl Schmitt in Contemporary China' (2020) 18 *International Journal of Constitutional Law*, 130.

15. See Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (OUP 2001).

16. Xinyuan Dai and Lucie Lu, 'Beyond Liberal Narratives: China and the International Human Rights Order' (2025) 101 *International Affairs*, 459.

to empower individuals through a State empowered to pursue paths of collective uplift – a duality lost on those who see power distribution between individuals and States in zero-sum terms.¹⁷

As a matter of authority, proponents of Chinese conceptions of human rights will often turn attention to how individual-centred theories of rights were profoundly complicit in histories of imperial domination and race hierarchy, as well as the preservation of their legacies.¹⁸ From these Chinese critiques comes an alternative view of human rights that stresses economic development and subsistence as providing the essential foundation for realising human rights in a world of so many embedded inequalities.¹⁹ While this elevation of interests over ideals has certainly gained influence beyond the PRC (especially in a Global South weary of Western efforts to generate ‘development’),²⁰ for those critical of China, such invocations of human rights are a cynical tool for furthering Chinese influence and expansion by shifting attention away from the PRC’s accountability for its many human rights

17. Ruijun Dai, ‘China and International Human Rights Law’ in Ignacio de la Rasilla and Congyan Cai (eds.), *The Cambridge Handbook of China and International Law* (CUP 2024) 261.

18. Elliott Young, ‘Chinese Coolies, Universal Rights and the Limits of Liberalism in an Age of Empire’ (2015) 227 *Past and Present*, 121; Roland Boer, ‘Sovereignty and Human Rights: A Comparison Between Western Liberal and Chinese Marxist Traditions’ (2022) 23 *Political Theology*, 13.

19. Ryan Martinez Mitchell, ‘Domestic Governance as Critique of International Law: Beijing’s ‘SDG’ Authoritarianism and the Contested Future of Human Rights’ in Helmut Aust, Heike Krieger, and Felix Lange (eds), *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar 2024) 351; Esther Song and Joanne Yang, ‘China’s Adherence to International Human Rights Treaties: An Empirical Assessment’ (2023) 26 *International Area Studies Review*, 252.

20. Rana Mitter, ‘China in the Indian Ocean: The Search for a New Hegemon?’ in Harry Verhoeven and Anatol Lieven (eds), *Beyond Liberal Order: States, Societies and Markets in the Global Indian Ocean* (Hurst 2022) 209, 219-26; Matthew Erie, ‘Chinese Law and Development’ (2021) 62 *Harvard International Law Journal*, 51; Matthew Erie, ‘The Soft Power of Chinese Law’ (2023) 61 *Columbia Journal of Transnational Law*, 1.

abuses.²¹ It would not be difficult for such a critic to see the characterisation of human rights in the Chinese Society of International Law's South China Sea arbitration rebuttal as consistent with this behaviour – especially as it concerns the lack of attention to the human rights of those victimised by PRC actions in the South China Sea.

The extent to which China's invocation of human rights in this context constitutes a genuine affirmation of its 'Cute, Cuddly Panda' image or a strategic manipulation in line with its 'Fire-Breathing Dragon' persona largely depends on its adherence – or lack thereof – to the law of the sea as it applies to its maritime presence in the South China Sea.²² After all, if Chinese fishermen are operating within a zone of their State's entitlement, then forcible actions against them are rightly condemned for their human rights implications. Conversely, if these same fishermen are acting on behalf of the PRC to interfere with the maritime entitlements of neighbouring States, then human rights claims in this context warrant closer scrutiny. As with many issues related to human rights, a clear juridical consensus remains elusive.

From the perspective shared by Western States and China's South China Sea rivals, China's arguments are in fundamental conflict with the UNCLOS framework. On this basis, as per the conclusion reached by Kardon, regarding governance of the world's oceans, China is a disruptor of global standards whose efforts are less an attempt to build a coherent alternative but rather the construction of a regional order yielding to the fact of Chinese sovereignty.²³ This prospect is all the more serious if en-

21. See Margaret Lewis, 'Why China Should Unsign the International Covenant on Civil and Political Rights' (2020) 53 *Vanderbilt Journal of Transnational Law*, 131.

22. Randall Peerenboom, 'The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability' (2006) 7 *Chicago Journal of International Law*, 17.

23. Isaac Kardon, *China's Law of the Sea: The New Rules of Maritime Order* (Yale University Press 2023).

hanced Chinese efforts to become a maritime power are taken seriously.²⁴ Unsurprisingly, Chinese scholars see the situation differently and base their claims to historic rights over the South China Sea and key island chains within it (namely the Spratlys and Paracels)²⁵ that predate European legal impositions-cum-imperialism in the region.²⁶ The limits of the UNCLOS framework in addressing the deeper histories and legacies of colonialism and imperialism, and to produce a resolution in light of these issues, plays a key role in sustaining ongoing contention over the South China Sea.²⁷

Given this Western versus Chinese contention regarding the law of the sea and human rights – two meta-issues fundamentally entangled through the PRC’s maritime military strategy – what analytical tools are available to the observer seeking to navigate the politically treacherous waters that accompany this topic? One such tool is comparative international law where, rather than emphasising international law’s innate unity, the task of the analyst is awareness of how international legal interpretations differ among those with different histories, cultures, and polit-

24. Howard Wang, ‘Toward a Sea-Power Strategy – Chinese Communist Party Debates and Consensus Building under Jiang Zemin, Hu Jintao, and Xi Jinping’ (2024) 77 *Naval War College Review*, 41.

25. Anthony Carty, ‘Archives on Historical Titles to South China Sea Islands: The Spratlys’ (2019) 4 *Jus Gentium: A Journal of International Legal History* 7; Anthony Carty, ‘British and French Archives Relating to Ownership of the Parcel Islands 1900-1975’ (2019) 4 *Jus Gentium: A Journal of International Legal History*, 301.

26. See Jianming Shen, ‘China’s Sovereignty over the South China Sea Islands: A Historical Perspective’ (2002) 1 *Chinese Journal of International Law*, 94; Sienho Yee, ‘The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns’ (2016) 15 *Chinese Journal of International Law*, 219; Xinmin Ma, ‘Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal’ (2018) 8 *Asian Journal of International Law*, 12.

27. Ryan Martinez Mitchell, ‘An International Commission of Inquiry for the South China Sea: Defining the Law of Sovereignty to Determine the Chance for Peace’ (2016) 49 *Vanderbilt Journal of Transnational Law*, 749.

ical objectives.²⁸ While seemingly Schmittian in its acknowledgement of embedded barriers to rules-based integration, comparative international law need not fall into Schmitt's trap of irreducible enmity that excludes other relevant considerations of why differing legal interpretations might exist on a planetary scale.²⁹ To quote Stephen, this approach to comparative international law:

[G]ives us the tools to unpack both the external context and internal logic of particular international legal claims. It focuses not on the audience—asking whether all or most other states accept a claim as an accurate statement of international law – but on the claimant – asking what explains why the particular actor chose the argument made.³⁰

While certainly more attuned to politics than other international legal engagements,³¹ contra Schmittian emphasis on fundamental difference, through a comparative international law approach, we can see how mapping legal argument in a diverse world contains numerous possibilities of hybridity and dialogical engagement.³² In other words, even the most seemingly fundamental difference cannot be separated from a greater

28. See Boris Mamlyuk and Ugo Mattei, 'Comparative International Law' (2011) 36 *Brooklyn Journal of International Law*, 385; Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds), *Comparative International Law* (OUP 2018); Miriam Bak-McKenna, 'Remaking the Law of Encounter: Comparative International Law as Transformative Translation' in Zeynep Gulsah Capan, Filipe dos Reis, and Maj Grasten (eds), *The Politics of Translation in International Relations* (Palgrave Macmillan 2021) 67.

29. Benno Teschke, 'Fatal Attraction: A Critique of Carl Schmitt's International Political and Legal Theory' (2011) 3 *International Theory*, 179 and 184.

30. Paul B Stephan, 'Wars of Conquest in the Twenty-First Century and the Lessons of History – Crimea, Panama, and John Bassett Moore' (2021) 62 *Virginia Journal of International Law*, 63 and 70.

31. Daniel Abebe, 'Why Comparative International Law Needs International Relations Theory' in Roberts et al. (n 28) 71.

32. See Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019) 50-53.

web of interaction where constant merger and synthesis provides great insights into international law's possible evolutionary trajectory. As such, contentions between Chinese and Western approaches as they concern human rights, the law of the sea, and their varied overlaps might be planting the seeds for something entirely new that might contain elements of forces that were once fundamentally opposed. While the issue of Chinese maritime militias can certainly be analysed through this interactive lens, the challenge of this Chinese strategy to current international legal understandings must first be explicated in detail. This is especially pressing given the high degree of novelty and legal regime intersection entailed by the question of Chinese maritime militias.

2.1 Rewriting the seascape: China's maritime militias, international law, and global power dynamics

The rise of maritime militias as quasi-governmental forces, notably in the context of China's assertive practices in contested waters, has posed significant challenges to default understandings of international law. These maritime militias, state-supported civilian vessels, often referred to as China's 'third sea force' alongside its navy and coast guard,³³ reflect the PRC's ambition to become an enhanced sea power and a "country that leads the world in terms of composite national strength and international influence" by its centennial year in 2049.³⁴ Bolstered by three major organisations within its Armed Forces, each possessing a maritime

33. Andrew Erickson, 'China's Maritime Militia: The "Gray Zone" Force in the South China Sea' (23 December 2023), available at <<<https://www.andrewerickson.com/2023/12/chinas-maritime-militia-the-gray-zone-force-in-the-south-china-sea/>>>.

34. Yi Changliang, 'Predicting the Future: China's Composite National Strength in 2049' (*The Centre for Strategic Translation*, 1 May 2020), available at <<<https://www.strategictranslation.org/articles/predicting-the-future-chinas-composite-national-strength-in-2049>>>.

subcomponent,³⁵ the PRC has intensified its efforts to assert its authority over the South China Sea, one of the most disputed territories in the world, based on its understanding of its historic rights/title claims.³⁶ Through its controversial nine-dash line,³⁷ which marks China's expansive territorial claims on the map of Southeast Asia,³⁸ the PRC claims control over much of the region – well beyond what is recognised under international law³⁹ – while aiming to edge out other claimants. This has escalated tensions, as countries such as Vietnam and the Philippines strive to uphold their own rights, while others, like the United States

35. The People's Liberation Army (PLA) includes the PLA Navy (PLAN), a key element in projecting naval power; the People's Armed Police, which increasingly oversees China's Maritime Law Enforcement (MLE) forces such as the China Coast Guard, plays a crucial role in asserting maritime claims; and the Militia, that includes the People's Armed Forces Maritime Militia (PAFMM), a growing force of sea-based units that operate in tandem with other branches. See, Andrew Erickson, 'Understanding China's Third Sea Force: The Maritime Militia' (*Harvard Fairbank Center Blog Post*, 8 September 2017), available at <<<https://fairbank.fas.harvard.edu/research/blog/understanding-chinas-third-sea-force-the-maritime-militia/>>>.

36. 'Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea' (2016) 15 *Chinese Journal of International Law*, 903.

37. Hannah Beech, 'Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?' (*Time*, 19 July 2016), available at <<<https://time.com/4412191/nine-dash-line-9-south-china-sea/>>>.

38. China recently declared new baselines around Scarborough Reef in the South China Sea to assert territorial claims. These baselines signal China's intent to strengthen its maritime control and enforce sovereignty in the region. This development aligns with China's broader strategy of using straight baselines to maximise maritime zones despite conflicts with international law under UNCLOS. See Yucong Wang, Clive Schofield, and Warwick Gullett, 'Drawing Lines in the South China Sea: What Beijing's New Claims Over a Disputed Coral Reef Mean' (*The Conversation*, 29 November 2024), available at <<<https://theconversation.com/drawing-lines-in-the-south-china-sea-what-beijings-new-claims-over-a-disputed-coral-reef-mean-244197>>>.

39. Conor Steeds, 'Why Have the People's Republic of China and the Socialist Republic of Vietnam been able to Create and Sustain Maritime Militias' (2022) 4 *Contemporary Voices, Stages in Security*, 199.

(U.S.), United Kingdom, Japan, and Australia seek to underwrite freedom of navigation in these strategic waters.⁴⁰

For the last 30 years, the PRC leadership has consistently emphasised the nation's 'maritime rights and interests' in nearby seas, with much of its maritime power expansion aimed at both safeguarding and coercively advancing these claims.⁴¹ In response, Vietnam and the Philippines have sought to assert their respective territorial rights. While maritime militias remain rare, Vietnam stands as the only other country with a comparable force specifically created to contend with China's assertive maritime strategy. Hanoi formally established its maritime militia in 2009 under Law No. 43/2009/QH12, primarily to compete directly with China's People's Armed Forces Maritime Militia (PAFMM) in what can be described as an ongoing 'people's war at sea'.⁴² Unlike China, Vietnam does not possess a long-standing maritime militias tradition, but its military strategy draws from the broader 'people's war' doctrine, shaped by its revolutionary history and the Chinese Communist Party's military theory.⁴³ In contrast, the Philippines, lacking a similar history, despite expressing interest in creating its own maritime militia through legislation in 2016, has not yet succeeded in establishing such a force.⁴⁴

China's armed fishing militia – PAFMM – plays an instrumental role in blurring the lines between private civilian activity and state-driven efforts to advance sovereign claims. Operating under the direct command and control of the People's Liberation Army (PLA), the PAFMM has existed for decades, supporting Chinese Coast Guard (CCG) and PLA

40. Emma Salisbury, 'China's PLAN: Maritime Dominion Beyond the South China Sea', Council on Geostrategy, Policy Paper, Geopolitics Programme, No GPPP05, May 2024.

41. *Ibid.*, 10.

42. Steeds (n 39) 215.

43. *Ibid.*

44. *Ibid.*, 206.

Navy (PLAN) operations in the region.⁴⁵ It does so by establishing a *de facto* Chinese presence in disputed areas, thereby challenging the ability of counterclaimants to assert control over disputed features. These grey-zone operations, which use nontraditional forces and methods to pursue security objectives without triggering armed conflict,⁴⁶ are designed to “win without fighting” by overwhelming adversaries with swarms of fishing vessels – often supported by CCG and, depending on the contingency, potentially PLAN ships.⁴⁷ Within this spectrum, maritime militias serve as a pivotal instrument for asserting control over contested waters by obstructing and harassing ships of opposing parties and conducting intelligence gathering and surveillance.⁴⁸ In doing so, they maintain a routine military presence that enforces controlled tension without resolving disputes or escalating to full-scale conflict. Furthermore, because maritime militiamen are civilians, China gains a strategic advantage by operating in a legal grey area, allowing for both legal ambiguity and diplomatic manoeuvring.⁴⁹ It is this civilian status that underpins the Chinese Society of International Law’s claims of human rights abuses in its rebuttal to the 2016 Arbitral Tribunal’s decision.

45. Derek Grossman and Logan Ma, ‘A Short History of China’s Fishing Militia and What it May Tell Us’ (*Rand*, 6 April 2020), available at <<<https://www.rand.org/pubs/commentary/2020/04/a-short-history-of-chinas-fishing-militia-and-what.html>>>.

46. Shuxian Luo and Jonathan Panther, ‘China’s Maritime Militia and Fishing Fleets: A Primer for Operational Staffs and Tactical Leaders’ (2021) *Military Review*, 7.

47. Derek Grossman and Logan Ma, ‘A Short History of China’s Fishing Militia and What it May Tell Us’ (*Rand*, 6 April 2020), available at <<<https://www.rand.org/pubs/commentary/2020/04/a-short-history-of-chinas-fishing-militia-and-what.html>>>.

48. Kentaro Furuya, ‘Law Enforcement Measures Against Chinese Maritime Militia’ (2023) 100 *International Law Studies*, 672, 673; see also Conor Kennedy, ‘Gray Forces in Blue Territory: The Grammar of Chinese Maritime Militia Gray Zone Operations,’ in Andrew Erickson and Ryan Martinson (eds), *China’s Maritime Gray Zone Operations* (Naval Institute Press 2019) 168.

49. James Kraska and Michael Monti, ‘The Law of Naval Warfare and China’s Maritime Militia’ (2015) 91 *International Law Studies*, 450.

Before parsing China's state responsibility for its, still civilian, self-styled agents of guerilla warfare dedicated to entrenching its maritime presence, it is worth examining China's stance during the UNCLOS negotiations and, more recently, its engagement in the latest development of the BBNJ Agreement. These engagements demonstrate how China has sought to recalibrate maritime governance to advance its visions of equitable access while resisting what it condemns as Western hegemony. Understanding these dynamics is critical to contextualising China's deployment of maritime militias as tools of maritime control and its broader efforts to reshape the normative order of the seas.

2.2 Tides of power: China's shaping of ocean governance through UNCLOS and the BBNJ Agreement

In August 2022, states convened at the United Nations Headquarters to negotiate a new legally binding instrument – the BBNJ Agreement – on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, namely the high seas and the Area.⁵⁰ This agreement was adopted in June 2023 as the third implementing agreement under UNCLOS. Central to these negotiations was the debate over whether the *common heritage of humankind*⁵¹ constitutes a binding principle of international law or “remains a mere conceptual ideal”.⁵² China, while supportive of applying the ad hoc principle, expressed discontent with what it perceives as the “West's lack of political will to equitably

50. UNCLOS, Article 1(1)(1): “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”.

51. See, Rüdiger Wolfrum, ‘The Principle of the Common Heritage of Mankind’ (1983) Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 43, 312-337.

52. Nengye Liu and Shirley Scott, ‘China in the UNCLOS and BBNJ Negotiations, Yesterday Once More?’ (2024) Leiden Journal of International Law 1, 1.

share the benefits stemming from exploiting marine genetic resources in the seabed, ocean floor, and subsoil beyond the limits of national jurisdiction.”⁵³ This disquiet has not only shaped China’s negotiating posture but also informed its broader maritime strategy.

As a key actor in both UNCLOS and the BBNJ Agreement negotiations, China has consistently sought to align the evolving legal framework with its strategic and geopolitical ambitions. Its active engagement in shaping these legal instruments showcases an ambition to redefine the normative structure governing the high seas. These attempts have been reflected in China’s advocacy that such resources should be used for peaceful purposes, “jointly by the peoples of all countries”⁵⁴ and managed through “an effective international regime” to prevent “any form of super-Power manipulation or monopoly and the exclusive control or arbitrary exploitation of international deep-sea resources by one or two super-Powers on the strength of their advanced technology”.⁵⁵ These positions, and their clear homage to China’s revolutionary and anti-imperialist traditions, signal China’s broader attempt to place itself as a counterweight to Western dominance in maritime governance and to assert itself as a leading global actor.

Historically, China’s stance has undergone significant transformations, particularly in its relations with the U.S. and Soviet Union since the 1970s. During the UNCLOS III negotiations (1973-1982), China aligned closely with the Global South, prioritising sovereignty and equitable access to maritime resources.⁵⁶ By positioning itself as an ally of

53. *Ibid.*, 2.

54. UNCLOS III, Second Session, 25th Plenary Meeting, UN Doc. A/CONF.62/SR.25 (2 July 1974), para 18.

55. *Ibid.*

56. Liu and Scott (n 52) 2.

developing nations (and an alternative to the U.S. and Soviet Union),⁵⁷ China sought to oppose hegemonies, a stance consistent with the anti-imperialist rhetoric of that era. Nevertheless, over time, these dynamics evolved considerably, particularly under President Xi Jinping's leadership commencing in 2012. Xi's launch of the Belt and Road Initiative (BRI) in 2013 marked a shift toward constructing a new global era, under the concept of a "Community of Shared Future for Mankind."⁵⁸ This ambition, nonetheless, has coincided with intensified strategic rivalry with the U.S., as evidenced by the South China Sea arbitration (2013-2016),⁵⁹ President Donald Trump's 'Trade War' in 2018,⁶⁰ and the overall deterioration of this bilateral relation.⁶¹

Conversely, China's relations with (post-Soviet) Russia have grown increasingly robust with Presidents of both states meeting in person 42 times from 2013 to 2023,⁶² culminating in the formal upgrade of their bilateral ties to a "comprehensive strategic partnership" in 2019.⁶³

57. See Jeremy Friedman, *Shadow Cold War: The Sino-Soviet Competition for the Third World* (University of North Carolina Press 2015); Gregg Brazinsky, *Winning the Third World: Sino-American Rivalry during the Cold War* (University of North Carolina Press 2017).

58. James McBride, Noah Berman, and Andrew Chatzky, 'China's Massive Belt and Road Initiative' (*Council on Foreign Relations*, 2 February 2023), available at <<<https://www.cfr.org/backgroundunder/chinas-massive-belt-and-road-initiative>>>.

59. China contends that the unilateral initiation of UNCLOS Annex VII Arbitration by the Philippines was orchestrated under the influence of the US government, see Wang Xiaohui, 'South China Sea Arbitration: A US-Led Conspiracy behind the Farce' (*People's Daily Online*, 12 July 2016), available at <<<http://en.people.cn/n3/2016/0712/c90000-9085051.htm>>>.

60. Tao Liu and Wing Thye Woo, 'Understanding the US-China Trade War' (2018) 11 *China Economic Journal*, 319.

61. Liu and Scott (n 52) 14.

62. Huiyun Feng and Kai He, 'Why China and Russia not Form an Alliance? The Balance of Beliefs in Peacetime' (2024) 100 *International Affairs*, 2089.

63. 'China, Russia Agree to Upgrade Relations for New Era', (*State Council of the People's Republic of China*, 6 June 2019), available at <<https://english.www.gov.cn/news/top_news/2019/06/06/content_281476701425684.htm>>.

Of particular note, the China-Russia Foreign Ministerial Joint Declaration on Issues of Global Governance adopted on 23 March 2021,⁶⁴ reaffirmed China's vision of the global order by challenging the U.S.-anchored "rules-based international order" and emphasising the primacy of "international law underpinned by the United Nations."⁶⁵ While China has officially abstained from supporting Russia's war in Ukraine, Russia's complete isolation from the West has undeniably cemented its alignment with China, driven by shared security and economic interests.⁶⁶ President Xi's state visit to Russia in March 2023, shortly after securing his third term, resulted in a new joint statement reaffirming the strength of Sino-Russian ties, describing them as being in their "best period in history" and "fast growing towards the future".⁶⁷

Against this backdrop of shifting power dynamics and strengthening ties, China has leveraged UNCLOS and the BBNJ Agreement's negotiations on a two-pronged front. First, China vigorously sought to exclude disputed sea areas, such as the South China Sea, from the scope of the BBNJ Agreement.⁶⁸ For instance, during negotiations on issues like Area-based management tools (ABMTs), decision-making process, and dispute settlement, China proposed that such measures "shall not

64. Andrea Kendall-Taylor and David Shullman, 'China and Russia's Dangerous Convergence' (*Foreign Affairs*, 3 May 2021) available at <<<https://www.foreignaffairs.com/articles/china/2021-05-03/china-and-russias-dangerous-convergence>>>.

65. Liu and Scott (n 52) 14.

66. Pascal Abb and Mikhail Polianskii, 'Xi and Putin's Strategic Tango: Unpacking the Complexities of Russia-China Relations After the 2023 Moscow Summit' (*Prif Blog*, 20 April 2023), available at <<<https://blog.prif.org/2023/04/20/xi-and-putins-strategic-tango-unpacking-the-complexities-of-russia-china-relations-after-the-2023-moscow-summit/>>>.

67. China Ministry of Foreign Affairs, 'Joint Statement of the People's Republic of China and the Russian Federation on Deepening the Comprehensive Strategic Partnership of Co-ordination for the New Era', (22 March 2023), available at <<https://www.fmprc.gov.cn/zyxw/202303/t20230322_11046188.shtml>>.

68. Liu and Scott (n 52) 19.

be involved in any kind of land or maritime disputes”.⁶⁹ Furthermore, it asserted that in cases where disputes arise over whether an area lies beyond national jurisdiction, such areas should not be designated as AB-MT.⁷⁰ Thus, China’s position reflects its broader strategy to prevent international regulatory frameworks from impacting its territorial claims and interests in contested regions. Second, China exhibited considerable scepticism regarding the application of the UNCLOS dispute settlement mechanism, *mutatis mutandis* to the BBNJ Agreement,⁷¹ reflecting its strong criticism of the South China Sea Arbitration conducted under Annex VII UNCLOS – a case that emphasised China’s longstanding concerns over the implications of compulsory dispute settlement for issues of sovereignty.⁷² Consistent with its stance during the UNCLOS III negotiations, China has demonstrated resistance, holding that sovereignty-related disputes should not be subject to compulsory adjudication. Instead, it has advocated for the establishment of a distinct dispute settlement mechanism for the BBNJ Agreement, one that would prioritise state consent as its foundational principle.⁷³ Nevertheless, while China failed to garner adequate support for creating such a mechanism, it did succeed in securing Article 60(9),⁷⁴ which explicitly precludes the BBNJ Agreement from exercising jurisdiction over any sovereignty disputes. China’s participation in the UNCLOS and BBNJ Agreement negotia-

69. Ibid. China, Article 17 Proposals, IGC 5th (18 August 2022), available at <<<https://www.un.org/bbnj/igc-5th-proposals>>>.

70. China, Article 17bis Identification of Areas, IGC 5 Proposals (18 August 2022), available at <<<https://www.un.org/bbnj/igc-5th-proposals>>>.

71. Yubing Shi, ‘Settlement of Disputes in a BBNJ Agreement: Options and Analysis’ (2020) 122 Marine Policy, 104 and 156

72. CSIL, ‘Critical Study’ (n 3) 246-397.

73. Liu and Scott (n 52) 19.

74. 2023 Agreement under the United Nations Convention on the Law of The Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (‘BBNJ’) Agreement, Article 60(9).

tions demonstrates a strategic approach aimed at reshaping the law of the sea in a manner that aligns with its national interests and geopolitical ambitions. This strategy is further bolstered by the deployment of maritime militias, which operate as *de facto* enforcers of Chinese territorial claims in contested waters. By leveraging international law to legitimise its maritime interests while relying on non-traditional actors to reinforce its claims, China positions itself as a counter-hegemonic actor in global maritime governance while also asserting its regional designs. This dual approach raises critical questions about state responsibility: to what extent does China's legal and operational strategy, executed through hybrid actors operating under the covert direction of the state, reshape the legal consciousness of the seascape and global order?

2.3 The thin line of accountability: China's hybrid maritime actors and State responsibility

The obscure and clandestine nature of Chinese maritime militias poses significant international legal challenges. As a guardian of China's expansive maritime claim to over 90 percent of the South China Sea,⁷⁵ this covert maritime force has become a key lever for power projection during peacetime.⁷⁶ As tensions escalate over China's overlapping maritime claims with Vietnam and the Philippines, *inter alia*, Beijing's maritime militia serves as a potent non-forcible method of coercion.⁷⁷ By dom-

75. United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, 'People's Republic of China: Maritime Claims in the South China Sea' (*Limits in the Seas*, No. 150, January 2022) <<<https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf>>>.

76. Kraska and Monti (n 49) 454.

77. Ibid. For a rejection of this 'nonforcible' characterisation, see Aurel Sari, 'Maritime Incidents in the South China Sea: Measures of Law Enforcement or Use of Force?' (2024) 103 *International Law Studies*, 463.

inating the seascape without the risk of open conflict, China furthers its geopolitical aims while blurring the lines between civilians, fishing vessels and state actions, thereby complicating the attribution of state responsibility. Nevertheless, the International Court of Justice (ICJ), in its 1949 advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, marked a landmark moment by recognising that “the progressive increase in the collective activities of states has given rise to instances of action [...] by certain entities which are not states”⁷⁸ and thus entities other than states are indispensably qualified as subjects of international law.⁷⁹

While the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provide a robust legal framework – particularly in terms of (1) the attribution of conduct to the state under international law and (2) the breach of an international obligation of the state (Article 2) – their application in the context of China’s maritime militias is fraught with complexities.⁸⁰ The militias, operating under the covert direction of the state, consist of vessels and personnel affiliated with state-owned fishery companies. However, as these entities do not qualify as state organs under Article 4,⁸¹ nor as parastatal entities exercising governmental authority under Article 5 of ARSIWA,⁸² which makes the attribution of responsibility to the Chinese state under these provi-

78. ICJ, *Reparations for Injuries Suffered in the Service of United Nations*, Advisory Opinion of 11 April 1949, 178.

79. James Crawford and Simon Olleson, ‘The Nature and Forms of International Responsibility,’ in Malcolm Evans (ed), *International Law* (OUP 2003) 446.

80. Su Jin Yoo and Min Gyo Koo, ‘Is China Responsible for Its Maritime Militia’s Internationally Wrongful Acts? The Attribution of the Conduct of a Parastatal Entity to the State’ (2022) 24 *Business and Politics*, 277, 280.

81. ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ YILC 2001, vol II, Article 4 (hereinafter: ILC, ‘Draft Articles on State Responsibility’).

82. *Ibid.*, Article 5.

sions problematic. This structural ambiguity creates notable challenges in establishing China's responsibility for the militia's actions, particularly with regard to acts of harassment, bullying, and obstruction of the navigational rights and freedoms of foreign vessels.⁸³ Such actions not only contravene some of the obligations set forth in UNCLOS⁸⁴ – that was ratified by China in 1996 – but also raise questions about the attribution of responsibility to states for unlawful conduct carried out by hybrid, non-state actors operating under its auspices.⁸⁵ In addition, these activities have significant human rights implications for vulnerable coastal communities and foreign seafarers subjected to intimidation, violence, or economic coercion. These maritime militia actions may, in certain cases, amount to violations of fundamental human rights protections under international law, including the right to security⁸⁶ and protection from inhumane treatment.⁸⁷ Nevertheless, the actions of the militias, which operate under China's internal directives and are tasked with carrying out its mission at sea, remain attributable to the Chinese government.⁸⁸ This is because, under Article 4 of the ARSIWA, the militia can be considered a state organ, making China responsible for its conduct, even when that conduct is carried out by entities not formally recognised as

83. Jaymes MacKinnon, 'Fishery Depletion and the South China Sea' (2019) 9 *Flux: International Relations Review* 47; Ryan Martinson, "No Ordinary Boats: Cracking the Code on China's Spratly Maritime Militias." (*CIMSEC Capability Analysis*, 17 May 2021), available at <<<https://cimsec.org/no-ordinary-boats-cracking-the-code-on-chinas-spratly-maritime-militias/>>>.

84. E.g., Articles 58, 94, 192, 194, 279, 296, and 300, as recognised by the Arbitral Tribunal in its 2016 South China Sea award on the merits.

85. Jonathan Odom, 'Guerrillas in the Sea Mist: China's Maritime Militia and International Law' (2018) 3 *Asia-Pacific Journal of Ocean Law and Policy*, 31.

86. International Covenant on Civil and Political Rights (ICCPR), Article 6.

87. ICCPR, Article 7.

88. Koki Sato, 'China's Maritime Militia: A Legal Point of View' (*Maritime Issues*, 12 March 2020), available at <<<https://www.maritimeissues.com/politics/maritime-militia-in-east-and-south-china-seas.html>>>.

state organs under international law.⁸⁹

But even if these vessels in effect belong to state-owned fishery companies, since they are empowered by China's internal directives "to defend the frontier and maintain public order"⁹⁰ in disputed waters, such activities would constitute a "typical or essential state function" regardless of the identity or character of a maritime militia as a parastatal or private entity.⁹¹ Thus, pursuant to Article 4 of the ARSIWA commentary, "a state is responsible for the conduct of its own organs" and must assume responsibility for their conducts, even if it denies their formal status as state organs.⁹² This principle was affirmed by the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* where it stated in categorical terms that, "according to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule [...] is of a customary character."⁹³ A similar application of the "typical or essential state function" test was articulated in the 1985 *Hyatt v. Iran* case.⁹⁴ The tribunal in this case determined that it was necessary to

89. ILC, 'Draft Articles on State Responsibility' (n 81) vol II, Article 4.

90. Massaki Yatsuzuka, 'China's Advance into the Sea and the Maritime Militia' (*NIDS Commentary* 53, 2016) 1–5, available at <<<https://www.nids.mod.go.jp/english/publication/commentary/pdf/commentary053e.pdf>>>; James Kraska, 'China's Maritime Militia Vessels May Be Military Objectives during Armed Conflict', (*The Diplomat*, 7 July 2020), available at <<<https://thediplomat.com/2020/07/chinas-maritime-militia-vessels-may-be-military-objectives-during-armed-conflict/>>>.

91. Oliver Jones, 'Implausible Deniability: State Responsibility for the Actions of Private Military Firms' (2009) 24 *Connecticut Journal of International Law* 239, 265–267.

92. ILC, 'Draft Articles on State Responsibility' (n 81) vol II, Article 4 (1–4); Chester Brown, 'Article 4 of the ARSIWA: Conduct of Organs of a State' in Andreas Kulick and Michael Waibel (eds), *General International Law in International Investment Law, A Commentary*, (OUP 2024) 249.

93. *Difference relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, para 62, 87.

94. Yoo and Koo (n 80) 282.

consider whether the function performed by the entity is “typically or essentially” a state function. It therefore concluded that the foundations in question were not private but public entities, empowered by Iranian internal law, whose mandate to locate and confiscate foreign properties could be characterised as actions serving public purposes on behalf of the government.⁹⁵

The application of the ‘typical or essential state function’ test is not limited to traditional state organs but extends to entities whose activities are deemed to serve state interests, even when these entities operate outside the formal structures of government. In *Nicaragua v. United States* (1986), for instance, the ICJ ruled that responsibility for the conduct of the Contra rebels fell on the U.S., despite the fact that they were not formal organs of the U.S. government.⁹⁶ In this regard, the Court concluded that the group’s actions, directed by the U.S. to further its foreign policy, could be attributed to the State, since they performed essential functions related to state interests.

Considering China’s maritime militia, the key issue here is whether the activities conducted by these vessels – often in contested waters – serve to protect China’s sovereignty or territorial integrity both of which are central to state functions. Similar reasoning was applied in *Nicaragua v. United States* (1986), where the Court held that actions carried out by paramilitary forces, whether state-controlled or not, could be attributable to the state when they were directed towards achieving the state’s objectives.⁹⁷ Thus, the conduct of China’s maritime militia – empowered by state directives to defend disputed maritime areas – would, under the customary rules of state responsibility, be attributable to the state itself.

95. Ibid. Iran-United States Claims Tribunal, *Hyatt International Corporation v. The Government of the Islamic Republic of Iran*, IUSCT Case No.134, Interlocutory Award, 17 September 1985.

96. *Nicaragua v. United States* (1986), ICJ Reports 1986, paras 110 and 115.

97. Ibid.

With all the above in mind, China's strategic manoeuvres appear to reflect a calculated effort to reinterpret and reshape the international legal framework in a way that aligns with its geopolitical ambitions, while limiting accountability. By leveraging legal ambiguities and deploying its maritime militias, China challenges the global maritime order. In doing so, it seeks to assert its regional influence, acting as both a rule-maker and, at times, a rule-breaker in the South China Sea. For Kardon, China's actions – in their highly selective approach to existing international law coupled with no presentation of a coherent alternative – is potentially creating a new maritime order in East Asia premised on a sovereign supremacy at odds with creating and adhering to universally applicable standards.⁹⁸ Thus, "rather than changing the rules, China is changing the international environment in which those rules take effect."⁹⁹ Speculating upon the future consequences of such a shift, in Kardon's words, "international acceptance of a special set of Chinese claims and rules underpinning them would create a precedent for other states to develop non-uniform practices and idiosyncratic rules of their own. It would become more difficult for courts and arbitral panels to deny the validity of plural interpretations of rules as applied in different regions of the world."¹⁰⁰ The great emphasis on sovereignty, openness to bilateral dialogue, and lack of faith in international adjudication measures amongst other East Asian states (especially after the enforceability limits of the Philippines's arbitration action became plainly apparent) only compounds this process of fragmentation.¹⁰¹

98. Kardon (n 23).

99. *Ibid.*, 263.

100. *Ibid.*, 267.

101. *Ibid.*, 267-68; Nguyen Huong Thach Thao, 'The Philippines and Vietnam's Responses to the Permanent Court of Arbitration's Final Award on the Arbitration Case Initiated by the Philippines Against China over the South China Sea (July 2016)' (2019) 11 *Vienna Journal of East Asian Studies*, 155.

3. What possible rejoinder: ‘Considerations of Humanity’ with Chinese characteristics?

If there are ample grounds for criticising China’s particular approach to the human rights/law of the sea nexus in relation to its maritime militia strategy, what exactly might a Chinese rejoinder look like? Adopting a lens of comparative international law makes it possible to speculate on such matters and consider that factors that might inform any alternative interpretation. That said, when assessing this prospect, a place to look is for gaps in existing doctrine through which China’s might lodge its own approach to worldmaking – and thus reconcile its longstanding critiques of international law with its ambition to provide world leadership through international law.¹⁰² On such gap relevant to both human rights and the law of the sea is the recognition of ‘considerations of humanity’ within the jurisprudence of the law of the sea as interpreted and applied by ITLOS.¹⁰³ While there is extensive debate on whether ‘considerations of humanity’ should exist as a narrow gap-filler or a broad norm-creating means of humanising the oceans,¹⁰⁴ the latter interpretation gained a major boost through ITLOS’s 2024 Advisory Opinion articulating States’ duties to mitigate climate change.¹⁰⁵ As

102. Ignacio de la Rasilla and Hao Yaezi, ‘The Community of Shared Future for Mankind and China’s Legalist Turn in International Relations’ (2021) 20 *Chinese Journal of International Law*, 341.

103. Francesca Delfino, ‘Considerations of Humanity’ in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals’ in Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019) 421.

104. Anna Petrig and Marta Bo, ‘The International Tribunal of the Law of the Sea and Human Rights’ in Martin Scheinin (ed), *Human Rights Norms in ‘Other’ International Courts* (CUP 2019) 353, 402-405.

105. Request for an Advisory Opinion by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion – International Tribunal for the Law of the Sea (21 May 2024), at 66 (‘the Tribunal notes that climate change represents an existential threat and raises human rights concerns’).

Benoit Mayer has observed “[t]he Opinion is a significant step in international law because it confirms that states have obligations on climate change mitigation arising from sources other than climate treaties and that climate treaties do not preclude the application of such obligations.”¹⁰⁶ In other words, the prospects for connecting wide-ranging interpretations of ‘humanity’ to the law of sea are open as they never were before.

Considering this development and its vast potential in expanding relevant ‘considerations of humanity’ in relation to the law of the sea, there is no shortage of paths for Chinese utilisation in light of its own international legal understandings and ambitions. This is especially true as climate change – and the calls for decisive worldwide action that it entails – forms a key medium for connecting human rights to the law of the sea in light of recent jurisprudence. On this point, a fundamentally relevant Chinese concept is its meta-project of ‘ecological civilisation’.¹⁰⁷ Devised in response to the large-scale environmental impact of China’s rapid industrialisation in the early twenty-first century, ecological civilisation as a modality of environmental protection stresses the related importance of top-down action by a powerful State and the need to transcend Western modes of reasoning when implementing meaningful climate action.¹⁰⁸

106. Benoit Mayer, ‘Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law’ (2025) 119 *American Journal of International Law*, 153, 154.

107. Mette Halskov Hansen, Hongtao Li, and Rune Svarverud, ‘Ecological Civilization: Interpreting the Chinese Past, Projecting the Global Future’ (2018) 53 *Global Environmental Change*, 195.

108. Xin Zhou, ‘Ecological Civilization in China: Challenges and Strategies’ (2021) 32 *Capitalism Nature Socialism*, 84; Bing Xue, Bin Han, Hongqing Li, Xiaohua Gou, Hong Yang, Heiko Thomas, and Stefan Stückrad, ‘Understanding Ecological Civilization in China: From Political Context to Science’ (2023) 53 *Ambio*, 1895.

While not without its critics,¹⁰⁹ as a meta-policy for framing the operation of international law it is not difficult to see how ‘ecological civilisation’ can easily fit within China’s strategy of appealing to the States of the Global South. By prioritising concrete interests over abstract ideals – an approach central to China’s human rights strategy – ecological civilisation directly addresses the immediate and visceral impacts of climate change in the Global South, circumventing the displacing rhetoric of ‘future generations’ that has often framed and constrained climate action.¹¹⁰ On an additional (related) level, by challenging Western hegemony in climate governance, China’s concept of ecological civilisation turns attention to how Western States fail to acknowledge their greater historical responsibility for climate change, thereby constraining their climate action proposals.¹¹¹ As mechanism of meta-legality, ecological civilisation can thus offer an effective inversion of the infamous ‘standard of civilisation’ whereby the applicability of international law to a given polity was preceded by the question of whether the polity was a ‘civilised’ or ‘uncivilised’ nation.¹¹² If China’s ‘ecological civilisation’ is to shape the future discourse on human rights, the law of the sea, and their varied intersections, how might this standpoint reframe the question of maritime militias?

If ‘ecological civilisation’ and the actions it calls for can be framed as a ‘considerations of humanity’ lodged as an interpretive template regard-

109. See Paul Barresi, ‘The Role of Law and the Rule of Law in China’s Quest to Build an Ecological Civilization’ (2017) 1 *Chinese Journal of Environmental Law*, 9; Evelyn Li Wang, ‘A Beacon of Hope for a troubled Earth? A Critical Analysis of China’s Authoritarian Approach to Constructing ‘Ecological Civilization’ (2023) 26 *Asia Pacific Journal of Environmental Law*, 108.

110. Stephen Humphreys, ‘Against Future Generations’ (2022) 33 *European Journal of International Law*, 1061.

111. Julia Dehm, ‘Carbon Colonialism or Climate Justice: Interrogating the International Climate Regime from a TWAIL Perspective’ (2016) 33 *Windsor Yearbook of Access to Justice*, 126.

112. Gerrit Gong, *The Standard of ‘Civilization’ in International Society* (OUP 1984).

ing the law of the sea (especially as it concerns climate change mitigation), this holds tremendous implications as to how China might frame its actions in the South China Sea and their international legality. After all, the more China seeks to integrate its economic growth agenda with its environmental protection designs, the more closely it will need to acknowledge the many links between land and sea as central to ecological sustainability. In other words, in actualising environmental policies in light the inescapable land-sea nexus, the further China turns to a ‘green economy’, the more it will need to recognise the relevance of a ‘blue economy.’¹¹³ When it comes to actualising its efforts, the further the reach of its maritime jurisdiction, the more directly China will be able to manage its ‘blue economy’ in a manner tied to the central presumption of ecological civilisation that climate action requires a State highly empowered to act in a top-down capacity. Given the South China Sea’s significance as a key site for renewable and non-renewable resource extraction, there is little reason to doubt that it will remain central to this unfolding agenda. If China further develops its arguments linking the blue economy to its ecological civilisation strategy within a broader international legal framework, it can frame its claims over the South China Sea beyond narrow historical entitlements, instead appealing to ‘considerations of humanity’ on a larger scale. Such invocations would speak directly to Chinese discourse surrounding the “human community of fate”.¹¹⁴

Against this possible reframing, China’s maritime militias – and China’s advocacy on behalf of their human rights – can take on a new form

113. Michael Fabinyi, Annie Wu, Sallie Lau, Tabitha Mallory, Kate Barclay, Kathleen Walsh, and Wolfram Dressler, ‘China’s Blue Economy: A State Project of Modernisation’ (2021) 30 *Journal of Environment and Development*, 127; Sufian Ahammed, Md Masud Rana, Helal Uddin, Shapan Chandra Majumder, and Saju Shaha, ‘Impact of Blue Economy Factors on the Sustainable Economic Growth of China’ (2024) *Environment, Development, and Sustainability*, 1.

114. See Ryan Martinez Mitchell, ‘The Human Community of Fate: A Conceptual History of China’s Ordoglobal Idea’ (2022) 13 *Humanity*, 175.

of meaning that could generate new international legal arguments. If the greater extent of China's maritime jurisdiction is correlated with an enhanced ability of China to combat climate change (and enhance human rights in the process), then the maritime militia fishermen operating to bolster these claims are hardly the disruptive rogues that certain interpretations of international law would deem them to be. Rather, true to their heritage as guerrilla fighters working to uplift the human condition via world revolution, the maritime militias are on the forefront of struggle on behalf of all mankind. On this basis, if placed within the Chinese frame in which transformed material conditions to achieve emancipation are the great end of human rights, then the protection of the human rights of maritime militia fishermen, must be paramount. From this perspective, any interpretation of the law of the sea (or of international law more broadly) that can easily justify force against Chinese maritime militias in the South China Sea does not take due account of the 'considerations of humanity.'

4. Conclusion – on the Vietnam conundrum

Any Chinese rejoinder along these lines would certainly invite a broad array of critical counterclaims, and – as shown through Section 3 – there is no shortage of potential legal constructs for a would-be critic to draw upon. However, for all the questions this might raise (especially when anticipating subsequent Chinese rejoinders), the terms of discourse in this vein must always be critically assessed if the insights of any deployment of comparative international law are to be global in character. While a pitting of Western international legal interpretations against Chinese ones is unavoidable in an era of rising powers and faltering liberal hegemony, focus here must not ignore the peoples and nations

caught between them. As Anne Orford notes of the newfound relevance of an increased regionalisation of international order, amongst the most profound insights can be found through turning attention to the border regions and those who inhabit them.¹¹⁵ In the context of the South China Sea debates, this would include the other Asian parties to this dispute in the form of Brunei, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam. As Douglas Guilfoyle has observed, China has “potentially underestimated the extent to which its policy impinges on other states’ national interests in the maritime domain – interests they conceptualize in legal terms.”¹¹⁶ The perceptions of these states carry tremendous bearing on China’s ability to provide leadership of the non-Western world. After all, when it comes to offering an alternative to Eurocentric dominion, how might China prove that its rise in the twenty-first century will be marked differently from the rise of Imperial Japan in the twentieth century?¹¹⁷ China’s own victimisation in this context can only explain so much.¹¹⁸

While an admittedly colossal question, if maritime militias are a key nexus for China’s distinct interplay of human rights and the law of the sea in a potential new regional order in East Asia, one nation of profound international is the People’s Republic of Vietnam. Alongside China, Vietnam is the only other nation that maintains a maritime militia force to stake out claims in the South China Sea that is rooted in furthering the

115. Anne Orford, ‘Regional Orders, Geopolitics, and the Future of International Law’ (2021) 74 *Current Legal Problems*, 128, 191-193.

116. Douglas Guilfoyle, ‘The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea’ (2019) 95 *International Affairs*, 999, 1000.

117. See Zhiguang Yin, ‘Is China Just Another Japan in the World: Towards a Non-Hegemonic Understanding of Global Order’ (2021) 14 *Tsinghua China Law Review*, 75.

118. Patrick Sze-Lok Keung and Bijun Xu, ‘The Sino-Japanese War and the Collapse of the Qing and Confucian World Order in the Face of Japanese Imperialism and European Acquiescence’ in Carty and Nijman (n 10) 413.

world revolution through the tactic of guerilla warfare.¹¹⁹ Interestingly, despite this ostensibly unified cause, for Chinese legal scholars addressing Vietnam's maritime militias, their criticisms are remarkably similar to Western legal scholars addressing China's maritime militias.¹²⁰ In both cases, maritime militias are a menace operating according to illegitimate purposes.¹²¹ This appears to be a striking disjuncture between two nations that still claim legitimacy on the basis of building a unified socialist revolutionary front. While inquiry into why this is the case might reveal a great deal about the operation of international law and politics after Western hegemony, this broader inquiry will have to wait for another occasion. However, the mere fact that such an inquiry is possible at all is a testament to the power of the often narrowly considered maritime militia question to vastly complicate assumed wisdom regarding the relationship between human rights and the law of the sea.

119. Hoaran Cui and Yubing Shi, 'A Comparative Analysis of the Legislation on Maritime Militia Between China and Vietnam' (2022) 53 *Ocean Development and International Law*, 147.

120. Hoaran Cui, 'Evolution of Vietnam's Maritime Militia and Its Impact on the Situation in the South China Sea' (2022) 18 *China Oceans Law Review*, 140.

121. *Ibid.*, 154-157; Raul Pedrozo, 'China's IUU Fishing Fleet: Pariah of the World's Oceans' (2022) 99 *International Law Studies*, 318.