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An Incident in the South China Sea

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I. INTRODUCTION (THE SITUATION)

A NATO warship is in transit near Subi Reef, a low-tide elevation (LTE)¹ that features an artificial installation, built and occupied by the People's Republic of China (PRC).² Subi Reef is in the vicinity of Thitu Island, a rock³ that also contains a Philippines-occupied feature.⁴ The NATO warship has a short "tail," an antisubmarine warfare towed sonar array, deployed in the water and trailing the vessel.

A flotilla of Chinese fishing vessels, apparently operating in concert, maneuver to impede the transit of the warship, which at this time is located less than ten nautical miles from Subi Reef, and approximately fourteen nautical miles from Thitu Island. Radio transmissions from the fishing vessels indicate that they are under the direction of a China Coast Guard (CCG) cutter six nautical miles distant. Several fishing vessels stop in front of the warship, while others steam towards the warship on a constant bearing, decreasing range course.

Among the fishing vessels is a large steel hull PRC fishing vessel (although no nets or fishing gear are visible). While the smaller vessels are harassing the warship in close proximity, this large vessel stands off at three thousand yards. It transmits a message via Channel 16 bridge-to-bridge: "This is Chinese territorial waters. You don't have permission to be here. You must leave now."

The warship continues along its mean line of advance, although it adopts a zigzag pattern in response to the maneuvering of the fishing vessel, with a view to keeping as much water between it and those vessels. The warship also increases its readiness and watertight integrity states.

1. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶ 368 (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086> [hereinafter South China Sea Arbitration Award]. For elements of the Chinese response, see *The South China Sea Arbitration Awards: A Critical Study*, 17 CHINESE JOURNAL OF INTERNATIONAL LAW 207, 520–51, ¶¶ 645–721 (2018) (discussing LTEs); *id.* at 594–607, ¶¶ 827–57 (discussing Chinese maritime law enforcement activities directed at Philippine vessels).

2. *Subi Reef*, ASIA MARITIME TRANSPARENCY INSTITUTE, <https://amti.csis.org/subi-reef/> (last visited Oct. 27, 2020) (noting that China first took possession of the feature in 1988 and providing overhead images of its subsequent development).

3. South China Sea Arbitration Award, *supra* note 1, ¶ 622.

4. *Thitu Island*, ASIA MARITIME TRANSPARENCY INSTITUTE, <https://amti.csis.org/thitu-island/> (last visited Oct. 27, 2020) (noting that Thitu Island is a rock near the Spratly Islands and the Philippines first took possession of the feature in 1974).

Within minutes, the warship receives a further transmission apparently from the CCG cutter: “You are not in innocent passage. You do not have PRC permission to be here. You must leave the area immediately.” The warship responds that it is exercising its freedom of navigation under international law.⁵ The CCG cutter then transmits a further message: “If you do not leave our waters, we will use force. The consequences will be yours.”⁶ By this stage, the warship is still within ten nautical miles of Subi Reef but has closed to a range of thirteen nautical miles from Thitu.⁷

The regular fishing vessels maneuvering at the warship’s quarters now proceed to cross close astern and snag the warship’s tail.⁸ Crewmembers on one of these fishing vessels visibly haul in a bight of the tail and hack through

5. For the Chinese reaction to a warship’s passage through a claimed territorial sea while exercising the freedom of navigation, see *British Navy’s HMS Albion Warned over South China Sea ‘Provocation’*, BBC (Sept. 6, 2018), <https://www.bbc.com/news/uk-45433153>.

6. For a case analyzing the threat of the use of force in a maritime incident, see *Guyana vs. Suriname*, Case No. 2004-04, PCA Case Repository, Award (Perm. Ct. Arb. 2007), <https://pcacases.com/web/sendAttach/902:439>. For the Tribunal’s discussion of the threat or use of force in this case, see *id.* ¶¶ 425–40. With regard to the demand made of the Guyanese rig to leave the area, the Tribunal stated,

The testimony of those involved in the incident clearly reveals that the rig was ordered to leave the area and if this demand was not fulfilled, responsibility for unspecified consequences would be theirs. There was no unanimity as to what these ‘consequences’ might have been. The Tribunal is of the view that the order given by Major Jones to the rig constituted an explicit threat that force might be used if the order was not complied with.

Id. ¶ 439. The Tribunal continued,

The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary. However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity. This Tribunal has based this finding primarily on the testimony of witnesses to the incident . . . Suriname’s action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law.

Id. ¶ 445.

7. These distances are not geographically precise; they are for the purposes of the scenario only.

8. For a discussion of the 2009 USNS *Impeccable* incident involving a U.S. Military Sealift Command vessel and three 2011–12 cable cutting incidents involving Vietnam-licensed survey vessels and PRC vessels, see Michael Green et al., *Counter-Coercion Series: Harassment of the USNS Impeccable*, ASIA MARITIME TRANSPARENCY INITIATIVE (May 9, 2017), <https://amti.csis.org/counter-co-harassment-usns-impeccable/>; see also Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, 62 NAVAL WAR COLLEGE REVIEW, Summer 2009, at 99, 101; *China Accuses Vietnam in South China Sea Row*, BBC (June 10, 2011), <https://www.bbc.com/news/world-asia-pacific-13723443>.

it. The fishers gather in the separated part of the tail and coil it on the deck of the fishing vessel.

Simultaneously, the large steel-hulled fishing vessel closes at high speed on a collision course. The warship maneuvers away, but the large fishing vessel collides with the warship abaft the beam,⁹ causing significant damage to the guardrails, gunwales, superstructure, and a rigid-hulled inflatable boat and launch derrick, and injuries to several crewmembers. The impact holes the hull well above the waterline.

II. ASSESSMENT METHODOLOGY

The following assessment focuses on the law of the sea framework, with a brief reference to some associated responsibility matters. The scenario also clearly raises a raft of other legal questions: When does use of force, ostensibly for a maritime law enforcement purpose, cross the line into U.N. Charter Article 2(4)¹⁰ territory. What factors and indicia do we use to determine this point? Does the legitimacy or otherwise of the claim or right purportedly being enforced alter this assessment? Where both the target and perpetrator vessel are State vessels, when does a use of force for maritime security purposes approach the quite low 1949 Geneva Conventions Common Article 2 threshold for an international armed conflict?¹¹

The aim of this assessment, however, is to deal more narrowly with law of the sea characterization issues; consequently, these other highly relevant, but—in legal terms—more diversely referenced aspects of the scenario have been set aside. This assessment of this scenario, therefore, proceeds along the following iterative line. First, where, in law of the sea terms, did the incident happen? Second, who, employing a law of the sea characterization scheme (but referencing relevant responsibility regimes where necessary)

9. For a discussion of the Black Sea bumping incident involving collisions between U.S. and Soviet naval vessels following a warning from the Soviet vessels not to violate the U.S.S.R. border, see John Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How Innocent Must Innocent Passage Be*, 135 *MILITARY LAW REVIEW* 137 (1992); William Aceves, *Diplomacy at Sea: US Freedom of Navigation Operations in the Black Sea*, 46 *NAVAL WAR COLLEGE REVIEW*, Spring 1993, at 59, 59; John Hitt, *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 *VIRGINIA JOURNAL OF INTERNATIONAL LAW* 713 (1989).

10. U.N. Charter art. 2, ¶ 4.

11. *See, e.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

were the perpetrator vessels? Third, where does responsibility for their conduct lay? And finally, how do the where and who factors interact in assessing the incident, and some associated responsibilities, by reference to the law of the sea?

A. The Location of the Incident

The first question is to ascertain *where* the incident(s) occurred in terms of the scheme of maritime zones and passage regimes set out in the 1982 United Nations Law on the Sea Convention (UNCLOS)¹² and as reflected in customary international law.¹³ In particular, it is essential to determine whether the incident(s) occurred:

1. Within twelve nautical miles of a rock (which generates a territorial sea),¹⁴ or
2. Within twelve nautical miles of a LTE that is itself within twelve nautical miles of a rock (and thus can potentially—although this is contested—extend the territorial sea attaching to the rock),¹⁵ or
3. Outside twelve nautical miles from any territorial sea generating or extending feature (meaning that the waters in question are—for purposes of navigation—simply high seas).

Any analysis of this question would need to pay close attention to the baselines that may legitimately be claimed around any territorial sea generating feature (rocks, in this scenario). Moreover, the capacity of a LTE that lies within twelve nautical miles of these baselines to extend a territorial sea must be assessed. There is some debate as to whether these “parasitic LTEs” operate in this way from mere rocks or only from fully entitled islands.¹⁶ In the

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

13. Union of Soviet Socialist Republics-United States: Joint Statement With Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1989, 28 INTERNATIONAL LEGAL MATERIALS 1444 (1989).

14. UNCLOS, *supra* note 12, art. 121(3).

15. *Id.* art. 13. The Tribunal in the *South China Sea Arbitration* case appears to take the position that LTEs can operate in this way in relation to the territorial seas of rocks. *See infra* note 16.

16. *See, e.g.*, James Kraska & Raul “Pete” Pedrozo, *Can’t Anybody Play This Game? US FON Operations and Law of the Sea*, LAWFARE (Nov. 17, 2015), <https://www.lawfare-blog.com/cant-anybody-play-game-us-fon-operations-and-law-sea>. By contrast, the South

scenario, the analysis will assume that a rock's territorial seas may also benefit from the effect of a parasitic LTE.

The law of the sea anticipates that the baselines of rocks and islands may, in fact, be some way out from a rock by virtue of the existence of, for example, a fringing reef.¹⁷ Such features can serve to push the baselines—and thus the outer limit of the territorial sea—quite some distance from the rock itself. Thus, the use of the low water mark of the rock simpliciter on the one hand, or of the fringing reef on the other, could make a considerable difference as to whether a vessel located more than twelve nautical miles from the geographic rock is actually less than twelve nautical miles from the fringing reef baseline around the feature as a whole, and falls within the territorial sea as a result.

As noted above, this analysis could also have significant implications for whether a nearby LTE is ultimately situated within twelve nautical miles of the generating feature's baselines (thus radically extending that feature's territorial sea), or is located more than twelve nautical miles from the parent feature's baselines, in which case it does not affect the territorial sea's outer limit for the generating feature. Of relevance for this scenario, the *South China Sea Arbitration* award observes,

A more complex question, however, is whether Subi Reef lies within 12 nautical miles of a high-tide feature, such that it would could [sic] serve as a baseline for the territorial sea of that high-tide feature pursuant to Article 13(1) of the Convention. Subi Reef lies slightly more than 12 nautical miles from the baseline of Thitu Island, and would not qualify for the purposes of Article 13(1) for a territorial sea drawn from Thitu Island itself. The 1867 fair chart of the Thitu Reefs, however, clearly depicts a high-water 'Sandy Cay' on the reefs to the west of Thitu Island. This feature—provided that it, in fact, exists—would lie within 12 nautical miles of Subi Reef, which would be permitted by Article 13(1) to serve as a baseline for the territorial sea drawn from Sandy Cay.¹⁸

Nevertheless, if the Thitu baselines were redrawn and extended by some means (or considered as integrated with those of Sandy Cay),¹⁹ there is some

China Sea arbitral panel appeared to accept that parasitic LTEs can operate upon the territorial seas of rocks. South China Sea Arbitration Award, *supra* note 1, ¶ 373.

17. UNCLOS, *supra* note 12, art. 6.

18. South China Sea Arbitration Award, *supra* note 1, ¶ 369.

19. The baselines currently claimed in this area appear to be based in part on an 1867 British survey. South China Sea Arbitration Award, *supra* note 1, ¶ 371; see also *id.* ¶ 384

potential that Subi Reef might operate as a parasitic LTE by reference to either the proximity of Sandy Cay (which is also dry at high tide and is thus classifiable as a rock²⁰) and Thitu Island (or both). As one commentator notes,

Subi was a low-tide elevation before China built an artificial island on it. As such, it does not generate its own territorial sea but could bump out the territorial sea of at least one of the unoccupied sand cays, which is dry at high tide and located less than 12 nautical miles from it. So it could be claimed that these ships are all operating within the territorial sea of both Thitu and the sand cay(s) with which Subi is associated.²¹

Indeed, as the *South China Sea Arbitration* award notes,

As Subi Reef lies within 12 nautical miles of the reef on which Sandy Cay is located, it could serve as a basepoint for the territorial sea of Sandy Cay. The Tribunal also notes, however, that even without a high-tide feature in the location of Sandy Cay, Subi Reef would fall within the territorial sea of Thitu as extended by basepoints on the low-tide elevations of the reefs to the west of the island. Accordingly, the significance of Sandy Cay for the status of Subi Reef is minimal.²²

Thus, even though Subi is by one estimate just more than twelve nautical miles from Thitu, either (i) different baselines for Thitu, (ii) the presence of Sandy Cay as a link between Thitu and Subi (dependent on shared sovereignty), or (iii) the independent operation of Sandy Cay upon Subi, all create the potential for a territorial sea upon which Subi, an LTE, might have extension effects. And while Sandy Cay currently has no permanent presence, both the Philippines and the PRC (and other States) claim this feature. As Valencia concludes, “Subi also lies within the 12nm territorial sea of Sandy Cay. Both China and the Philippines claim these sandbars outright as their

(“Subi Reef lies within 12 nautical miles of the high-tide feature of Sandy Cay on the reefs to the west of Thitu.”).

20. South China Sea Arbitration Award, *supra* note 1, ¶¶ 372–73.

21. *Confirming the Chinese Flotilla Near Thitu Island*, ASIA MARITIME TRANSPARENCY INSTITUTE (Aug. 17, 2017), <https://amt.i.csis.org/confirming-chinese-flotilla-near-thitu-island/>.

22. South China Sea Arbitration Award, *supra* note 1, ¶ 373.

sovereign territory and indirectly because they are situated within Thitu's territorial sea."²³

It follows that the first steps in untangling this scenario from a legal perspective are: (i) look at the chart; (ii) allocate feature status (LTE, rock, island); (iii) come to a conclusion on baselines; (iv) assess the geographic scope—in principle—of any potentially claimable territorial sea; and (v) check whether the warship is, or was, within that potential territorial sea.

1. If There Is a Potential Territorial Sea in Play

If it is determined that there is, potentially, a territorial sea issue in play, then further consideration is necessary as to another preliminary and more normative question regarding whether that territorial sea is juridically valid and thus must be recognized.

This question to some extent hinges on the interpretive approach of the warship's State as to whether a recognized (by that warship's State) allocation of sovereignty over the rock is a precondition to the existence (as far as that warship's State is concerned) of any territorial sea around that rock. That is, if sovereignty over the territorial sea generating feature, for example, the Thitu rock, is unsettled and no specific sovereign (neither the Philippines, which physically occupies the rock, nor Vietnam or the PRC that also claim the rock²⁴) is recognized by the warship's State, is there still a territorial sea around that feature?²⁵

Here, there are two options. The first option is to recognize that the feature generates a territorial sea, and, although the warship's State is not able to say which State is sovereign over that territorial sea, a territorial sea nevertheless exists as a legal fact. Therefore, that territorial sea (and by implication the undetermined sovereign's claim to it) ought to be respected.²⁶

23. Mark Valencia, *The Standoff at Sandy Cay in the South China Sea*, EASTASIAFORUM, (May 24, 2019), <https://www.eastasiaforum.org/2019/05/24/the-standoff-at-sandy-cay-in-the-south-china-sea/>.

24. RAUL (PETE) PEDROZO, CNA, CHINA VERSUS VIETNAM: AN ANALYSIS OF THE COMPETING CLAIMS IN THE SOUTH CHINA SEA (2014), https://www.cna.org/cna_files/pdf/iop-2014-u-008433.pdf.

25. Noting the inescapable linkage between sovereignty and territory implicit in UNCLOS. See UNCLOS, *supra* note 12, art. 2.

26. For example, an argument to this effect might cite the maxim that the land dominates the sea and that the geographic fact of land—not the question of who owns the land—creates the legal fact of a territorial sea. See also Lea Brilmayer & Natalie Klein, *Land and Sea*:

The second option is to assert that a territorial sea must be “claimed”²⁷ as opposed to merely claimable to be valid. That is, there is no automaticity to the existence of a territorial sea around a potential territorial sea generating feature. Under this approach, either the inability to identify the necessary linkage to a sovereign, or the indeterminacy between competing claims,²⁸ for example, as between the PRC and the Philippines, would render the existence of any territorial sea juridically inchoate and thus deniable.

Two Sovereignty Regimes in Search of a Common Denominator, 33 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 703, 716 (2001)

The substantive law for allocation of maritime spaces is very different from the substantive law for allocation of land territory. Sir Robert Jennings contrasted ownership of land and maritime areas by saying that maritime spaces are allocated according to ‘certain a priori legal principles,’ while disputes over land boundaries are settled by consulting ‘the juridical and geographical history of the particular boundary in question,’ especially with regard to physical occupation.

27. UNCLOS, *supra* note 12, art. 2

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

See also Kraska & Pedrozo, *supra* note 16 (“UNCLOS Article 3 allows States to ‘establish’ a territorial sea – it is not automatic. Neither China nor any other claimant has established a territorial sea around a feature in the Spratly Islands. The law of the sea requires affirmative action by a sovereign state . . .”).

28. Kraska & Pedrozo, *supra* note 16 (“[I]n order for a rock to generate a territorial sea it must be under the sovereignty of a coastal state. The United States does not recognize any country as having sovereignty over the [Spratly Islands] features occupied or claimed by China . . .”). As O’Connell observed, “the idea that a State does not have a territorial sea unless it proclaims it, is difficult to reconcile with the doctrine of the inherency of the continental shelf.” 1 D. P. O’CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 52 (Ivan A. Shearer ed., 1982). However, the assumption underpinning O’Connell’s point is that there is a recognized sovereign in the first place. Indeed, O’Connell’s observation that under the “police” theory of the territorial sea, there is “no alternative solution to that of sovereignty as the explanation of territorial sea rights,” implies that the absence of a sovereign could obviate the legal requirement to respect a claimed territorial sea. *Id.* at 62. As O’Connell continues, in describing the “sovereignty theory” of the territorial sea, he states, “The predatory instincts of States could only be satisfied in the concept of sovereignty, for where sovereignty was lacking there was doubt about the State’s authority to appropriate to itself the riches of the coastal sea, and to legislate effectively for foreign ships . . .” *Id.* at 710.

2. Consequences for Passage

If the approach adopted is that there is no potential territorial sea in play, either because the conduct takes place outside twelve nautical miles from any rock feature and there is no LTE extension or, because while there is a potential territorial sea, there is no valid or recognized claim to a territorial sea, and thus there is no territorial sea, then the legal characterization of the waters is international waters. That is, the water space where the incident takes place would either be high seas within which the high seas freedoms of navigation and overflight apply²⁹ or as an area of a recognized EEZ—of the Philippines, for example—within which the high seas freedoms of navigation and overflight continue to apply, as long as they are exercised with due regard for the coastal State’s EEZ rights.³⁰ This approach would also mean—should it be relevant (on which, see more below)—that the UNCLOS provisions on piracy could also apply.

The alternative is that the warship’s State recognizes that there is a territorial sea around the feature (potentially also extended by the LTE), which

29. UNCLOS, *supra* note 12, art. 87

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

30. *Id.* art. 58

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

must be respected even if the sovereign is unknown. In this case, if the warship were at any time within that territorial sea, then innocent passage would be the applicable navigational regime. However, in this particular instance, the exercise of innocent passage in the abstract would pose a number of second-order practical difficulties. One difficulty that would flow from the absence of an identified sovereign over the territorial sea is the inability to identify an authority to whom to direct a demarche regarding the hampering (by private fishing vessels—on this see below) of the warship's exercise of its right of innocent passage.

Another issue would be that a piracy analysis of the conduct of the fishing vessels would be complicated. This is because there are two arguments available as to the validity of a piracy analysis based on location; however, while both arguments draw force from UNCLOS Article 101,³¹ they arrive at diametrically opposed outcomes. The first argument is that because piracy takes place in international waters, not territorial seas, there can be no piracy in this situation. But there is no (for the warship's State) recognized sovereign, and thus no territorial jurisdiction-linked domestic law as to criminal conduct at sea that is immediately applicable in this particular territorial sea. This raises an interesting question as to whether the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),³² which can apply in territorial seas, might be available to fill the domestic offense creation and definition lacunae that follows from the fact that the sovereign is unknown. Alternatively, in the absence of an identified sovereign with territorially-based priority prescriptive and enforcement jurisdiction over that territorial sea, the possibility that the warship's State—if it has the requisite extraterritorial jurisdiction and offenses within its domestic law—might exercise its national jurisdiction over the fishing vessels' conduct requires consideration.

The second argument is to conclude that while there is a territorial sea, the fact the sovereign is unknown effectively means that this untethered and thus inchoate territorial sea is “a place outside the jurisdiction of any State,”³³ which is separate from the high seas. In this case, the absence of a territorial sea jurisdiction would invite Article 101 back into play, allowing a piracy analysis to proceed.

31. *Id.* art. 101.

32. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 4(1), Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention].

33. UNCLOS, *supra* note 12, art. 101(a)(ii).

3. Summary

This brief analysis of the where indicates that the key question of whether or not the incident took place in a territorial sea is itself a multipart geographic assessment (baselines, parasitic LTEs), which itself requires preliminary recourse to some fundamentally normative questions (sovereignty and territorial sea claims). Even at this stage, these considerations also invite questions as to subsidiary consequences, such as the jurisdictions available in the incident area. However, in the scenario posed, the issue of where—along with its ancillary challenges to jurisdiction—is not unconnected from the issue of who, because in terms of legal characterization and analysis, the status of the water space and the status of the actor are intertwined. Consequently, it is to the *who* that the assessment now turns.

B. Characterizing the Actors

Accepting the clear sovereign immunity attaching to the NATO warship, the scenario poses two types of directly engaged “adversary” protagonists: the large steel-hulled vessel and regular fishing vessels. The large steel-hulled vessel, of the Sansha City Maritime Militia type,³⁴ or specifically of the People’s Armed Forces Maritime Militia (PAFMM),³⁵ will, in almost all situations, be considered a government vessel on non-commercial service.³⁶ By contrast, the regular fishing vessels appear to vacillate between routine private status (in UNCLOS terms, “merchant ship” or “government ship operated for commercial purposes”³⁷) and some other more State-agent based status. This raises the difficult question of the legal characterization of both

34. Conor M. Kennedy & Andrew S. Erickson, *Riding a New Wave of Professionalization and Militarization: Sansha City’s Maritime Militia*, CIMSEC (Sept. 1, 2016), <http://cimsec.org/riding-new-wave-professionalization-militarization-sansha-citys-maritime-militia/27689>.

35. OFFICE OF THE SECRETARY FOR DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 2018, at 72 (2018), <https://media.defense.gov/2018/Aug/16/2001955282/-1/-1/1/2018-CHINA-MILITARY-POWER-REPORT.PDF> (“People’s Armed Forces Maritime Militia (PAFMM). The PAFMM is a subset of China’s national militia, an armed reserve force of civilians available for mobilization. The PAFMM is the only government-sanctioned maritime militia in the world.”). *See also id.* at 71–72.

36. UNCLOS, *supra* note 12, art. 32; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 2.2.1 (2017).

37. UNCLOS, *supra* note 12, pt. II, sec. 3, subsec. B (arts. 27–28).

the vessels and the conduct of purportedly ad hoc maritime militia units.³⁸ Settling upon the status of the fishing vessels used in such a manner—mainly engaged in commercial fishing, but also occasionally engaged on harassment or presence operations³⁹—is not without significant legal consequences.

1. Status of the (non-PAFMM) Fishing Vessels

While engaged in harassment of the NATO warship, the key question is whether the fishing vessels are State vessels or private vessels. If the adopted approach is to characterize the fishing vessels engaged in these apparently directed harassment operations as State vessels, they will not meet the definitional requirements for a warship.⁴⁰ In this case, the only other “State” status option is to characterize them as government vessels on non-commercial service, given that the harassment operation is clearly State mandated and directed.

However, this approach raises a fundamental complication in that the fishing vessels are also still routinely engaged in their commercial function as private (merchant) vessels. It is not at all clear that a fishing vessel can switch so simply, so often, and for such a short time, between the modes of non-sovereign immune private fishing vessel and sovereign immune government vessel on non-commercial service. There is no formal and public “re-badging” or notification involved. And, while there is no international rule that is precisely on-point, there is a strong argument that such ad hoc, short-term, and unnotified changes in mission do not fundamentally alter the character of the vessel. Accordingly, such vessels remain private vessels, even while engaged in these State-directed harassment operations.

38. Robert McLaughlin, *The Legal Status and Characterisation of Maritime Militia Vessels*, EJIL:TALK! (June 18, 2019), <https://www.ejiltalk.org/the-legal-status-and-characterisation-of-maritime-militia-vessels/>; James Kraska & Michael Monti, *The Law of Naval Warfare and China's Maritime Militia*, 91 INTERNATIONAL LAW STUDIES 450 (2015).

39. This is one potential characterization of, for example, the June 2019 Reed Bank (Recto Bank) incident, where a PRC fishing vessel rammed a Philippines fishing vessel and then left the vessel without rendering assistance. See Lucio Blanco Pitlo III, *Can the Philippines and China Get Past the Reed Bank Debacle?*, THE DIPLOMAT (June 29, 2019), <https://thediplomat.com/2019/06/can-the-philippines-and-china-get-past-the-reed-bank-debacle/>; Regine Cabato, *Boat Collision in Disputed Waters Tests Chinese-Philippine Relationship*, WASHINGTON POST, June 13, 2019, https://www.washingtonpost.com/world/boat-accident-in-disputed-waters-tests-chinese-philippine-relationship/2019/06/13/2c0170c6-8db4-11e9-b162-8f6f41ec3c04_story.html.

40. UNCLOS, *supra* note 12, art. 29.

In terms of the law of the sea, the strongest argument in support of the view that the fishing vessels remain private vessels is that classification as a government vessel on non-commercial service requires that the vessel is used only on government non-commercial service.⁴¹ There are also other—albeit less direct—indicators that the law of the sea disfavors any contention that such changes of character between State and private vessel may occur unnotified, ad hoc, and for very short periods of time. For example, the idea that a merchant vessel should be permitted to switch between flags as a matter of simple convenience is antithetical to the scheme of jurisdiction, attribution, and responsibility enshrined within the law of the sea.⁴² The idea that a fishing vessel might likewise move between State and private characterizations at whim would seem to be as equally antithetical to these same objectives.

There are also other arguments to support the conclusion that ad hoc, unnotified, and short-term switching between State and private vessel status is impermissible. One such argument proceeds from the practice among States with auxiliary fleets, for example, the United States and its Military Sealift Command,⁴³ or the U.K. practice of, when necessary, employing ships taken up from trade, such as the *Atlantic Conveyor* during the Falklands War.⁴⁴ In these situations, the practice of chartering merchant vessels into government non-commercial service—with its concomitant possible attachment of sovereign immune status—is generally for the minimum period of a voyage and, when utilized, requires notification. For example, a Chief of Naval Operations message sets out the U.S. Navy policy for voyage charters:

Limited privileges of sovereign immunity are asserted for MSC US flag voyage charters. As a matter of policy, the government ordinarily asserts only freedom from arrest and taxation for US flag vessels voyage chartered

41. *Id.* art. 96.

42. *Id.* arts. 91–92, 94.

43. *About MSC*, MILITARY SEALIFT COMMAND, <https://sealiftcommand.com/about-msc> (last visited Oct. 27, 2020).

44. Sebastian Roblin, *The Royal Navy Turned Two Container Ships into Aircraft Carriers During the Falkland War*, NATIONAL INTEREST, June 30, 2019, <https://nationalinterest.org/blog/buzz/royal-navy-turned-two-container-ships-aircraft-carriers-during-falkland-war-64951>.

by MSC. Masters of these vessels will be advised when the US intends to assert full sovereign immunity for them.⁴⁵

It is also of note—albeit not directly applicable in this scenario—that 1907 Hague Convention VII sets out detailed rules about change in status from merchant vessel to warship, including that such changes must be formally and publicly notified.⁴⁶ And while Hague VII does not address the issue of high seas conversions (this was too disputed for any consensus at the negotiations), the implication of the transfer of a vessel from the merchant list to the list of warships is that this necessarily involves a long-term change of character and status.

Consequently, the most legally sound characterization of the fishing vessels in this scenario is that their status as private (merchant) vessels endures, regardless of the responsiveness of those fishing vessels to directions to be involved in ad hoc State-sanctioned harassment or presence operations. However, this conclusion is not without second-order complications.

The first such complication is whether, during the period of responsiveness to State direction and control, the conduct of a private fishing vessel outside any recognized territorial sea remains liable to the characterization of piracy under the law of the sea. Assuming that all other elements of the definition of piracy are met (an act of violence; by a private vessel; against another vessel; in the high seas⁴⁷), the question becomes whether the act was (i) “illegal” and (ii) committed for “private ends.” Each requires brief discussion.

First, an act of piracy requires an illegal act of violence. This begs the question as to whether a State-sanctioned and State-directed act of violence against another vessel (or, indeed, the cutting and taking—depredation—of part of the warship’s “tail”), by a private fishing vessel, is an illegal act. If the reference point is the law of the State of nationality of the fishing vessel—the PRC in this scenario—then the act is unlikely to be illegal given there will be a domestic permission or excuse for such conduct built into the perpetrator’s national law. As Alfred Rubin observed:

45. CNO [Chief of Naval Operations] Washington DC, R 071719Z JUL 16, [U.S.] Sovereign Immunity Policy ¶ 4.b, <https://www.public.navy.mil/bupers-npc/reference/messages/Documents2/NAV2016/NAV16158.txt>.

46. Convention No. VII Relating to the Conversion of Merchant Ships into War-ships art. 6, Oct 18, 1907, 205 Consol. T.S. 319.

47. UNCLOS, *supra* note 12, art. 101.

Read carefully, [the definition of piracy] seems to revive the law of privateering by its reference to “illegal” acts, implying that some depredations for private ends might be “legal,” and leaving no explanation of how sense is to be made of a purported definition of a “crime” that rests on an undefined and unreferenced concept of prior “illegality”: Illegal under what law? By whose determination?⁴⁸

Sandra Hodgkinson, addressing this same issue, seems to indicate that the arbiter of illegality must be something more generally recognized than simple domestic exculpatory fiat, stating, “The definition [of piracy] does require . . . that the acts be illegal, opening the door to the possibility that a legal act of violence or detention (perhaps in self-defense or for some otherwise legally justified reason) would not be an act of piracy.”⁴⁹

The correct reference point for defining illegal is not the law of the State of nationality of the offending vessel; rather, it is the international law applicable between the concerned States. This is no different than defining a war crime under the international law applicable between the concerned States rather than each State’s particular formulation of either the offense or available defenses. In other words, the existence of a domestic authorization to commit an international crime does not remove the sting of international illegality; it merely renders the domestic jurisdiction unwilling or unable to prosecute the offense. This leaves the possibility of a piracy analysis of the fishing vessels’ conduct available, but contestable.

Much more contentious in our scenario is the second challenging definitional requirement of private ends. Much has been written and debated as regards the definition of private ends with respect to piracy, and it is fair to say that there remains no universally accepted view as to whether an act by a private actor for “political purposes” (including environmental purposes) nevertheless qualifies as a private end.⁵⁰ One court put it this way:

48. Alfred Rubin, “Piracy” in the *Twentieth Century*, 63 INTERNATIONAL LAW STUDIES 292, 333 (1988) (citation omitted).

49. Sandra Hodgkinson, *The Governing International Law on Maritime Piracy*, in PROSECUTING MARITIME PIRACY: DOMESTIC SOLUTIONS TO INTERNATIONAL CRIMES 13, 18 (Michael Scharf, Michael Newton & Milena Sterio eds., 2015).

50. See, e.g., Arron N. Honniball, *Private Political Activists and the International Law Definition of Piracy: Acting for ‘Private Ends,’* 36 ADELAIDE LAW REVIEW 279, 328 (2015) (“[A]lthough current precedents are insufficient to establish a recognised definition of ‘private ends’ under international law, it is hoped they will be followed and therefore not exclude violent acts perpetrated by individuals from effective punishment merely because such actors were motivated by political goals.”); Douglas Guilfoyle, *Political Motivation and Piracy: What History*

You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.⁵¹

To some extent, this characterization issue hinges on the divergence of views on the relevance of the subjective aspects of intention compared with the objective fact of agent status. Consequently, debate endures as to whether acting for a political purpose, albeit without State sanction, is a public or private end. However, if the purpose of the violent acts here was to respond to the direction of PRC authorities, then this perhaps takes us further than merely personal—albeit altruistic—purpose on the part of the crews of the fishing vessels, and places the conduct squarely within the ambit of the *Nicaragua* “effective control”⁵² or the *Tadić* “overall control”⁵³ test. This would suggest the acts were not for a private end.

A less legally fraught approach, however, might be to consider the potential liability of the fishing vessels' more serious conduct as violations of

Doesn't Teach Us About Law, EJIL:TALK! (June 17, 2013), <https://www.ejiltalk.org/political-motivation-and-piracy-what-history-doesnt-teach-us-about-law/>

[I]n law we usually do not contrast the word ‘private’ with the word ‘political’; the usual dichotomy employed is between ‘private’ and ‘public’. Precisely why having a political motivation of the type held by a protest group or terrorist organisation should exempt one from the law ordinarily applicable to violence on the high seas has never been satisfactorily explained

51. *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 708 F.3d 1099, 1101 (9th Cir. 2013).

52. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶ 109–15 (June 27). “For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” *Id.* ¶ 115.

53. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 117 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999)

States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case.

the 1988 SUA Convention.⁵⁴ This is because the Convention does not impute a requirement for private aims to a fishing vessel's act of violence against a warship; it only requires that the conduct be unlawful and intentional.⁵⁵ Nor does the Convention's objective excision of State vessels from its scope cover the private fishing vessels in this scenario.⁵⁶ Certainly, the issue of unlawfulness—as with piracy—would need to be explored in terms of whether State direction of what is otherwise clearly and objectively proscribed private conduct dissolves the illegality. Ostensibly, however, it does not. Still, noting that jurisdiction over the offense also potentially resides in the warship's State (which would likely consider the act illegal) via SUA Convention Article 6(2)(b) or (c),⁵⁷ it is possible to look to the Convention as potentially applicable in this scenario. Indeed, as noted in the *South China Sea Arbitration* award, the fact that vessels with sovereign immune status engaged in a range of dangerous navigation practices, characterized by reference to the COLREGS,⁵⁸ did not mean that those practices could no longer be characterized as breaches of UNCLOS.⁵⁹ In this case, the breaches are of Articles 94(3)(c) and (4)(c) (prevention of collisions) and Article 94(5) (the obligation

54. For example, “[a]ny person commits an offense if that person unlawfully and intentionally” does any of the following acts: “performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship” or “destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship.” See SUA Convention, *supra* note 32, art. 3(1)(b)–(c). Likewise, a person that “injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth [in Article 3(1)]” also commits an offense. See *id.* art. 3(1)(g).

55. *Id.* art. 3(1). For a commentary on the *mens rea* aspect of Article 3, see JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 806–09 (2013).

56. SUA Convention, *supra* note 32, art. 2

1. This Convention does not apply to: (a) a warship; or (b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes 2. Nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

57. *Id.* art. 6(2) (“A State Party may also establish its jurisdiction over any such offence when . . . (b) during its commission a national of that State is seized, threatened, injured or killed; or (c) it is committed in an attempt to compel that State to do or abstain from doing any act.”).

58. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16.

59. South China Sea Arbitration Award, *supra* note 1, ¶¶ 1081, 1090–1109; see also UNCLOS, *supra* note 12, art. 21(4) (noting that during innocent passage, crews must comply with “all generally accepted international regulations relating to the prevention of collisions at sea”). The Philippines raised this point during the arbitration.

on all vessels to “conform to generally accepted international regulations, procedures and practices” related to “ensur[ing] safety at sea”).⁶⁰

Finally, the possibility that a private fishing vessel can engage in conduct attributable to its State of nationality without necessarily engaging in a parallel transformation in its status from private vessel to State vessel must be considered. Article 8 of the International Law Commission’s Articles on State Responsibility (ASR)⁶¹ clearly anticipates this outcome. Indeed, the commentary specifically indicates that an Article 8 attribution of responsibility for conduct by a private group of individuals acting as a collective (such as with a fishing vessel?), to the State that directed that conduct, does not transform the private actor(s) into an organ of the directing State:

In such cases it does not matter that the person or persons involved are private individuals or whether their conduct involves “governmental activity.” Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries” while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as “volunteers” to neighbouring countries, or who are instructed to carry out particular missions abroad.⁶²

ASR Article 8 deals with the attribution of responsibility for conduct by a private group to a State in relation to the consequences *between States*—such as for the availability of countermeasures as a remedy. But this attribution does not extinguish the concurrent amenability of that private group’s conduct to legal assessment schemes that hold “individual” liabilities for private actors. The fact that a State sends a private group into a neighboring State to commit war crimes, and thus attracts State responsibility for those acts, does

60. UNCLOS, *supra* note 12, arts. 94(3)(c), 94(4)(c), and 94(5).

61. *Report of the International Law Commission to the General Assembly*, 53 U.N. GAOR Supp. No. 10, art. 8, at 47, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 47, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *Articles on State Responsibility*] (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

62. *Id.* at 43, cmt. ¶ 2; see also JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 113, ¶ 9 (2002).

not alter the fact that the individuals in that private group might still be liable to prosecution at (for example) the International Criminal Court for the war crimes committed—assuming both jurisdiction and that the ASR Article 8 responsible State is unwilling or unable to prosecute the group.⁶³ By the same path, there is nothing inherent within the SUA Convention that would render it *prima facie* inapplicable to the conduct of the private fishing vessels and their crews just because—for the purpose of a different accountability scheme—that conduct is also attributable to a State.

With the where and the who of the situation assessed, it is now possible to explore the operative significance of the incident as a whole.

C. *Assessing the Incident*

There are three key points for understanding the operative significance of the incident. One, given that the PRC's claims in this scenario are already known, the legitimacy—for the warship's State—of the warship's deployment of a towed array sonar tail and the PAFMM vessel's riding-off conduct is largely dependent upon the warship State's view regarding the existence of a territorial sea. If the warship's State agrees there is a relevant territorial sea, that the warship is operating in those waters, and that the territorial sea must be respected—in the abstract, given there is no recognized sovereign—the deployment of a tail is ostensibly a breach of innocent passage.⁶⁴ However, even if there is a breach of innocent passage, and even if an inchoate right to “require” the warship to depart the territorial sea⁶⁵ is conceded to the PAFMM vessel's sovereign (the PRC), the conduct of the regular fishing vessels concerning the warship is still wrongful. These vessels do not hold the maritime law enforcement rights of a government vessel on non-commercial service. Moreover, the taking of a section of the towed array sonar tail—which is sovereign immune property⁶⁶—is clearly a wrongful act.

By contrast, the large steel hull fishing vessel—the PAFMM vessel—is a government vessel on non-commercial service. This then raises the issue of

63. Rome Statute of the International Criminal Court arts. 5, 17, 19, 20(3), July 17, 1998, 2187 U.N.T.S. 90.

64. *See, e.g.*, UNCLOS, *supra* note 12, art. 19(2)(c) or art. 19(2)(f).

65. *Id.* art. 30 (“If the warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial seas . . . and disregards any request for compliance therewith . . . the coastal State may require it to leave . . . immediately.”).

66. *See, e.g.*, Sam LaGrone, *China Returns US Navy Unmanned Glider*, USNI NEWS (Dec 20, 2016), <https://news.usni.org/2016/12/20/china-returns-u-s-navy-unmanned-glider>.

what it purported to be the PRC laws and regulations on warship passage through the territorial sea and *how* it purported to “enforce” them.

First, any claim that the PAFMM vessel is enforcing the PRC’s view on the requirement for prior authorization of warship innocent passage⁶⁷ is unlikely to be accepted as legitimate by the NATO warship’s State. This might be on the basis that the PRC incorrectly interprets the law on innocent passage. Alternatively, the warship’s State—while recognizing a territorial sea—may not recognize that it is a PRC territorial sea, and thus hold the view that the PRC has no right to enforce its position on innocent passage in this situation. A claim on the part of the PAFMM vessel to be requiring the “delinquent” warship to depart the territorial sea because of a breach of, for example, the UNCLOS Article 19(2)(f) prohibition on “launching, landing or taking on board of any military device”⁶⁸ would be stronger, but still susceptible to questions as to that PRC vessel’s fundamental right to enforce any regulations at all in a territorial sea that the warship’s State does not recognize as necessarily being a PRC territorial sea.⁶⁹

With regard to the how there is significant State practice on the use of force in maritime law enforcement operations.⁷⁰ This includes practice indicating that riding off is a tolerated maritime law enforcement and maritime

67. Law on the Territorial Sea and the Contiguous Zone of 25 February 1992 (promulgated by the Standing Committee, National People’s Congress, Feb. 25, 1992, effective Feb. 25, 1992) art. 6 (China), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf (“To enter the territorial sea of the People’s Republic of China, foreign military ships must obtain permission from the Government of the People’s Republic of China.”).

68. UNCLOS, *supra* note 12, art. 19(f).

69. See Rob McLaughlin *Authorizations for Maritime Law Enforcement Operations*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 465 (2016); Patricia Jimenez-Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award*, 13 JOURNAL OF CONFLICT AND SECURITY LAW 49 (2008).

70. See, e.g., Robert McLaughlin, *Revisiting the Red Crusader Incident*, 35 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 91 (2018).

security measure—the Cod Wars,⁷¹ Cold War confrontations,⁷² and the Kerch Strait incident⁷³—all provide some indicia of this practice. However, by the same token, the warship would be entitled to exercise defensive rights in response.⁷⁴ There is also a separate and differently assessed question as to the liability of (i) a situationally illegitimate (for example, the authority to regulate is not recognized) or (ii) otherwise legitimate maritime law enforcement or security power (for example, riding off a delinquent warship) to a U.N. Charter Article 2(4) use of force characterization. But as noted at the outset, that issue is beyond the scope of this brief assessment.

Two, alternatively, if the warship's State does not believe that the warship is inside a territorial sea, then innocent passage is not relevant, and the passage must be assessed against the high seas freedoms. The view that there is no territorial sea in play may be a result of the conclusion that:

1. Neither Thitu nor Sandy Cay has a recognized sovereign, thus, while each is a rock, neither ultimately generate a territorial sea (either in conjunction with other features or as separate features) in the absence of an identified sovereign; or
2. A potentially relevant territorial sea exists around Thitu or Sandy Cay, but the warship is operating outside of these areas. Additionally, neither set of rock baselines are within twelve nautical miles of Subi and, consequently, neither feature can leverage Subi as a parasitic LTE; therefore the warship is not operating within a territorial sea; or
3. A territorial sea exists around Thitu or Sandy Cay, but the warship is operating outside of these territorial seas. Furthermore, although

71. Paddy Johnston, *The Cod Wars against Iceland: The Royal Navy as Political Instrument*, 5 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 9 (1991); *Iceland v Britain: The Cod Wars Begin—Archive, September 1958*, GUARDIAN, Sept. 7, 2018, <https://www.theguardian.com/business/from-the-archive-blog/2018/sep/07/first-cod-war-iceland-britain-fish-1958>; Bob Hind, *Conflict at Sea during Furious 1970's Cod Wars*, PORTSMOUTH NEWS, June 3, 2019, <https://www.portsmouth.co.uk/retro/conflict-sea-during-furious-1970s-cod-wars-1314965>.

72. Such as the previously noted Black Sea bumping incident, *supra* note 9; see generally David Winkler, *The Evolution and Significance of the 1972 Incidents at Sea Agreement*, 28 JOURNAL OF STRATEGIC STUDIES 361 (2005).

73. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, ¶¶ 46–77, ITLOS Rep., https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf.

74. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

the warship is within twelve nautical miles of Subi, the warship's State does not subscribe to the view that parasitic LTEs operate to extend the territorial sea from mere rocks (as opposed to fully entitled islands).

It follows from this part of the analysis that the warship's conduct is entirely reasonable and in conformity with both high seas freedoms and the obligations of safe navigation. The conduct of the PAFMM vessel—a sovereign immune government vessel on non-commercial service—is the conduct of an organ of the PRC, for which State responsibility is borne by the PRC via ASR Article 4.⁷⁵ This conclusion then dictates that any further assessment of the PAFMM vessel's conduct would necessarily hinge around the fact that the vessel is sovereign immune (and thus not liable to, for example, a piracy or SUA Convention analysis). However, the fact of that vessel's clear status as an organ of the State means that further analyses of its conduct in terms of the legitimacy of its use of force in a purported maritime law enforcement context, and in relation to U.N. Charter Article 2(4), are both enlivened and warranted.

Three, based upon the conclusion that the acts by the regular fishing vessels against the NATO warship—harassment and damage to warship equipment—are acts by private vessels under State direction, then one enduring character of those acts is as private acts of violence at sea against a sovereign immune vessel. Two consequences follow. First, the fact that the fishing vessels' State bears international responsibility, in terms of the law of State responsibility, will go to the question of the wrongfulness of the act and its characterization. That is, was the act an illegitimate, unfriendly, but not internationally wrongful act of purported maritime law enforcement; or was it simply an internationally wrongful act. This analysis will then dictate the nature of any national remedy, such as retorsion or countermeasures.

However, the fact of PRC State responsibility does not necessarily immunize the private vessels from characterization and liability under other equally applicable schemes of assessment. These fishing vessels are not ASR Article 4 organs of the State in the same manner as the PAFMM vessel.

75. Articles on State Responsibility, *supra* note 61, art. 4, at 40

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Therefore, it would be necessary to explore whether the conduct of these vessels was also amenable to analysis of the private nature of their character. For example, a piracy analysis might be warranted, although indeterminacy around the issues of illegality and private ends will greatly complicate (and indeed likely undermine) this process. Alternatively, it may be that the conduct is amenable to assessment as a potential SUA Convention offense, noting that State direction is not necessarily fatal to SUA applicability, where the vessel is not an exempt vessel within the scheme of that instrument.

III. CONCLUSION

This scenario, dealt with only briefly and selectively in the assessment above, implicates a wide array of legal schemes and questions. In this analysis, the focus has been upon the interrelationship between the maritime zone, vessel status, and characterization of conduct in terms of the law of the sea, with secondary reference to potential applicability to relevant international law schemes of responsibility. What is hopefully evident from this analysis is that the legal assessment of even a simple navigational incident in the South China Sea is, in its execution, rarely a simple assessment.